

SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 95

Project 90

CUSTOMARY LAW: 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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PREFACE

This discussion paper was prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper are accordingly not to be regarded as the Commission's final views. The discussion paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focussed submissions before the Commission.

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 Constitution of the Republic of South Africa, Act 108 of 1996.

Respondents are requested to submit **written** comments, representations or requests to the Commission by **28 February 2001** to the address appearing on the previous page. The researcher will endeavour to assist you with particular difficulties you may have.

The researcher allocated to this project, who may be contacted for further information, is Mr Tienie Cronje.

SUMMARY OF RECOMMENDATIONS AND QUESTIONS FOR COMMENT

Recommendations concerning the administration of black estates

Comments are invited on the following proposals. Assuming that a different system should be retained for the administration of estates of blacks:

Estates of blacks who did not leave a will need not be reported to any government institution unless the value of the estate exceeds R100 000 or an interested party objects to the administration of an estate.

Estates in other cases should be reported to the magistrate of the district where the deceased was ordinarily resident before his or her death. The magistrate may, on application by an aggrieved party, instruct the family of the deceased to report the estate if the magistrate is of the opinion that minors or persons without full legal capacity may be prejudiced. The existing procedure set out in paragraph 2.19 below should be followed if estates are reported.

An interested party who is dissatisfied with any decision of a magistrate may appeal to the Master for a review of the decision.

If the customary law of succession is retained, a regimen similar to the above proposals may be retained for estates that devolve according to customary law.

(Par 4.4.)

Comment is invited 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.

(Par 4.5; Annexure section 43(1A).)

Recommendations concerning estates in terms of the Administration of Estates Act 66 of 1965

The Master should be authorised to dispense with formalities and control measures. (Par 5.2.17.)

As a first alternative, the Master should be given authority to exempt an executor from compliance with any or all the provisions of the Act, once estate duty has been paid or satisfactory provision has been made for its payment. Comment is invited on the question whether the Master should in all cases insist on a simple statement of assets at market value, liabilities and proposed distribution. The Master should have authority to revoke exemptions and direct an executor to comply with any or all the provisions of the Act if in the opinion of the Master circumstances justify it. Section 50 will have to be amended so that an executor is not liable for distribution otherwise than in accordance with an advertised account. The executor should not be liable merely for this reason if the Master authorised the representative to distribute the estate. Comment is invited on a provision that an executor authorised by the Master to distribute the estate may be held liable if he or she is unable subsequently to account for the liquidation and distribution of assets.

As a second alternative, in estates with assets above a prescribed value all executors should lodge accounts and advertise the accounts in the *Government Gazette*, without a requirement that the Master should examine the accounts.

(Par 5.2.23-24.)

The proposals regarding the level of control by the Master entail the abolition of appointments in terms of sections 18 and 25.

(Par 5.3.2.)

Ordinary letters of executorship in terms of section 13 should be issued for all "foreign" estates, and special provision should not be made in section 21 for certain proclaimed states.

(Par 5.3.8; Annexure section 21.)

If no estate duty is payable and a representative of the estate declares that there are no creditors, beneficiaries or immovable property in the Republic, the Master should have authority to dispense with all further requirements at the time of the appointment of the foreign executor to deal with the estate in South Africa or at any time after the appointment.

(Par 5.3.9.)

Something similar to the affidavit in terms of regulation 4 should be retained for all cases where a person not ordinarily resident in South Africa dies leaving assets in South Africa. Such a requirement can be set out in a provision similar to section 25 of the 1965 Act. (Par 5.3.11; Annexure section 25.)

Something similar to an Estate Duty Return is required to satisfy the Master that no estate duty is due.

(Par 5.3.12.)

Information on the next of kin should be called for in the death notice. Consideration can be given to having the death notice signed under oath or making it an offence to sign a false death notice.

(Par 5.3.13; Annexure section 102(1)(aA).)

Subject to the provisions below or the provisions of an order of court

(x)

every person shall, before letters of executorship are granted in his or her favour 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 as executor.

A person shall not be required to furnish security if he or she will be assisted by or is -

2.10.1 any person duly admitted to practise as an attorney in any part of the Republic;

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

2.10.3 any associate general accountant of the South African Institute of Chartered Accountants;

2.10.4 any board of executors or trust company which, on 27 October 1967, was licensed as such under the Licences Act, 1962 (Act 44 of 1962), and carrying on business of which a substantial part consisted of the liquidation or distribution of the estates of deceased persons;

2.10.5 any bank or mutual bank registered in of the Banks Act 94 of 1990 or the Mutual Banks Act 124 of 1993

2.10.6 any person exempted by the Minister in the light of the person's capabilities, financial standing and trustworthiness.

(Par 5.4.20; Annexure clause 23.)

Regulation 910 should be repealed; no attempt should be made to amend it.

(Par 5.4.23.)

It does not seem to be advisable to authorise the Master to call for security at any time in the light of the Master's powers to remove an executor or call for security as set out above.

(Par 5.5.5.)

The support for more Masters' Offices should be taken into account when a new regimen is considered.

(Par 5.6.1.4.)

Routine estate notices in newspapers should be done away with.

(Par 5.6.2.3; Annexure sections 29 and 35(5)(a).)

Combination of the two systems

Estates need not be reported to any government institution unless the value of the estate is more than R100 000 or unless an interested party objects to, or there is a dispute regarding the administration of an estate. (Annexure section 7.) A person who deals with an estate without being appointed as executor must, before liquidation or distribution of the estate, allow creditors who will not be paid in full and heirs 14 days to comment on a plan of liquidation and distribution. (Annexure section 12A.) A person who liquidates or distributes an estate without letters of executorship may be held liable if he or she fails to comply with this requirement or is subsequently unable to account for the liquidation or distribution of the estate or to produce a will in terms of which the distribution was made. (Annexure section 50(2) read with section 12A.)

Estates in cases not covered by the previous paragraph must be reported to the magistrate of the district where the deceased was ordinarily resident before his or her death by submitting a death notice and inventory. The magistrate may instruct the family of the deceased to report any estate if the magistrate is of the opinion that minors or persons without full legal capacity may be prejudiced. (Annexure sections 7 and 9.) Wills must be transmitted to the Master if the estate is reported. (Annexure section 8.)

In any estate reported to the magistrate, an executor must be appointed who shall lodge an estate duty return and a liquidation and distribution account with the magistrate. The account need not be examined, but must be advertised for inspection in the *Government Gazette*. (Annexure section 35.) An executor must furnish security in appropriate cases. (Annexure section 23.)¹ Provision should be made for objections against accounts and consideration of the objections by the Master. (Annexure subsections 35(7) to (11).) An executor should be liable for distribution other than distribution in accordance with an advertised account. (Annexure section 50.)

An interested party who is dissatisfied with any decision of a magistrate may, with notice to the magistrate, appeal to the Master who has jurisdiction for a review of the decision of a magistrate. (Annexure section 95(2).)

The magistrate shall forward all documentation regarding an estate to the Master when an account has lain for inspection. (Annexure subsections 35(6) and 35(6A).) The Master must deal with objections against accounts and matters of estate duty, as is the position at present.

(Par 6.6.)

3.6 The proposals in paragraphs 1.2, 2.4, 2.6, 2.7, 2.8, 2.11 and 2.14 above should be considered in the event of a combination of the two systems.

¹See paragraph 2.10 above.

Advantages and disadvantages of systems of administration of estates

Estates administered under control of Magistrates

Advantages

Many offices, easy access

Disadvantages

Allegedly estate duty not levied (§ 6.4)
No centralised records

Common law matters

Informal, not compulsory for account §2.20

Allegedly no enforcement to protect minors §2.21

Allegedly no strict measures for proper control and accountability §2.23

Customary law

After burial family meets and decides without delays, costs or formalities §2.35

If bad relationship, deprivation of property used as punishment §2.32

Estates under control of Master

Advantages

Detailed accounting, transparent, central record

Disadvantages

Extensive control by Master expensive, delays because of workload, best scrutiny cannot ensure correctness §5.2.16

Complicated system for foreign estates

Only six offices country wide

Advantages and disadvantages of proposed system

An attempt has been made to retain the advantages of the present systems. The proposed system will have the following disadvantages:

More work for magistrates, training and forms will be required.

Expenditure and administrative work to post documents to Master.

Arbitrary amount of R100, 000

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4 INTRODUCTION

4.1 Origin of the investigation

The main thrust of the Commission's investigation is to evaluate the different systems of administration of estates historically reserved for different sectors of the community. Historically the administration of estates of black persons was governed by the Black Administration Act 28 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 and regulations. The Administration of Estates Act 1965 also accommodated the administration of estates of black persons provided they had executed a will during their lifetime. The purpose of this review is to consider a unitary system of administration of estates for all South Africans. If there is any value in preserving certain rules of distribution of estates which certain sectors of the community follow, the possibility of applying them across the board will be considered.

4.2 Structure of the discussion paper

The approach of the discussion paper will be first to analyse the position as it obtains at present. In this regard there will be a discussion of the system under the Black Administration Act. The next step will be to evaluate the systems of administration of estates in other jurisdictions. The choice of jurisdiction is informed by such factors as similarity in the history of the country to ours, similarity in the judicial system and best practices in the country. In this regard, the discussion paper evaluates the administration of estates in Zambia and Zimbabwe. This is followed by recommendations regarding estates under the Black Administration Act. Next the position under the Administration of Estates Act is discussed, followed by the recommendations. The last part is the formulation of recommendations for a unified system. The recommendations will be influenced to a large extent by the Discussion Paper 93 on the customary law of succession.

5 ADMINISTRATION OF BLACK ESTATES -THE PROCEDURE UNDER THE 1927 ACT

Introduction

5.1 The administration of estates of black persons is governed by section 23 of the Black Administration Act 38 of 1927² and regulation R 200 published in Government Gazette No 10601 of 6 February 1987.³ The section and regulations provide for estates of every black person generally without taking into consideration the different tribal variations.⁴ The reasoning behind this state of affairs was that inheritance and succession in customary law are based on the universal rule of primogeniture, and therefore that the same rules apply across the board to all blacks.⁵

5.2 Although the customary law of succession is dealt with in a separate discussion paper of the Commission,⁶ it is impossible to deal with the administration of black estates without reference to the customary law of succession. Section 23 of the Black Administration Act is very intricate and gives various criteria to be taken into consideration in the devolution of the property of blacks. Firstly, property is categorised as immovable and movable and these categories of property devolve to people differently. A second factor in the devolution of property is the marriage regime according to which that person married. It is also a factor whether that person in fact married at all. A further determinant is where the property of the deceased is physically located. It matters whether the property is situated in a tribal settlement in a rural area or in a township or an urban settlement. This is because different tenure systems apply in these different areas. Another determinant is whether the deceased drafted a valid will in his lifetime.

²The Act.

³The regulations.

⁴Olivier acknowledges the different variations on inheritance amongst the different tribes and correctly points out the exceptions to this rule amongst the different tribes. The CALS comment to the Commission's Issue Paper 12 on Succession in Customary Law also points out emerging practices where the rule of primogeniture is not applicable.

⁵On primogeniture, Kerr **Succession** at p 12 writes that throughout the native tribes of South Africa, one system of inheritance exists - that of primogeniture.

⁶Discussion Paper 93.

5.3 The regulations give guidelines for administration and distribution of black estates based on the provisions of section 23. These regulations provide for two categories of estates, namely those that the Master of the High Court (“Master”) has jurisdiction to administer and those that the Master has no jurisdiction to administer, and where the magistrate plays a role.

Estates under the supervision of the Master

5.4 The Master has jurisdiction over testate estates. This is provided for by section 23(9) of the Black Administration Act. The section specifically states that those estates are administered in accordance with the Administration of Estates Act and are therefore beyond the scope of the Black Administration Act. In addition, the Master or any executor appointed by the Master has no powers in connection with the administration and distribution of “house property” or land in a “tribal” settlement held in individual tenure (see below).⁷

5.5 The common law guaranteed freedom of testation for both blacks and whites. However, for black persons the situation is not as simple as it seems. Section 23 provides for certain kinds of property that cannot devolve in terms of a will. Section 23(1) excludes what is commonly referred to as house property from the operation of a will. Section 23(2) excludes land in a tribal settlement held under quitrent tenure from the operation of a will.

5.6 There seems to have been a valid, almost noble reason for excluding “house property” from the operation of a will, based on a perceived connecting factor between “house property” and the institution of polygyny. The rule on “house property” was based on the assumption that each polygynous customary marriage created an exclusive “house” complete with its own minor heir and property; therefore the head of the family could not dispossess any of these households of property through a will. However, the institution of polygyny is no longer prevalent in this country. It is now an exception and is fast becoming obsolete.⁸

5.7 The Department of Land Affairs is in the process of reforming a lot of the land tenure systems of black persons and there are pointers that the issue of quitrent tenure will be upgraded. Whether black persons need to be given full freedom of testation, or whether we continue to treat them as a special category of people who need to be protected against their own decisions is discussed in the Discussion Paper 93 on the customary law of succession.

⁷Section 23(7).

⁸Bennett 1993 (56) THRHR at 52 states that in a society where polygamous marriages are an exception, section 23 (1) seems incongruous.

5.8 The Master has powers according to regulation 9 in instances where the executor testamentary is unwilling or unable to act, to appoint a magistrate of the district where the deceased was ordinarily resident as an executor of the estate. The regulation provides that the magistrate is not required to provide security for the administration of the estate. The reason why no security is required is probably because the state is liable for the actions of the magistrate.

5.9 A beneficiary would probably have more problems recovering money from the state for the actions of a magistrate than recovering money from a surety. The same reasons that militate for the provision of security for the administration of all other estates should be applicable in black estates, namely to prevent unscrupulous embezzling of the estate, and providing security should this happen.

5.10 In testate estates, the Master has jurisdiction to ask the magistrate in the district of the deceased to certify that the deceased was a black as defined in the Act.⁹

5.11 A reading of the regulation shows that the level of involvement of the Master will depend on whether the testator appointed a testamentary executor. If a testamentary executor was appointed, then the Master must supervise the activities of that executor. He or she must ask for security from the executor. Should there be no testamentary executor, or if the executor is unwilling or unable to act, then the Master delegates his or her responsibility to the magistrate to act as an executor, and no security is furnished. The magistrate must then handle the administration of the estate in the same fashion as those intestate estates administered by the magistrate (as discussed below).

Estates under the supervision of the magistrate

5.12 A distinction is made between assets devolving under the common law and assets devolving under customary law.

Estates devolving under common law

5.13 The magistrate is empowered by regulation 4 to supervise the estates of black persons who die intestate where their estates are regulated by the common-law rules of intestate succession. Regulation 2 sets out the categories of persons whose intestate estates will be

⁹ See regulation 10.

supervised by a magistrate or the magistrate's representative.

5.14 Regulation 2(a) provides that if a deceased was ordinarily resident outside South Africa other than in Mozambique, all movable assets in the estate after payment of claims due should be forwarded for disposal to the officer administering the district or area in which the deceased was ordinarily resident.

5.15 Regulation 2(b) provides for the administration of estates of deceased persons who, during their lifetime, were holders of an exemption from the application of the code of Zulu law.¹⁰ This section stipulates that the estates of exemptees would devolve as if they were Europeans. Simply put, the deceased estate would devolve according to the common-law rules of intestate succession.

5.16 Regulation 2(c) provides for the administration of intestate estates of blacks who entered into a civil marriage either in or out of community of property. The reasoning behind this section seems to be that by the fact that the parties chose a civil marriage, they necessarily chose the common law to govern the administration of their estate.

5.17 Regulation 2(d) provides for the administration of estates of deceased persons who during their lifetime entered into a customary "union", a putative marriage or in situations where the Minister was of the view that the application of customary law would be inappropriate or inequitable.

5.18 The Law Commission's Discussion Paper 93 on the Customary Law of Succession recommends the extension of the Intestate Succession Act 81 of 1987 to all estates, even if a deceased was subject to customary law. The discussion paper also recommends that the choice of law rules set out above should be repealed.

5.19 The magistrate of a district where the deceased person ordinarily resided in his lifetime administers the devolution of the property. A magistrate appoints a representative to administer the estate.¹¹ In most instances the magistrate simply appoints the widow of the deceased to this

¹⁰Bennett in his article 1993 (56) THRHR points out that regulation 2 creates a misconception that exemption applied only to the Code of Zulu law when s 31 of the Black Administration Act gives it a broader ambit.

¹¹See for instance the case of **Jele v Ngcango** 1951 (2) SA 156 where the then native

office, or another suitable relative. If there is immovable property involved, the magistrate issues a certificate of appointment. This certificate is necessary to pass transfer to the beneficiaries and heirs of the deceased.¹² An executor is not appointed to administer black intestate estates; however, the duties of the magistrates' representative's are styled on those of the executor.

5.20 The way the magistrate (through his or her representative) supervises the administration of the estate is very informal. There are no strict guidelines to enforce a proper administration of the estate. The regulation itself simply gives the magistrate a discretion to require an account if he or she deems it fit. It is not a peremptory measure on the representative.¹³ This informal administration of black estates may be prejudicial especially to dependant minors, who still have to be maintained and be taken through school. Regulation 7(1) provides that a magistrate may take such steps as he or she may consider necessary to safeguard and preserve the inheritance or interests of minors and may deposit the cash inheritance of any minor in the Guardian's Fund. The magistrate also has the responsibility of furnishing the Master with the particulars of the deceased parent, the date of birth of the minor and the name and address of the guardian.

5.21 There are suggestions from scholars that there is a need for a proper enforcement of regulation 7 as far as depositing of money into the Guardian's Fund is concerned. There is a suggestion that after the appointment of an administrator by the magistrate, accountability is seldom required and there is no effective record kept of the administration of the estate. A commentator recommends that regulations 7 and 8 need to be strictly enforced. Another recommendation is that regulations 7 and 8 should also perhaps be made applicable to administrators or heirs of estates subject to customary law in cases where minors are involved. This would at least ensure that minors are maintained from the Guardian's Fund if funds are available.¹⁴

5.22 Section 8 of the regulation provides that whenever a spouse of a deceased black wants to remarry, he or she must obtain a certificate from a magistrate by satisfying the magistrate that arrangements have been made for the preservation and protection of minors in that estate. This certificate has to be presented to the marriage officer who will marry the parties. This is a critical

commissioner appointed a daughter as his representative to administer the estate of her deceased mother.

¹²See Regulation 4(i)

¹³See Regulation 4(1) to (5)

¹⁴ See input by Francois Gerryts of Justice College, Masters training.

regulation for the maintenance of dependant minor children. The question is whether this section is diligently enforced in every circumstance. Similar provisions in the Administration of Estates Act 24 of 1913 were phased out.¹⁵

5.23 Stricter measures for proper control and accountability of the administration officials who handle estates need to be devised if the magistrates are to continue to supervise the administration of estates. This is because there are genuine advantages if magistrates continue to administer black intestate estates. In the alternative, the possibility of the Master handling all estates must be investigated.¹⁶

5.24 Section 43 of the Administration of Estates Act 66 of 1965 provides as follows:

(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.

...

(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.

5.25 Section 90 of the Administration of Estates Act 66 of 1965 provides as follows:

(1) The Master may, subject to subsection (2) and subject to the terms of any will

¹⁵Section 105 of the Administration of Estates Act 66 of 1965.

¹⁶Francois Gerrys finds the present allocation of Black intestate estates to magistrates the most effective administrative control. He states that experience proves the need for the supervisory official to be in the immediate vicinity of the ordinary place of residence of the deceased. This would not be achieved by the limited number of offices of the Master and would unnecessarily burden interested parties who do not have the means to access these offices.

or written instrument disposing of the money or, in the case of a tutor or curator, by which the tutor or curator has been nominated, pay to the natural guardian or to the tutor or curator, or for and on behalf of the minor or other person concerned, so much of any moneys standing to the credit of the minor or other person in the Guardian's Fund as may be immediately required for the maintenance, education or other benefit of the minor or other person or any of his dependants, or for any purpose referred to in sub-paragraph (i), (ii) or (iv) of paragraph (c) of the proviso to section 82, or for any investment in immovable property within the Republic or in any mortgage over such immovable property on behalf of the minor or other person, approved by the Master: Provided that, subject to the terms of any such will or instrument, the aggregate of the payments made in the case of any minor or other person for purposes of maintenance, education or other benefit shall not, without the sanction of the Court, exceed the amount (R100 000) determined by the Minister from time to time by notice in the Gazette of the capital amount received for account of the minor or other person concerned.

(2) Where a natural guardian gives security in terms of section 43 (2) after the sum of money to which a minor is, according to any liquidation and distribution account in any deceased estate or by virtue of any other source, entitled, has been paid into the Guardian's Fund, the Master may pay to that guardian, for and on behalf of such minor, the sum of money standing to the credit of the minor in the Guardian's Fund, where after the provisions of section 43 (3), (4) and (5) shall mutatis mutandis apply.

5.26 In *Bester v Die Meester*¹⁷ the court held that the phrase "natural guardian" in sections 43 and 90 of the Administration of Estates Act refers to a guardian whose authority to receive and care for assets of the minor is not derived from the provisions of the Act. The court held that an adoptive parent qualifies as a "natural guardian" in terms of the provisions. The court rejected reliance on section 74(2) of the Children's Act 33 of 1960, inter alia because that section does not deal with guardianship and sets out the rights of the adopted child and not of the adoptive parent. (Section 74(2) provides, subject to qualifications, that an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent. Section 20(2) of the Child Care Act 74 of 1983, which came into operation on 1 February 1987, provides that a child adopted in terms of the Act or similar previous legislation shall for all purposes whatever be deemed in law to be the legitimate child of the adoptive parent, as if the child was born of that parent during the existence of a lawful marriage.)

5.27 Lorenza Booyesen, a commentator, is in the business of facilitating withdrawal of money paid into the Master's Guardian's Fund to persons entitled thereto. She says that until recently

¹⁷1985 (4) SA 70 (T).

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.

Estates administered according to customary Law

5.28 Subsections 23(1) and(2) provide that "house property" and land in a tribal area will devolve and be administered according to the customary law rules of succession. In terms of regulation 2(d) the estates of blacks married according to customary law, where there is a putative marriage or where the marriage did not produce legal consequences of a marriage, will devolve according to black law and custom. Another category of blacks whose estates will devolve according to customary law rules of succession is that of unmarried blacks in circumstances where no valid will was available on death. If the deceased left a will, the estate is administered under the supervision of the Master.

5.29 After the death of a family head, the eldest son of a family succeeds the family head. He virtually "steps into the shoes of the deceased"¹⁸, rather like the paterfamilias of Roman times. He succeeds both to the status and property of the deceased. In a polygamous marriage there is a universal heir who inherits the status of the family head and also succeeds his father in his own house where he was born. The other eldest sons in the other houses become heirs inheriting property in their own houses where they were born. In a monogamous family the two offices fall on a single heir.

5.30 The heir has reciprocal duties in the family which he inherits from the family head. Olivier discusses the obligations of an heir in this manner:

The successor in status has the same rights and responsibilities towards the houses and other inhabitants of the kraal head as the deceased himself had, including the position as guardian of minors. In respect of a particular house, the successor is entitled to the earnings of the minors and the widow of that house, the lobolo obtained from women, the payment of damages and fines for delicts committed against members of the particular house and debts due to the deceased. The successor has the responsibility to provide and

¹⁸See **Mngoza v Mngoza** 1967 (2)436 (AD) at 440 D where Steyn C J states that the kraal head lives on in his heir. The heir steps into the shoes of his predecessor, inheriting all his rights and also his liabilities.

maintain the widow and minor children, he is also liable for the delicts committed by them. He is also responsible for providing the lobolo for the first wife of each of the other sons and he must provide for the expenses of the daughters e.g. their "trousseaux".¹⁹

5.31 The situation discussed by Olivier gives a general picture of the rights and obligations of the heir. It is applicable to a lesser or greater extent depending on a variety of circumstances, i.e whether or not the family is in a rural area; whether or not the heir is himself unemployed, in which case the inheritance might just be seen as a windfall and he might want to enforce it to the letter; and the attitude of the heir himself. If the heir is reasonable, he might let the widow and her minor children live their lives without any interference.

5.32 It also depends on the relationship between the heir and other members of the husband's family with the widow. Usually if there is a good relationship, the widow and her children are left alone to use the property without any interference. If the relationship is not healthy, then the deprivation of the property is used as punishment. It is also critical whether the heir is a son of the widow or whether he is just another male relative of the family. The former might be more sympathetic to the needs of the widow and minor children than the latter.

5.33 In the majority of cases the custom has evolved to such an extent that succession is only symbolic, with the heir acting as a figurehead in the family. He is the one to whom the widow and the children report when they need advice on family matters and protection from harassment. He is also the one who negotiates lobolo for sons and daughters. This would in most instances be the role of a universal heir in a polygamous household, or that of a senior male relative in a monogamous household where the deceased had no sons.

Estates of unmarried blacks

5.34 In other cases, in effect cases of unmarried blacks, regulation 2(e) provides that the property must be distributed according to black law.²⁰ Under black law and custom the

¹⁹Olivier par 148.

²⁰This section provides that if the deceased does not fall into any classes described in paras (a) to (d) the property devolves under black law and custom. The classes in the preceding paragraphs include people married either according to customary law, civil rights, or relationships that do not produce a marriage or a putative marriage. In essence they are all classes of married people.

administration and devolution of the property will differ from tribe to tribe.²¹ The general practice however will be that any major asset will devolve to the father or his heir.²² This is because the father is the unmarried person's intestate heir. The personal effects are distributed amongst the mother and other siblings. The heir then has a duty to maintain any children of the deceased person.

5.35 In most families, especially in monogamous ones, the practice is such that after the burial of the deceased, the family council meets and decides what should happen to the property, the widow and children of the deceased. In most instances the family seeks to maintain the family life as before. Often the widow is allowed to manage the property and the household as best she can. The relatives only offer themselves for assistance and support if and when it is needed. There are however cases where the heir apparent claims the title and the property in his individual capacity, disregarding the interests of everybody else.

5.36 The magistrate is empowered by the regulation to conduct an enquiry to determine the rightful heir in situations where there is a dispute about the customary heir.²³ The magistrate according to the regulation may call upon any person who may give the magistrate information on the distribution of the estate. The magistrate then has the power to give directions with regard to the distribution of such property as he or she deems fit.

5.37 In *Musefuwa and Others NO v Mathivha*²⁴ the court was seized with an application for the review of an enquiry in terms of the regulation.²⁵ In this case the magistrate refused to allow a postponement, since in his own words “the matter had been dragging on for a long time and hence a postponement is likely to affect and prejudice the other parties”.²⁶ He also refused to admit affidavits submitted because of certain technical objections concerning their validity. The

²¹T W Bennett in his “Source book of African Customary Law for Southern Africa” at 422, writes that amongst the Sotho, an unmarried woman’s property is inherited by her parents. The personal belongings go to her mother and any cash or cattle go to her father, but they are obliged to share these out. Amongst the Swazi, an unmarried woman’s property is inherited by her father or heir.

²²In keeping with the rule of primogeniture.

²³ Regulation 3(2).

²⁴1990 (3) SA 446 (VSC).

²⁵For a brief discussion of the case see M Beukes 1990 CILSA at p 406.

²⁶1990 (3) SA 446 at 449H.

Supreme Court (as it then was) decided that an enquiry in terms of the regulation is a judicial inquiry, and therefore the magistrate must follow proper procedure. He must also be reasonable in handling the matter, and ensure that parties are given a fair hearing.²⁷

5.38 In practice the male heir inherits the property and the status in his individual capacity.²⁸ The widow and the other dependants have no right of ownership over the property; they are entitled only to the right of use during their lifetime and also a right of maintenance against the heir.²⁹ It is illogical to expect such a widow to revert to the status of a dependant simply because the husband is deceased. This would in fact mean that once the husband is deceased she is in a worse situation than during the lifetime of the husband.

5.39 In an ideal situation where the heir was reasonable and responsible enough to support the other dependants diligently, then this rule would be acceptable. However this is not the case in reality. There is no justification to support the custom when it does not fulfil its intended purpose, but simply works hardship on the interested parties.

²⁷At 450A.

²⁸Kerr **Immovable Property** at p 100, states that one of the important consequences of the heir's succeeding to the deceased's position is that he becomes owner of all the deceased's property, movable and immovable.

²⁹Becker and De Kock 1990 CILSA at 369 point out that in any case the woman is only entitled to the heir's care if she remains within the family, but if she should wish to opt out she is not entitled to maintenance from her husband's estate.

6 COMPARATIVE STUDY OF SYSTEMS OF ADMINISTRATION OF ESTATES ELSEWHERE IN AFRICA

6.1 Zambia

Introduction

6.1.1 Zambia, like many Anglophone countries, inherited a duality of legal systems. At independence, succession was governed by the English Wills Act, 1837 and probate was governed by the pre -1911 English law. Estates of Africans were governed by customary law. A host of problems, including the growing incidence of “property-grabbing”³⁰ and inequities in distribution of estates, necessitated reforms to the administration of estates in Zambia. The challenge for reform was taken by the Zambian Law Development Commission (“Commission”), which assessed the situation and developed proposals for reform.

The Commission’s findings and proposals

6.1.2 The underlying reason for the Commission’s work was to address the public concern about the practice of “property grabbing”. Their starting-point was to find ways in which the widow and the children would be protected. The Commission conducted an audit of statutes that preferred the widow and children over customary law beneficiaries.³¹ They found a number of these, namely the Workmen’s Compensation Act, the Civil Service Pensions Act, the National Provident Fund Act and the Fatal Accidents Act. These Acts had one clause in common, namely that payments do not form part of the deceased estate. It therefore means that compensation from these funds did not need to be distributed according to customary law, and therefore was for the exclusive use of the widow and children. Judicial decisions and banking practice had strengthened this position in Zambia.

6.1.3 The Zambian Administrator-General’s Act and Local Courts Act contain provisions similar to section 2(d) of South Africa’s regulation 200 which allows the Minister, at the application of the

³⁰Simon Coldham, 1989 JAL at 130 defines “property grabbing” as where a widow is deprived of any rights over her husband’s property and, in the absence of traditional systems of support, becomes destitute.

³¹See the Zambian Law Development Commission’s working paper on Customary law of Succession at p 2 and 3.

widow, to direct that an estate devolve according to common law rules of intestate succession if devolution by customary law will be inequitable or inappropriate.³²

6.1.4 A significant observation that the commission made was that although there were these safeguards in place, there were social and cultural pressures that forced women to share out their benefits with other customary beneficiaries.³³

Proposals for reform

6.1.5 The Commission observed that although there is a moral obligation to protect the widow and children, there needs to be a balance between these and other customary beneficiaries. They also cautioned against any drastic alteration of the law. They acknowledged that although customary law recognised the making of customary law wills, their implementation hinged more on social issues than on any legal obligation on the heir, and there was no guarantee that widows and children would be protected. The Commission raised several questions that had to be answered in order for any meaningful reform to take place.³⁴ These questions might well be relevant for our purposes in the South African context:

6.1.5.1 What should be the rights of the widow, the children, other relatives;

6.1.5.2 Should the rights referred to above be according to the size of the estate, for example in a small estate should the widow or children take all to the exclusion of other relatives;

6.1.5.3 Should the rights referred to above be different in relation to different kinds of property;

6.1.5.4 Should certain kinds of property, ie land or cattle, continue to be distributed in accordance with customary law even if special provision is made for other kinds of property;

6.1.5.5 Should any provision be made to enable a court to revise the statutory entitlement of a widow because the needs of other relatives are greater or because of the behaviour of the widow during the marriage or because of her behaviour after the death of her husband;

6.1.5.6 What safeguards should be introduced to ensure in practice that the estate is properly

³²See section 32 of the Administrator-General's Act and section 38 of the Local Courts Act cited in the Law Development Commission's working paper at p 3.

³³These cultural and social pressures were identified in a study by the Women and the law project entitled "Inheritance in Zambia the law and practise" as fear of witchcraft and the cultural need to be cleansed of the dead person's spirit.

³⁴See the Commission's working paper under the heading proposals for changes at pages 6, 7 and 8.

distributed, ie should all estates be distributed under an order for administration made by a court;

6.1.5.7 Should there be a specified period after the death during which the estate should not be distributed so as to enable the widow, children and other persons to put forward their claims;

6.1.5.8 What provisions should be introduced to prevent pressure being put upon a widow to surrender her rights;

6.1.5.9 Should there be any differentiation between different widows;

6.1.5.10 Should a man or a woman living with the deceased but not married to the deceased have any rights of inheritance;

6.1.5.11 Should any widowers be given rights in respect of their wives' estates equal to those given to widows.

6.1.6 The findings of the Commission met with so much criticism that their recommendations were never implemented. However, the work of the Commission provided valuable groundwork for future research in the field. In 1989, two statutes were enacted that govern succession and administration of estates in Zambia, namely the Intestate Succession Act, 1989³⁵ and the Wills and Administration of Testate Estates Acts, 1989³⁶. These Acts are currently in force in Zambia.

The Intestate Succession Act, 1989

Application

6.1.7 The Act codifies and amends the application of customary law in certain respects. It applies to intestate estates of people for whom customary law would otherwise have been applicable.³⁷ It excludes land held under customary law from its application.³⁸ This is a similarity with section 23(2) of the South African Black Administration Act, which excludes land held in a tribal settlement from devolving according to customary law rules. The Act also excludes family property from its application.³⁹ This is another similarity with section 23(1) of the Black Administration Act, which excludes what is commonly referred to as house property. These

³⁵No 5 of 1989.

³⁶No 6 of 1989.

³⁷Section 1 of the Act.

³⁸Section 1(2) (a).

³⁹Section 1(2)(b).

sections are based on similar reasoning that customary law is better suited to deal with these types of property. It acknowledges the extended obligations of a person governed by customary law rules, i.e. that the property is for the common good rather than for an heir's individual ownership.

6.1.8 The Act extends customary law understanding to the way various concepts are defined.⁴⁰ The definition of "dependant" includes persons who were maintained by the deceased immediately prior to his death. The person must have been living with the deceased or must have been a minor whose education was paid for by the deceased and who is incapable of supporting himself. This takes cognisance of the customary law understanding of a dependant. It extends to nephews and nieces who cannot support themselves. These dependants need not be minors; the definition includes adults who depended on the deceased for livelihood. The Act then defines near relative as sisters and brothers, grandparents and other more remote dependants of the deceased. It defines priority dependants as the wife, husband, child or parent. The word "parent" is also given the customary law connotation; it includes a guardian who has been responsible for the welfare and education of the deceased.

6.1.9 The customary law understanding of terms is carried over to the definitions of "children", "issue" and "marriage". "Child" includes both legitimate and illegitimate children, "issue" includes children, grandparents and other remote relatives. "Marriage" includes polygamous marriages.

6.1.10 The Act categorises property into family property, homestead property and personal chattels. Family property refers to property that is held collectively by members of a family or is held for the benefit of such members collectively. This includes both immovable and movable property. Homestead property is that property which belongs to a particular household in a polygamous marriage and is not part of family property. Personal chattels are furniture, clothing, appliances and utensils and other articles of household use. They also include cars, books and consumables, but exclude chattels for business purposes and money or securities for money.

Distribution

6.1.11 The Act devises a quota system of distribution.⁴¹ It allocates percentages to categories of dependants. The surviving spouse is entitled to twenty percent of the intestate estate of the deceased. This twenty percent share is further divisible amongst the wives in a polygamous

⁴⁰See section 3 of the Act.

⁴¹See sections 4 to 14 of the Act.

marriage in relation to the duration of their marriages to the deceased. Children are entitled to a fifty percent share in the intestate estate in relation to their age and educational needs. A twenty percent share is allocated to the parents of the deceased, and the last ten percent share is allocated to other dependants in equal shares.

6.1.12 Priority dependants have a preferred claim to the intestate estate. An aggrieved priority dependant may apply to the court to have his or her share adjusted if the division renders the share unreasonably small.⁴² Priority dependants have an absolute claim to the personal chattels of the deceased in a monogamous marriage.⁴³ It is interesting, however, to note that the Act excludes money, securities in money and chattels for business from the classification as personal chattels. Priority dependants have an absolute claim over homestead property in a polygamous marriage.⁴⁴ The priority dependants are entitled to the house where the estate includes a house.⁴⁵ If there is more than one house, then the spouse and children are entitled to one house, and the remainder form part of the estate. Where there is more than one wife then the wives hold the house in common as tenants. The surviving spouse has a life interest in the house, and it determines when that spouse remarries.

6.1.13 The Act provides for variations to the quota percentages allocated to beneficiaries.⁴⁶ It tries to cater for most of the eventualities that can arise when an intestate estate falls to be distributed. It also allows other beneficiaries to transfer their property to the priority dependants if they so wish.⁴⁷ The most significant thing that the Act does is criminalising “property-grabbing”. It makes it an offence for a person unlawfully to deprive any dependant of the use of the property to which he or she is otherwise entitled.⁴⁸ It also criminalises unlawful interference with the lawful use of the property. This is a significant step, but the question remains whether it is effective in practice.

Administration of estates

⁴²See the proviso to section 4.

⁴³See section 8 of the Act.

⁴⁴See section 10 (a) of the Act.

⁴⁵See section 9.

⁴⁶Section 6.

⁴⁷Section 13.

⁴⁸Section 14.

6.1.14 Letters of administration on intestacy may be granted to individuals or to the Administrator-General. An interested person may apply to be granted letters of administration.⁴⁹ Where two people apply, the determining factor in selecting one would be consanguinity and immediate interest in the estate⁵⁰. A creditor may also be granted letters of administration where no interested party comes forward to apply.⁵¹ The Administrator-General has the discretion to appoint any interested party who applies if he is persuaded that the person is fit to administer that property. He may also appoint more than one person in respect of any estate, but he may not appoint more than four people.⁵² The Administrator-General may administer an estate if there is no applicant for letters of administration or there is minority or a life interest in the estate.⁵³

6.1.15 The administrator is tasked with paying the debts and funeral expenses of the deceased and effecting a distribution of the estate in accordance with the rights of beneficiaries.⁵⁴ He or she has to keep an inventory and an account of the administration of the estate. These accounts may be inspected by the court *mero motu* or at the instance of an interested party. The court may require sureties for granting letters of administration.⁵⁵ The Act makes it an offence wrongfully to deprive a minor of property or a share in property for the perpetrator's own benefit or the benefit of another person. The court may order restitution to the minor. A beneficiary who intentionally causes the death of the deceased forfeits his or her right to benefit from the estate.

6.1.16 The Act provides for the appointment of a "receiver" of the estate pending a grant of letters of administration in circumstances where there is reason to believe that the property may be wasted. Any interested person may apply to court to be appointed a receiver.⁵⁶ This clause seems to be addressing situations where relatives may come and misappropriate property even before the funeral of the deceased, and before the beneficiaries have had time to take stock of the estate.

⁴⁹Section 15.

⁵⁰Section 15(2).

⁵¹Section 15(3).

⁵²Section 16.

⁵³*Ibid.*

⁵⁴Section 19.

⁵⁵Section 28.

⁵⁶Section 37.

Jurisdiction

6.1.17 The local courts have jurisdiction over smaller estates. They have jurisdiction over estates not exceeding fifty thousand Kwacha.⁵⁷ The subordinate courts have jurisdiction over medium estates not exceeding one hundred thousand Kwacha.⁵⁸ The High Courts have jurisdiction over large estates. The local and subordinate courts may transfer applications to the High Court if they are persuaded that it is in the interests of justice to do so.

6.1.18 The Local Courts Act⁵⁹ strengthens the protection of the estate from misappropriation by the administrator. It creates two penalties. It makes it an offence for the administrator to administer the estate in any manner contrary to customary law.⁶⁰ It also confers a right of restitution against an administrator who misappropriates an estate.⁶¹

Discussion

6.1.19 Although leading academics see the Intestate Succession Act as a milestone in protecting widows and children, there are still criticisms that are levelled against it. The system of fixed percentages to beneficiaries is criticised. There is a concern that the Act made no concessions to customary law in certain respects; instead it ran roughshod over certain customary practices. In its approach it is biased towards the patrilineal systems and ignores the matrilineal system, whereas the majority of people in Zambia live under the matrilineal system.⁶² In its definition of dependant, the Act omits a nephew (who is defined as a near relative), whereas according to the matrilineal system it is customary that a man's property devolves upon the nephew. A second criticism levelled at the Act is that the fixed system of distribution does not cater for all eventualities. It does not grant the administrator or the court any discretion in distributing the estate. Simon Coldham discusses this problem in this manner:

⁵⁷Section 43.

⁵⁸Ibid.

⁵⁹Local Courts Act No 8 of 1991.

⁶⁰Chuma Himonga discusses these offences at p 150.

⁶¹Ibid.

⁶²Simon Coldham 1989 JAL at131.

the fixed shares system has the advantage of certainty, of course, but it fails to take into account the differing circumstances of particular beneficiaries or the differing sizes of families.

Another problem that has been identified relates to implementing the provisions of the Act. A significant point is the appointment of the administrator and the law that is applied in distributing the estate. The local and subordinate courts, with the exception of the High Court, still appoint relatives of the deceased instead of the spouses. The problem then arises that the estates are administered by people who have no interest in terms of the Act. These appointed administrators administer the estate according to customary law, ignoring the fixed quotas stipulated under the Act. This prejudices the surviving spouses and children despite the existence of the Act.⁶³ A noteworthy point is that in all estates administered by the Administrator-General, the Act is followed to the letter.⁶⁴

6.1.20 Another significant problem is the confusion in the minds of relatives appointed as administrators. They seem to regard themselves also as beneficiaries, whereas the Act does not regard them immediately as such. There are also social pressures, like threats of witchcraft and death from relatives, which lead spouses to let relatives deal with property in any way they see fit. A concern not identified by commentators is that for every estate there must be letters of administration granted. The family is not allowed to deal with the estate quickly and efficiently, involving formal structures only if there is disagreement.

The Wills and Administration of Testate Estates Act

6.1.21 This Act does not apply to land held under customary law. This means that land and property held under customary law are excluded from the operation of a will. The problem is that the majority of Zambians live in rural areas where property is held under customary law. It therefore means that the bulk of the estate of the average Zambian is excluded from the operation of a will.

6.1.22 The way that this Act defines “dependant” differs from the Intestate Succession Act. This Act defines “dependant” as the wife, husband, child or parent. This definition does not take into account the extended meaning of the term in customary law. The Act, however, does extend the definition of marriage to polygamous marriages. This therefore means that certain beneficiaries

⁶³See Himonga at p 156.

⁶⁴Ibid at 162.

will be excluded, depending on whether the testator executed a valid will.

6.1.23 The Act recognises oral wills made in the presence of two witnesses.⁶⁵ This is an extension of custom and it is brought within the operation of the Act. The concern is that an oral will loses its customary connotations; it is then handled according to the Wills Act which imports foreign concepts into it. Whereas the maker of an oral will may not have intended to limit his dependants in the sense imported by the Act, that is the result obtained. This may cause confusion in the minds of prospective beneficiaries who expect the devolution of the property to be according to customary law in terms of their understanding of an oral will.

6.1.24 The Wills Act creates statutory offences similar to those found in the Intestate Succession Act. It makes it an offence for a personal representative or a guardian wrongfully to deprive a minor of his share of the property.⁶⁶ It also makes it an offence to meddle with or take possession of property unless authorised by law.⁶⁷

6.1.25 The major concern about the enforcement of the Wills Act is the fact that the average Zambian does not execute a will. If there is a will the relatives are able to exert pressures on the widow and children not to enforce the will.

6.2 Zimbabwe

The Administration of Estates Amendment Act

6.2.1 Administration of estates is governed by the Administration of Estates Amendment Act, 1997. Before this amendment came into operation the administration of estates of persons subject to customary law was provided for by a number of different Acts.⁶⁸ This Act has incorporated the administration of estates of people subject to customary law into the

⁶⁵See section 6(4)(c).

⁶⁶Section 58 of the Wills Act.

⁶⁷Section 65 of the Wills Act.

⁶⁸Ncube states that the customary law of succession governs the inheritance of all property belonging to Africans due to the combined effects of section 69 of the Administration of Estates Act, section 13 of the African Marriages Act and section 6 A of the Primary Courts Act. These are the sections that the Act is amending as stated in its preamble.

mainstream law. The Act has taken cognizance of the extended customary law definitions of various concepts.

6.2.2 In terms of this Act, “family” refers to the extended family.⁶⁹ It refers to the persons who are recognised under customary law as constituting the deceased person’s family. The family is therefore not restricted to the nuclear family of the deceased. This is significant because in rural Africa the wider family members have an interest in the estate of the deceased member, the reason being that there is property held in common for all family members. To exclude the family members from the benefits of the common property would be tantamount to disinheriting them unfairly. It is therefore important that these broad meanings be taken into consideration.

6.2.3 A customary law marriage is valid for the purposes of this Act.⁷⁰ The Act also differentiates between a beneficiary and an heir.⁷¹ A beneficiary includes the surviving spouse, a child or any person who is entitled to inherit any property in the estate. An heir refers to an heir at customary law. These two categories of people inherit different and distinct parts of the estate. The heir inherits the deceased’s name and *tsvimbo* or *intonga*, and any other articles that must pass to him under customary law.⁷² The beneficiaries inherit the net estate after creditors have been paid, funeral expenses have been paid and the heir has received his customary law articles.⁷³

6.2.4 An innovation of the Act is the fact that it gives the executor the powers to draw up an inheritance plan for the distribution of the estate.⁷⁴ The executor must pay off all legitimate creditors and then draw up a distribution plan of the net estate to the beneficiaries. In drawing this plan the executor may call a family council to consult with them and to try and broker an agreement as to the distribution.⁷⁵ This is an important innovation because it acknowledges the customary role of the family in the distribution of the estate. This consultation may prove valuable

⁶⁹See the definition section of the Administration of Estates Amendment Act.

⁷⁰Ibid.

⁷¹Ibid.

⁷²Section 68 C.

⁷³Section 68 D(b).

⁷⁴Section 68 D.

⁷⁵Section 68 D(2)(b).

in cutting down disputes and “estate looting”⁷⁶ since it may foster the feeling of having been consulted about the distribution and the decision being a family decision. It is important to note that the executor must then submit to the Master of the High Court the approved distribution plan. If the Master is satisfied that the agreement has been entered into with full knowledge of the parties’ rights, the executor may then proceed to distribute the property in accordance with the plan.⁷⁷ If there are disagreements, the Master has the duty to resolve any disputes and then instruct the executor to distribute the estate in accordance with his or her determination.⁷⁸

Distribution

6.2.5 The customary heir inherits the deceased’s name and any other articles which customarily are supposed to devolve to him.⁷⁹ This changes the custom that the customary heir inherits the property in his individual capacity and only has an obligation to maintain the dependants.

6.2.6 This is an amendment to section 6A of the Customary Law and Primary Courts Act which provides that:

the immovable property of a deceased African to whom customary law would have been applicable, regardless of marriage shall devolve in accordance with customary law rules of intestate succession, except that the heir shall succeed in his individual capacity.

6.2.7 The customary heir’s status is now more symbolic than real. He inherits the deceased’s name (and presumably any other customary law obligations), but his status as the sole heir has been removed in favour of the deceased’s immediate dependants, namely the surviving spouse or spouses and children.

6.2.8 The Act introduces a system of share allocation to beneficiaries rather like the Zambian

⁷⁶W Ncube and J Stewart 1992 WILSA at 103 refer to the phenomenon of “property grabbing” as “estate looting”.

⁷⁷Section 68E(3)(a).

⁷⁸Section 68E(3)(c).

⁷⁹Section 68F(a).

Intestate Succession Act. A third of the net estate is allocated to the wife and where there is more than one wife, the senior wife gets two shares and the remainder is divided equally amongst the rest of the wives.⁸⁰ This preferential treatment given to the senior wife is not justified anywhere in the Act. At first glance it looks unfair. One would have thought that the senior wife should get the lesser of the share since in all probability, when the husband dies, her children will be grown up and independent. In any case if there is still a share for the children, there is really no clear reason why the wives should not share their allocation on equal terms.

6.2.9 The remaining two-thirds of the estate is shared equally amongst the children. If there are no children then any descendant is entitled to benefit from this portion. It is significant that this Act does not provide for parents of the deceased expressly. One deduces from the wording of the Act that where there are no children, any descendant may benefit. In all probability this descendant would be the parents or brothers and sisters. This Act does not provide for these close relatives except by default if there are no children.

6.2.10 If a deceased is survived by two or more wives, they each get ownership of the house they each occupied, failing which they each get a usufruct over the house together with the household goods. Where the wives lived together in one house at the time of the death, they get joint ownership of the house, failing which they get a joint usufruct of the household goods.⁸¹ This is a common protection given to wives in a polygamous set-up throughout Anglophone Africa. In the South African context, household property is preserved for the sole use of the wife who owned it during the life of the deceased, and it is not transferable.⁸² The position is the same in Zambia.⁸³

6.2.11 This principle is also applicable to a surviving spouse in a monogamous marriage. The surviving spouse gets ownership of the house together with her children, failing which she gets a usufruct over the house together with all the household goods.⁸⁴ This principle of giving the wife ownership of the house is a significant improvement. It is another move that ensures that the

⁸⁰Ibid.

⁸¹Ibid at (b)(i) and (ii).

⁸²See section 23(1) of The Black Administration Act 38 of 1927.

⁸³See section 9 of the Zambian Intestate Succession Act.

⁸⁴Section 68 F (2) (d).

customary heir has no business in the deceased's property.⁸⁵ It would be a major improvement in the South African context if this principle were imported; it would prevent sad stories that abound in this country similar to that in *Mthembu v Letsela*,⁸⁶ where the customary heir sought to evict the wife and child of the deceased on the basis that he was the sole heir to the deceased at customary law.

6.2.12 The Act provides for the devolution and distribution of estates in situations where the deceased is a woman. If this was a polygamous marriage, then the husband gets one - third of the net share of the estate and the remainder devolves upon her children in equal shares. One may infer that the children would remain in their mother's house since it is their family home, although the Act does not expressly provide for this. In situations where there is only a surviving spouse and no children, the spouse gets the house and half of the net estate, and the surviving parents, sisters and brothers of the deceased get the remaining half of the estate in equal shares. This section acknowledges the expectations that relatives in a customary marriage have in relation to the property of other members of the clan; the fact that property is perceived as common property held in trust by individuals.

6.2.13 Where an unmarried person dies intestate, his or her estate devolves upon the surviving parents, brothers and sisters in equal shares.⁸⁷ Where the unmarried person had children, his or her property will devolve upon the children in equal shares. This section is a significant improvement on the custom in most patrilineal societies, where the estate of an unmarried person devolves on the father or customary heir. In such a situation the children simply receive the personal effects of the parent and all the customary heir has is an obligation to support the children – which he can disregard with impunity. If he does support them, he can just provide for the bare minimum. The Act provides expressly that the net estate should be used extensively to support the basic needs of beneficiaries who have no other means of support.

⁸⁵W Ncube and J Stewart discuss the ideal in Zimbabwean customary law where although the customary heir succeeds to the deceased's property in his individual capacity, he still owes the deceased's dependants a duty of support which duty includes the obligation of providing them with suitable shelter. The Zimbabwean case law abounds with cases where customary heirs have simply dispossessed a deceased's dependants without any support or maintenance in return like the South African case law.

⁸⁶1997 (2) SA 936 (T).

⁸⁷Section 68F(2)(h).

6.2.14 The most important thing to note is that customary law remains the residual law applicable in intestate succession, subject to the provisions of this Act. This therefore means that any other situation that is not covered by the Act would still be determined by customary law.⁸⁸

Choice of law

6.2.15 The Act provides for certain presumptions to be made in determining whether the law applicable to an intestate estate is customary law or the general law of Zimbabwe. The type of marriage entered into by the deceased is used as a yardstick for the legal regime applicable. If it is a customary law marriage, then the presumption is made that customary law should apply. The Act also provides that if there are disputes regarding the law applicable, then the issue should be referred to the Master, who should resolve the matter quickly and cheaply.⁸⁹

6.2.16 A similar presumption is applied in South Africa: the marriage regime determines the issue whether the common law principles of intestate succession or the customary law should be used in the devolution of an intestate estate.⁹⁰ This determination by marriage precludes the unmarried person, whose estate is automatically dealt with under customary law unless he or she executed a valid will. There are no other factors that are used to cater for the unmarried person. This determination by marriage is also not a satisfactory determinant, since people may marry under both regimes. Even if they marry under customary law alone, marriage by itself is not conclusive of the choice of law applicable to people.

6.2.17 The Act precludes small estates from its application. All estates under 60 000 Zimbabwean dollars may be dealt with outside the operation of this Act, informally and speedily by the family perhaps.⁹¹ This is a noteworthy section in this Act, and it makes practical sense. The estate of the average Zimbabwean will in all probability be small, and to apply to the Master for an executor may not always be cost - effective and necessary. In that case the family may just decide to let the status quo continue; the wife and children keep the house and household

⁸⁸Section 68F(2)(j). Also see Simon Coldham at par 7 where he gives a brief commentary on this clause in the Act.

⁸⁹See section 68G(1) and (2).

⁹⁰See section 2 of regulation GN 200 of 1987.

⁹¹Section 68 H.

goods undisturbed.⁹² In any event, a small estate is unlikely to cause any dispute. However if there is a dispute, the Act does not preclude the Master from intervening. The Zambian Act lacks this important section, which means on the face of it that for every intestate estate, there must be an application to the Administrator-General to appoint an administrator.

Conclusions

6.2.18 This Act has made major inroads into the customary law of intestate succession. It has taken cognisance of the modern developments in Zimbabwe and adjusted itself to them. What is worth having in customary law has been kept, while out-of-date practices have been discarded. This Act in fact vindicates the dynamism of customary law in adjusting itself to modern situations.⁹³ There is a tendency for courts to apply the fossilised customs that were followed fifty years ago to an extent that even when practices on the ground have changed for the better, the law is slow to recognise this.

⁹²W Ncube and J Stewart 1992 WILSA note that there is a developing trend in Zimbabwe that families leave the widow and children alone and do not interfere in the estate of the deceased husband.

⁹³This is discussed by W Ncube and J Stewart 1992 WILSA.

7 RECOMMENDATIONS CONCERNING THE ADMINISTRATION OF BLACK ESTATES

- 7.1 The following guidelines are recommended:
- 7.1.1 There should be as little state interference as possible in the administration of black estates. Paragraph 2.35 above notes that after the burial the family council meets and decides what should happen to property. If agreement can be reached, there seems to be no reason for state interference.
- 7.1.2 Effective measures should be available in cases of disagreement or disputes, or where minors or other beneficiaries without full legal capacity may be prejudiced.
- 7.2 If the customary law of succession is abolished,⁹⁴ it will not be appropriate to distinguish between the administration of estates that devolve according to customary law and other estates. It would probably be unacceptable to provide that all estates of blacks should be reported formally to a government institution such as a magistrate. This is a drastic change from the present practice, especially in rural areas.
- 7.3 Magistrates are opposed to the exercise of administrative duties. Consideration could be given to granting powers to traditional leaders, but it seems that their role should be limited to informal consultations and arbitration. The involvement of magistrates seems to be unavoidable.
- 7.4 ***Comments are invited on the following proposals. Assuming that a different system should be retained for the administration of estates of blacks.***⁹⁵
- 7.4.1 ***Estates of blacks who did not leave a will need not be reported to any government institution unless the value of the estate exceeds R100 000 or an interested party objects to the administration of an estate.***

⁹⁴See Discussion Paper 93 on the customary law of succession paragraph 4 on (xvi).

⁹⁵See the discussion in paragraph 6 below of the question whether separate systems should be retained for the administration of estates of blacks and estates of other persons.

- 7.4.2** *Estates in other cases should be reported to the magistrate of the district where the deceased was ordinarily resident before his or her death. The magistrate may, on application by an aggrieved party, instruct the family of the deceased to report the estate if the magistrate is of the opinion that minors or persons without full legal capacity may be prejudiced.*
- 7.4.3** *An interested party who is dissatisfied with any decision of a magistrate may appeal to the Master for a review of the decision.*
- 7.4.4** *If the customary law of succession is retained, a regimen similar to the above proposals may be retained for estates that devolve according to customary law.*
- 7.5** The non-recognition of guardians according to customary law⁹⁶ may be the result of lack of proof of the relationship. A cautious approach by the Master in so far as moneys of minors are concerned, cannot be rejected outright. ***Comment is invited 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.*** (Annexure section 43(1A).)

⁹⁶Paragraph 2.27 above.

8 ADMINISTRATION OF ESTATES UNDER THE ADMINISTRATION OF ESTATES ACT 66 OF 1965

8.1 Introduction

8.1.1 Estates are administered under the Administration of Estates Act 66 of 1965 (the 1965 Act) -

8.1.1.1 if a black has died leaving a valid will which disposes of any portion of his estate that is not allotted by the testator or accrues under black law or custom to any woman with whom he lived in a customary union or any house, and is not land in a tribal settlement held in individual tenure upon quitrent conditions;⁹⁷ or

8.1.1.2 if a person who is not a black has died leaving assets or a will in South Africa.⁹⁸

8.1.2 The main issue for consideration in the Commission's investigation is the existence of two different systems for the administration of estates of blacks and for the administration of estates of other persons. Before this issue can be considered an evaluation of each of the two systems is necessary. The following issues have been identified for consideration in respect of estates under the 1965 Act: the level of control by the Master of the High Court (the Master); different types of letters of executorship; Regulation 910 *Government Gazette* 2080 of 22 May 1968 (limitation of the liquidation or distribution of deceased estates to certain persons); security by executors; and sundry issues which are listed below.

8.2 Level of control by the Master

8.2.1 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 of the 1965 Act, the Master may dispense with the appointment of an executor.

Section 18(3) appointment

8.2.2 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*

⁹⁷Section 23(9) of the Black Administration Act 38 of 1927 read with subsections (1) and (2).

⁹⁸Section 7(1) (see section 104 for exceptions) of the 1965 Act. Sections cited below without mentioning the Act refer to the 1965 Act.

Gazette.⁹⁹ The Minister has determined the amount of R50 000 by notice in **Government Gazette** No 15308 dated 1 December 1993. In practice the Master in terms of section 18(3) authorises the surviving spouse or one of the heirs to collect and distribute the estate if the assets are worth less than R50 000. In the case of minor heirs or other heirs with limited legal capacity, or of disputes between heirs, etc, the Master may decide to appoint an executor although the value of the assets is less than R50 000.

8.2.3 Before the Master's authority is issued, the candidate for appointment is required to sign an undertaking which contains the following:

8.2.3.1 I undertake to administer the estate, to pay the debts from the estate assets and to distribute any balance according to the Master's directions in terms of Section 18 (3) of the Estates Act (*sic*), 1965 and accept that I am bound by any amendment or cancellation of such directions.

8.2.3.2 I undertake that I shall not administer any asset(s) which has/have not been reflected in the Section 9 inventory, and as soon as it becomes known to me that the value of the assets exceed R50 000 to report to the Master this fact, and to return the directions.

8.2.3.3 I confirm that to the best of my knowledge the estate is solvent and undertake to immediately advise the Master when it becomes known to me that the estate is insolvent. That to my knowledge the known liability/ies of the estate is/are as follows: ...¹⁰⁰

8.2.4 The appointee is authorised to take control of the assets 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.¹⁰¹ There is usually no accounting to the Master by the representative appointed by the Master. If the Master calls for accounting, an elementary statement of assets, liabilities and a distribution account will suffice. The Master may also request proof of payment of debts and inheritances.¹⁰²

⁹⁹Section 18(3).

¹⁰⁰Form J 155.

¹⁰¹Form J 170.

¹⁰²Justice College manual page 44 to 47.

Section 25 appointment or directions

8.2.5 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:

8.2.5.1 sign and seal letters of executorship lodged with the Master in terms of section 21; or

8.2.5.2 if no such letters are produced, appoint an executor or direct the manner in which the estate shall be liquidated and distributed; and

8.2.5.3 subject to such conditions as the Master may determine, exempt the executor from compliance with section 35 (lodging and advertising account).

8.2.6 Before the Master exercises these powers an affidavit in terms of regulation 4 must be lodged with the Master, estate duty must be paid or secured and the Master must be satisfied that no person in South Africa will be prejudiced.¹⁰³ The Master may call for an affidavit that letters of executorship have not already been granted or signed and sealed by any other Master in South Africa.¹⁰⁴

8.2.7 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.¹⁰⁵ 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 section 25.¹⁰⁶

8.2.8 The practice set out in the previous paragraph is not supported in full by the wording of section 25. The section does not distinguish between shares and other movables, and this distinction seems to be a remnant of the wording of the 1913 Act and section 25 of the 1965 Act before its amendment in 1984. Although an executor may be exempted from compliance with section 35 in terms of section 25, the section is silent on exemption from compliance with

¹⁰³Section 25.

¹⁰⁴Section 22(2)(c).

¹⁰⁵Justice College manual page 78 and 79.

¹⁰⁶Justice College manual page 69 to 78.

section 28. 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 **proclaimed** state.

Appointment of executor

8.2.9 When letters of executorship issued in a proclaimed state have been signed and sealed by the Master in terms of section 21 of the 1965 Act, the person in whose favour the appointment has been granted is in the same position as an executor. The main duties of an executor are -

8.2.9.1 to advertise for creditors in a newspaper and in the Government Gazette;¹⁰⁷

8.2.9.2 to determine solvency and to follow the prescribed procedure if the estate is insolvent;¹⁰⁸

8.2.9.3 to liquidate the estate in so far as it is appropriate;

8.2.9.4 to lodge a liquidation and distribution account and advertise it for inspection in a newspaper and the Government Gazette;¹⁰⁹

8.2.9.5 to distribute the estate in terms of the account; and

8.2.9.6 to lodge an estate duty return and pay any estate duty that may be payable.

8.2.10 Even though the Master's role has been reduced somewhat,¹¹⁰ the Master is still entitled to exercise extensive control over executors. Section 35(4) provides that the 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.¹¹¹

¹⁰⁷Section 29.

¹⁰⁸Section 34.

¹⁰⁹Section 35.

¹¹⁰Section 47 was amended in 1983 in order that the consent by the Master was 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.

¹¹¹Section 36.

Discussion of factors determining level of control

(i) Section 18(3) - value of estate

8.2.11 In terms of the 1965 Act, estates are subject to extensive control by the Master unless section 18 or 25 is applied.

8.2.12 The only factor in section 18(3) for dispensing with the appointment of an executor is the value of the estate. It is an all-or-nothing approach. Either the Master appoints an executor subject to extensive control, or no executor is appointed and the Master usually exercises no control.

8.2.13 Problems arise in small estates as well as in large estates. In large estates beneficiaries are probably better able to protect their own interests than in small estates. The value of the estate is significant if the question of estate duty arises or the value of the assets is so small that it is of little interest to anyone. ***It is submitted that it is unsatisfactory to base the level of control by the Master on the value of the estate alone.***

(ii) Agreement by family; section 25 - absence of prejudice

8.2.14 According to customary law the deceased's family gathers after the burial ceremony in order to determine the assets and liabilities and also to confirm the identity of the heir. Something similar to this practice seems to be worthy of consideration. Leaving aside matters such as estate duty or Master's fees, there seems to be no reason why anyone should interfere if beneficiaries of full legal capacity are satisfied with arrangements for the distribution of the estate.

8.2.15 Section 25 provides that the Master may dispense with the usual procedure if estate duty has been paid or secured and the Master is satisfied that no person in South Africa will be

prejudiced.¹¹² These seem to be sensible guidelines for dispensing with formalities and control measures.

(iii) Submission on factors to determine level of control

8.2.16 Several submissions were received that the level of control should be reduced in some cases:

- C Master's Offices are finding it extremely difficult to cope with workloads;
- C if a more user-friendly and cost-efficient system of probate were introduced it would not be necessary to increase Master's staff above the current levels;
- C all the scrutiny one can muster cannot tell us if there are assets fraudulently omitted from the account;¹¹³
- C section 35(4) of the Administration of Estates Act 66 of 1965 should not require the Master to examine each and every account lodged with the Master;
- C most European systems leave matters pretty much to the heirs, unless the court or the testator provided differently;
- C the Master can force the executor to accept his or her opinions even if the heirs and creditors are quite happy that everything has been done correctly; and this inevitably leads to long delays in finalising the administration of estates;
- C owing to the fact that unnecessary activities will no longer be required, the Master will have ample time to fulfil his or her real role, namely that of supervising the activities of the executor, who should take responsibility and be accountable for everything in the estate;¹¹⁴

¹¹²See paragraph 5.2.6 above.

¹¹³Letter Association of Trust Companies in South Africa 31 May 1996.

¹¹⁴Submissions by Prof N J Wiechers attached to letter by The Association of Trust Companies in South Africa dated 31 May 1996.

C the administration of estates should be simplified in cases where the surviving spouse or a major heir inherits the whole estate.¹¹⁵ The South African Revenue Service agrees that a formal account is not essential. It submits that a list of assets at market value should be required to enable the Service to review information submitted for purposes of income or donation tax: it is often not possible to establish the market value of assets before the appointment of an executor or other representative.

5.2.17 It is submitted that the Master should be authorised to dispense with formalities and control measures.

Mechanism to dispense with formalities and control measures

(i) Sections 18(3) or 25 directions

5.2.18 When the Master gives directions in terms of section 18(3), no executor is appointed. The Master usually regards the estates as finalised once directions have been given. 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 executor.¹¹⁶ 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?

5.2.19 As a "creature of statute" the Master has the powers conferred upon him or her by the Act, either expressly or by necessary implication.¹¹⁷ 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. It may be argued that the power to act against persons given directions is implied and that a person who is given directions is bound by an undertaking to act according to the Master's directions and is bound by any amendment or cancellation of such directions, etc.¹¹⁸ However, it seems preferable for the Master to rely on

¹¹⁵Meeting of Estates Committee of Association of Law Societies and Masters of the Supreme Court 7 October 1992.

¹¹⁶See paragraphs 5.2.4 and 5.2.7 above.

¹¹⁷*Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (In Liquidation)* 1991 (4) SA 514 (N) 522.

¹¹⁸See paragraph 5.2.3 above.

express powers granted in an Act.

5.2.20. The mechanism in section 25 to appoint an executor and exempt the executor from certain duties seems to be satisfactory: an executor is appointed and the Master has wide powers to Act against executors. However, the wording used at present to exempt executors from requirements may be problematical, and the scope of the Master's authority to exempt the executor from complying with requirements is limited. The exemption is in practice subject to the provision that "the position of this Estate as declared remains unchanged".¹¹⁹ It may be difficult to determine whether the position of the estate has remained unchanged. It may also be advisable to reconsider the exemption even though the position of the estate as declared remains unchanged, for instance a beneficiary may complain about mismanagement by the executor.

5.2.21 In terms of section 25 the Master may exempt the executor from compliance with section 35 (lodging and advertising of account).¹²⁰ The scope of this exemption is limited, and in practice the Master adds other exemptions, for instance dispensing with the opening of a banking account.¹²¹ It seems advisable to give the Master a wide discretion to act according to the circumstances of the particular case.

(ii) Proposed mechanism to dispense with formalities and control measures

5.2.22 It is submitted that wide powers should be given to the Master to act according to the circumstances, and that the powers of the Master should be spelled out in the Act.

5.2.23 It is submitted that, as a first alternative, the Master should be given authority to exempt an executor from compliance with any or all the provisions of the Act, once estate duty has been paid or satisfactory provision has been made for its payment. Comment is invited on the question whether the Master should in all cases insist on a simple statement of assets at market value, liabilities and proposed distribution. The Master should have authority to revoke exemptions and direct an executor to comply with any or all the provisions of the Act if, in the opinion of the Master, circumstances justify it. Section 50 will have to be amended so that an executor is not liable for distribution otherwise than in accordance with an advertised account. It is submitted that

¹¹⁹See paragraph 5.2.7 above.

¹²⁰See paragraph 5.2.5.3 above.

¹²¹See paragraph 5.2.7 above.

the executor should not be liable merely for this reason if the Master authorised the representative to distribute the estate. Comment is invited on a provision that an executor authorised by the Master to distribute the estate may be held liable if he or she is unable subsequently to account for the liquidation and distribution of assets.

5.2.24 *As a second alternative, it is submitted that in estates with assets above a prescribed value all executors should lodge accounts and advertise the accounts in the Government Gazette, without a requirement that the Master should examine accounts.*

5.3 Different types of letters of executorship

Introduction

5.3.1 A commentator submits that the different types of letters of executorship in terms of sections 13, 18, 21 and 25¹²² of the 1965 Act should be standardised for the following reasons:

- C financial institutions and deeds offices are not familiar with all the different types of appointment and refuse to accept appointment of anyone other than an executor;
- C less formal appointments, like those in terms of sections 18(3) and 25 of the Act, take longer because the requirements are unknown and less experienced staff deal with them;
- C training of the staff of attorneys, accountants and trust companies can be simplified; and
- C delays can be avoided by simplification.¹²³

A committee of the Master's Office agrees that there should be one type of appointment and submits that the Master should be authorised to exempt the executor from compliance and the furnishing of security by a person to whom exemptions are granted; and the repeal of sections 20, 21 and 22 of the Act should be referred to the state law advisers for an opinion as to whether the sealing and signing of letters of executorship granted in a foreign estate may be revoked

¹²²Ordinary appointments are dealt with in section 13, sections 18 and 25 are explained above and section 21 dealing with the signing and sealing of foreign letters of executorship, is discussed below.

¹²³Letter Association of Law Societies of the RSA 28 April 1993.

unilaterally.¹²⁴

5.3.2 *The proposals regarding the level of control by the Master in paragraph 5.2.17 above entail the abolition of appointments in terms of sections 18 and 25.* The question whether the reporting of estates will have to be adjusted in order to furnish the Master with sufficient information to decide on the exemptions to be granted to an executor is discussed in paragraph 5.3.10 and the following below.

Recognition of "foreign" executors in terms of section 21

5.3.3 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.

5.3.4 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".¹²⁵

Basutoland (Lesotho)
 Bechuanaland Protectorate (Botswana)
 British Columbia
 British Guiana (Guiana)
 Channel Islands
 Eire, the Republic of
 Kenya
 New South Wales (New South wales, Australia)
 New Zealand
 Northern Rhodesia (Zambia)
 Nyasaland (Malawi)
 Southern Rhodesia (Zimbabwe)
 South West Africa (Namibia)
 Swaziland

¹²⁴Committee of the Master's Office recommendations 12 September 1997, including detailed legislative amendments.

¹²⁵The words in brackets are contemporary names of the countries stated in the Proclamation.

Tanganyika (Tanzania)

United Kingdom of Great Britain and Northern Ireland

Victoria (Victoria, Australia)

5.3.5 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 seems to be 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?

5.3.6 The choice seems to be between a reform of the list of proclaimed states or the repeal of the special treatment for some states. 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. A case occurred in the Master's office where a representative of a foreign estate, after being asked for a long list of new requirements for the second time, declared that he had concluded that the estate did not have assets in South Africa, but that it was a liability for a foreign estate to own property here. Special treatment should clearly be retained only if it facilitates the appointment of a representative. Apparently the signing and sealing of foreign appointments gives rise to more problems than it solves. 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. International agreements in this regard or reciprocal provisions in the laws of other states are not commonly known (if they exist at all). If benefits are not taken away, it seems unnecessary to investigate whether the repeal of sections 20, 21 and 22 of the Act and the sealing and signing of letters of executorship granted in a foreign estate can be revoked unilaterally.

5.3.7 It seems logical to facilitate recognition of a foreign appointment if there is confidence in the system which regulates the appointment of the foreign executor. It also makes sense to have special arrangements for states whose nationals are more likely than others to leave assets situated in South Africa behind after their deaths. However, special treatment for appointments issued in a list of states has drawbacks. It would be difficult to establish the nationality of those foreigners more likely than others to leave assets in South Africa and to investigate and make a decision on the reliability of the system of administration of estates in such countries.

5.3.8 It should not be too difficult to deal with assets of a citizen of any foreign state situated in South Africa. It seems advisable to make universal rules for the recognition of foreign appointments of executors and to adapt the manner in which the estate should be administered to the circumstances of the particular case. ***It is submitted 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.*** (Annexure section 21)

5.3.9 What factors should be considered before deciding on the manner of administration? If the deceased was not ordinarily resident in the Republic and a representative declares that there are no creditors or beneficiaries in the Republic, it seems that control should be left to the foreign administration. If the deceased left immovable property the ordinary procedures should be complied with. ***It is submitted that if no estate duty is payable and a representative of the estate declares that there are no creditors, beneficiaries or immovable property in the Republic, the Master should have authority to dispense with all further requirements at the time of the appointment of the foreign executor to deal with the estate in South Africa or at any time after the appointment.***

Information required when estates are reported

5.3.10 It is submitted in paragraph 5.2.17 above that the Master should dispense with formalities and control measures if Master's fees have been paid, estate duty has been paid and the Master is satisfied that no person will be prejudiced by dispensing with formalities and control measures. The Master should have as much information as possible to enable the Master to make a decision in this regard.

5.3.11 The gross value of the assets is required to enable the Master to assess the Master's fees. This can be ascertained from the inventory. An inventory is not required as a matter of course in terms of section 9 of the 1965 Act if the deceased was not ordinarily resident inside South Africa and died outside South Africa. ***It is submitted that something similar to the affidavit in terms of regulation 4 should be retained for all cases where a person not ordinarily resident in South Africa dies leaving assets in South Africa. Such a requirement can be set out in a provision similar to section 25 of the 1965 Act.*** (Annexure section 25)

5.3.12 ***Something similar to an Estate Duty Return is required to satisfy the Master that no estate duty is due.*** Such a form will also give an indication whether the estate is solvent.

5.3.13 The major concern in deciding whether persons will be prejudiced by dispensing with formalities is whether heirs are of full legal capacity and therefore able to protect their own interests. The prescribed form for the Estate Duty Return should be updated.¹²⁶ The question arises whether the form should not be adjusted so that it also reflects the basic information about the next of kin, like children, and the issue issue of predeceased children and parents. ***Alternatively, and more logically, it is submitted that information on the next of kin should be called for in the death notice.***¹²⁷ ***Consideration can be given to having the death notice signed under oath or making it an offence to sign a false death notice.*** (Annexure section 101(1)(aA))

5.4 Regulation 910 - limitation of the liquidation or distribution of deceased estates to certain persons

5.4.1 Mr C F Wensley, a respondent, has expressed his discontent with the provisions of the Regulation which limits the liquidation or distribution of the estates of deceased persons, thereby impacting on his right to earn a living. Similar comments have been received from Mr George de Wet, another respondent. He submits that the Regulation causes extra costs in practice because lay persons have to approach attorneys or attorneys refer estates to outside persons, and costs are charged on an attorney and client scale.

5.4.2 The viewpoint of the Association of Law Societies (ALS as it was then) on amendments to Regulation 910 was summarised as follows in a memorandum of the Department of Justice:

5.4.2.1 The regulations were made with the sole purpose of protecting the public.

5.4.2.2 The regulations do not create a monopoly as attorneys, accountants, boards of

¹²⁶According to South African Revenue Service the form has been updated and is being printed.

¹²⁷The prescribed form for the death notice can also benefit from a review.

executors and certain trust companies can do this work - literally thousands of people. In practice there are enough classes of persons allowed to do this work to cater for the needs.

5.4.2.3 The liquidation and distribution of deceased estates requires special knowledge and expertise and places a huge responsibility on the person doing the work.

5.4.2.4 The public must be protected and the ALS does not see any justification for extending the right to administer deceased estates.

5.4.3 Meyerowitz¹²⁸ states, without giving reasons, that the regulations may possibly be unconstitutional. The Constitutional Court remarks in **S v Lawrence**¹²⁹ 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 such 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.

5.4.4 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 a certain date, qualifies. A bank is disqualified unless it is appointed as executor in a will. 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 in 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. The Regulation 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".

5.4.5 The Regulation does not apply to the administration of certain estates of blacks, which may

¹²⁸Paragraph 8.4 footnote 1.

¹²⁹1997 (4) SA 1176 (CC) paragraph [33].

be discriminatory. The Regulation does not contain a consistent approach to ensure that the public will be 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.¹³⁰ It has been held that the qualifications of a trustee of an insolvent estate are determined according to the country of appointment and not the country which recognises the appointment.¹³¹ It seems incongruous to disqualify a foreign executor from appointment in South Africa because of local requirements.

5.4.6 The Regulation can apparently not be justified in its present form. A low-ranking banking official who has experience of the administration of estates will probably administer an estate better than an attorney or accountant who has no practical experience. The financial resources of banks ensure protection of the public against losses. The ALS poses the question whether a nurse with a keen interest in medicine and many years of experience should be allowed to practise as a doctor. The question should rather be posed whether an attorney with little or no experience is better qualified to administer estates than a banking official or any other person with sufficient experience, knowledge and infrastructure. It is submitted that the answer is clearly "no".

5.4.7 The public can be protected by ensuring that losses will not occur and by limiting administration of estates to persons with the requisite skills.

5.4.8 It is clear that Regulation 910 does little to protect against losses. On 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.

5.4.9 It is also clear that Regulation 910 does not succeed in limiting 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 within certain degrees are not.

¹³⁰Memoranda to and from Justice Head Office.

¹³¹**Ex pare Robinson's Trustee** 1910 TPD 25.

5.4.10 Although not all banking officials have the necessary training and skills, the bad publicity that incompetent service would entail should ensure that only trained and experienced staff are used by banks to administer estates.

5.4.11 The South African Institute of Chartered Accountants has submitted that Associate General Accountants should also be allowed to administer estates. They operate at an intermediate level, but enjoy the same access to technical, legal and ethical support as a chartered accountant and are bound by the same disciplinary rules and code of conduct.

5.4.12 There are probably other professionals who may be suitable to be admitted generally to administer estates, for instance, members of the South African Institute of Chartered Secretaries and Administrators, and the Institute of Commercial and Financial Accountants of Southern Africa.

5.4.13 The following solutions have been proposed or can be considered:

- 5.4.13.1 Prescribed qualifications or a statutory board similar to the Board of Sheriffs.
- 5.4.13.2 Amend the regulations to enable the Master to decide in each instance whether an individual is duly qualified to administer an estate.
- 5.4.13.3 Amend the regulations to remove arbitrary exclusions.

Statutory board similar to the Board of Sheriffs

5.4.14 ***A statutory board does not seem to be a viable solution.*** There is no umbrella organisation which can be transformed into a statutory board as was done in the case of the Board of Sheriffs. Provision would still have to be made for attorneys and accountants, and perhaps others, who could hardly be expected to join a statutory board just to be able to administer estates. Accountants and attorneys who specialise in this type of work have, with the odd exception, been doing it with good results for ages. A statutory board would need to lay down qualifications. There are no general qualifications for a person to administer estates.

Amend the regulations to enable the Master to decide in each instance whether an individual is duly qualified to administer an estate

5.4.15 One of the memoranda submits that this proposal would place a heavy burden on the Masters' offices, especially in the larger offices where it would lead to such an increase in the

workload that a shortage of personnel could follow. However, it seems that a similar practice is already followed, at least by some of the Masters.

5.4.16 In terms of section 23 of the 1965 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.

5.4.17 Meyerowitz¹³² 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.

5.4.18 If the changes proposed above are accepted, some executors will not be required to comply with requirements after their appointment. The position will in practice be similar to authority by the Master in terms of section 18(3) to collect and distribute the estate. The need for qualified persons to assist executors or be appointed as executors will be reduced in such cases. It also seems advisable to authorise the Master to dispense with security even if the executor is not exempted in a will or is not a spouse, child or parent of the deceased.¹³³ If the Master can dispense with security by a trustee without authority in the will or trust document in terms of section 6(3)(a) of the Trust Property Control Act 57 of 1988 there appears to be no reason why the Master should not have similar authority in the case of executors.

5.4.19 It seems advisable that the present practice of some Masters should be supported by legislation. First, classes of persons who are regarded as capable of being appointed as executor or to assist executors should be designated in legislation or elsewhere. Second, in order to ease the Master's burden, the ordinary rule should be that an executor must lodge security unless he or she is a designated person or entity or will be assisted by such a person

¹³²Paragraph 9.1 footnote 4

¹³³Section 23 of the 1965 Act.

or entity.

5.4.20 The following proposal is submitted for consideration:

- 5.4.20.1 Subject to the provisions below or the provisions of an order of court every person shall, before letters of executorship are granted in his or her favour 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 as executor;
- 5.4.20.2 A person shall not be required to furnish security if he or she will be assisted by or is -
- 5.4.20.2.1 any person duly admitted to practise as an attorney in any part of the Republic;
- 5.4.20.2.2 any accountant or auditor registered under the Public Accountants and Auditors Act 80 of 1991;
- 5.4.20.2.3 any associate general accountant of the South African Institute of Chartered Accountants;
- 5.4.20.2.4 any board of executors or trust company which, on 27 October 1967, was licensed as such under the Licences Act, 1962 (Act 44 of 1962), and carrying on business of which a substantial part consisted of the liquidation or distribution of the estates of deceased persons;
- 5.4.20.2.5 any bank or mutual bank registered in of the Banks Act 94 of 1990 or the Mutual Banks Act 124 of 1993
- 5.4.20.2.6 any person exempted by the Minister in the light of the person's capabilities, financial standing and trustworthiness.

Amend the regulations to remove arbitrary exclusions

5.4.21 Those who support Regulation 910 justify it because it protects the public.

5.4.22 In the light of the discussion in paragraph 5.4.19 above it is submitted that calling for security in appropriate cases is a better method to protect the public. It is difficult to define all classes of persons who should be allowed to administer estates.

5.4.23 *It is proposed that Regulation 910 should be repealed and that an attempt should not be made to amend it.*

5.5 Security by executors

5.5.1 It has been proposed that the Master should have a discretion in all cases to dispense with security or call for security (at any time) in terms of section 23 of the Administration of Estates Act 66 of 1965.¹³⁴ Nominated executors cannot obtain security. Security must in certain cases be furnished even if, for instance, the executor is the sole heir. The cost is sometimes exorbitant. It places a burden on the Master to investigate private sureties.¹³⁵

5.5.2 The General Council of the Bar did not support the proposal that the Master should have a wider discretion because it would take away an alternative remedy available to heirs for damages as a result of maladministration.¹³⁶

5.5.3 Section 23(3) of the 1965 Act provides as follows:

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 Master in an amount determined by the Master, for the proper performance of his functions.

5.5.4 In terms of section 54(1)(b)(ii) the Master may remove an executor from office if the executor fails to comply with a notice under section 23 (3) within the period specified in the notice or within such further period as the Master may allow. In terms of section 54(1)(b)(v) an executor may be removed from office by the Master if the executor fails to perform satisfactorily any duty imposed by or under the Act or to comply with any lawful request of the Master.

5.5.5 *It does not seem to be advisable to authorise the Master to call for security at any*

¹³⁴Meeting of Estates Committee of Association of Law Societies and Masters of the Supreme Court 7 October 1992.

¹³⁵Letter by Chief Master dated 19 April 1994.

¹³⁶Draft Memorandum October 1994.

time in the light of the Master's powers to remove an executor or call for security set out above.

5.6 Sundry issues¹³⁷

5.6.1 Whether more Masters' Offices should be created

5.6.1.1 Working Paper 30 of the Commission on the ***Review of the Law of Insolvency: Qualifications, appointment and removal of liquidators*** points out that there are three Masters' Offices that do not have their seat in the city within the jurisdiction of the office where most of the interested parties reside or carry on business. Pretoria is the seat of the Master's Office for the former Transvaal, while more people live and work in Johannesburg. The same applies to Pietermaritzburg and Durban in Kwazulu-Natal and, to a lesser extent, to Grahamstown and Port Elizabeth in the Eastern Cape. Although there are local divisions of the Supreme Court in Johannesburg, Durban and Port Elizabeth, there are no Master's Offices there. Kimberley had a Master's Office while the Supreme Court there was still a local division.

5.6.1.2 It is submitted that it would undoubtedly be more convenient for the people served by a Master's Office if there were Master's Offices in Johannesburg, Durban and Port Elizabeth. The redistribution of the large amount of work that is at present done in the Pretoria office would probably also have advantages. Having more than one Master's Office in a province does not give rise to unsurmountable problems, as is borne out by the three Master's Offices that functioned in the old Cape Province. The obvious advantages of more Master's offices should be weighed against the cost of such offices and the availability of personnel.

5.6.1.3 Comments were invited on the desirability of having Master's Offices in Johannesburg, Durban and Port Elizabeth. There was a lot of support for more Masters' Offices, especially for an office in Johannesburg. The matter was referred to the Department of Justice for investigation in 1993 without any apparent results to date.

5.6.1.4 The question of more Masters' Offices will be relevant when consideration is given to a

¹³⁷Submissions by Prof N J Wiechers attached to letter by The Association of Trust Companies in South Africa dated 31 May 1996.

new system or systems to replace the existing two systems referred to in paragraph 5.1.2 above. ***It is submitted that the support for more Masters' Offices should be taken into account when a new regimen is considered.***

5.6.2 Whether advertisements in newspapers pursuant to section 29 still serve any purpose

5.6.2.1 The draft Insolvency Bill recommended by the Commission does not provide for standard forms of notice in newspapers, because the usefulness of legal notices in newspapers is extremely doubtful. Provision is made for notice in the ***Government Gazette*** and personal notice to creditors.¹³⁸

5.6.2.2 The usefulness of newspaper advertisements in terms of section 29, and for that matter, in terms of section 35, 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 many areas.

5.6.2.3 ***It is submitted that routine estate notices in newspapers should be done away with.*** (Annexure sections 29 and 35(5)(a))

5.6.3 The Master's discretion to reduce or increase executor's fees

5.6.3.1 Clause 61 of the Draft Insolvency Bill, referred to above, retains the Master's right to reduce or increase remuneration according to tariff, but proposes that copies of applications for an increase in the tariff remuneration should be delivered to creditors at least 14 days before the application for an increase is lodged with the Master. (Clause 61 of the Draft Bill in Volume 1 of Discussion Paper 86.)

5.6.3.2 The Master's power to reduce executor's remuneration is probably the target of criticism, and not so much the Master's power to increase remuneration.

5.6.3.3 ***It is doubted whether the investigation of this matter falls within the scope of this investigation.***

5.6.4 The modernisation of all prescribed forms

5.6.4.1 The modernisation of forms for the Death Notice and Estate Duty Return was touched upon in the discussion above.

¹³⁸Report on **Review of the Law of Insolvency** Vol 1 Explanatory Memorandum paragraphs 1.34 and 1.35.

5.6.4.2 *It is submitted that this aspect be attended to in detail when there is greater certainty about the eventual form of the recommendations.*

6 TWO SYSTEMS FOR THE ADMINISTRATION OF ESTATES

6.1 The different systems for the administration of estates have been discussed above. Each of the systems has advantages and disadvantages.

6.2 If the full process of appointment of an executor is followed, the system under the Administration of Estates Act has the advantage that detailed accounting is available and that the process is transparent - at least two notices must appear in newspapers and the **Government Gazette**. The extensive control by the Master is an advantage in cases where it is necessary or useful, but may be a disadvantage in cases where it does not serve a purpose. Centralisation has the advantage that it is reasonably easy to obtain information at one of the six Master's Offices country wide. Centralisation is a disadvantage when interested persons are far removed from one of centres where the Master has an office. The extensive system costs money and is cumbersome.

6.3 The practice according to customary law that the deceased's family gathers after the burial ceremony to discuss and finalise the distribution of the estate, without government interference, has the advantages of simplicity and speed. (It is not customary in estates under the 1965 Act to have a "reading of the will".) A disadvantage is that there are insufficient mechanisms to deal with disputes, objections, or prejudice to minors or other persons without full legal capacity. Such a system has the advantage of accessibility to the interested parties who attend the funeral, but there is no record-keeping or formal accounting.

6.4 The South African Revenue Service submits that there should not be unfair discrimination - from an estate duty point of view it has been established that a large number of deceased estates (especially in the former TBVC states) are not reported or dealt with properly; magistrates also very rarely give notice of black estates where a possibility of estate duty exists (two cases in the last five years).

6.5 Before its repeal by the 1965 Act, the Administration of Estates Act 24 of 1913 provided for the lodging of an original and copy of a death notice and inventory with the magistrate¹³⁹ who had to certify the copy for his or her records and forward the original to the Master.¹⁴⁰ Liquidation and

¹³⁹If in a district where there is no Master's office.

¹⁴⁰Sections 13 and 22.

distribution accounts still lie open for inspection at magistrates' offices in addition to the copy at the Master's office, if appropriate.¹⁴¹ Decentralisation to magistrates' offices will have advantages and disadvantages. The magistrate's office is probably more accessible than the Master's offices situated in six main centres countrywide. However, it will be difficult to make enquiries about an estate and be sure that enquiries are made at the correct magistrate's office. This is less of a problem with Master's offices. One suspects that the practice of reporting estates to the magistrate who submitted original documents to the Master was discontinued because it caused delays and resulted in extra work and expenditure.

6.6 It is hard to justify two different systems of administration of estates for different segments of the population, even more so if the customary law of succession is abolished. In the, (as yet unreported) decision of the Transvaal Provincial Division of the High Court in ***Moseneke v The Master of the High Court*** 20006/2000 Judge Van Dyk issued an order that Regulation 3(1) of the Regulations promulgated in terms of the Black Administration Act 38 of 1927 is invalid, unconstitutional and of no force and effect. ***Comments are invited on the following combination of the two existing systems:***

6.6.1 Estates need not be reported to any government institution unless the value of the estate is more than R100 000 or unless an interested party objects to, or there is a dispute regarding the administration of an estate. (Annexure section 7.) ***A person who deals with an estate without being appointed as executor must, before liquidation or distribution of the estate, allow creditors who will not be paid in full and heirs 14 days to comment on a plan of liquidation and distribution.*** (Annexure section 12A.) ***A person who liquidates or distributes an estate without letters of executorship may be held liable if he or she is subsequently unable to account for the liquidation or distribution of the estate or to produce a will in terms of which the distribution was made.*** (Annexure section 50(2) read with section 12A.)

6.6.2 Estates in cases not covered by the previous paragraph must be reported to the magistrate of the district where the deceased was ordinarily resident before his or her death by submitting a death notice and inventory and the will, if any. (Annexure sections 7, 8 and 9.) ***The magistrate may instruct the family of the deceased to report any estate if the magistrate is of the opinion that minors or persons without full legal capacity may***

¹⁴¹Section 68 of the 1913 Act and section 35 of the 1965 Act.

be prejudiced. (Annexure sections 7(3)(a) and 9.) **Wills must be transmitted to the Master if the estate is reported.** (Annexure section 8.)

6.6.3 In any estate reported to the magistrate, an executor must be appointed (Annexure section 14.) **who shall lodge an estate duty return and a liquidation and distribution account with the magistrate. The account need not be examined, but must be advertised for inspection in the Government Gazette.** (Annexure section 35.) **An executor must furnish security in appropriate cases.**¹⁴² (Annexure section 23.) **Provision should be made for objections against accounts and consideration of the objections by the Master.** (Annexure subsections 35(7) to (11).) **An executor should be liable for distribution, other than distribution in accordance with an advertised account.** (Annexure section 50.)

6.6.4 An interested party who is dissatisfied with any decision of a magistrate may, with notice to the magistrate, appeal to the Master who has jurisdiction for a review of the decision of a magistrate. (Annexure section 95(2).)

6.6.5 The magistrate shall forward all documentation regarding an estate to the Master when an account has lain for inspection. (Annexure subsections 35(6) and (6A).) **The Master must deal with objections against accounts and matters of estate duty, as is the position at present.**

6.6.6 The proposals in paragraphs 4.5, 5.3.8, 5.3.11, 5.3.12, 5.3.13, 5.4.23 and 5.6.2.3 above should be considered in the event of a combination of the two systems.

¹⁴²See paragraph 5.4.20 above.

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**ANNEXURE
PROPOSED AMENDMENTS TO
ADMINISTRATION OF ESTATES ACT 66 OF 1965**

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

1 Definitions

In this Act, unless the context otherwise indicates-

...

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

...

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

...

'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 the Supreme Court appointed under section ~~two~~, who has jurisdiction in respect of that matter, property or estate;

...

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

...

4 Jurisdiction of Masters and magistrates

(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 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 magistrate appointed in respect of that district; and**
- (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 such letters already granted in respect of the estate concerned in terms of section 25(1):**

Provided that on written application by any person having an interest in a deceased estate, a **Master magistrate** who would otherwise have no jurisdiction in respect of that estate may, with the consent of the **Master magistrate** 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 provincial division of the Supreme 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 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).

(3) No act performed by a Master **or magistrate** 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 magistrate**.

(4) If more than one Master **or magistrate** 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 magistrate**, as soon as it becomes known to the Masters **or magistrates** concerned, be liquidated, distributed or administered as the case may be, under the supervision of the Master **or magistrate** who first exercised such jurisdiction, and any appointment made and any ~~grant, signing and sealing or~~ endorsement of letters of executorship, tutorship or curatorship, by any other Master **or magistrate** in respect of that estate or property, shall thereupon be cancelled by such other Master **or magistrate**.

5 Records of Master's office, etc

(1) Each Master shall, subject to the provisions of regulations made under section 103, preserve of record in his **or her** office all original wills, copies of wills certified in terms of section 14 (2), written instruments, death notices, inventories and accounts lodged at **or transmitted to** his **or her** office under the provisions of this Act or any prior law under which any such documents were lodged at the office of the Master, Orphan Master or registrar of deeds in the province concerned, and such other documents lodged at his **or her** office as the Master may determine.

(2) Any person may at any time during office hours inspect any such document **lodged with the Master or magistrate** (except, during the lifetime of the person who executed it, a will lodged with the Master under section *fifteen* of the Administration of Estates Act, 1913 (Act 24 of 1913)), and make or obtain a copy thereof or an extract therefrom, on payment of the fees prescribed in respect thereof: Provided that any executor, trustee, tutor or curator, or his **or her** surety, may inspect any such document or cause it to be inspected without payment of any fee.

...

7 Death notices

(1) Whenever any person dies within the Republic leaving **any** property **with a gross value of R100,000 or more** ~~or any document being or purporting to be a will therein-~~

- (a) the surviving spouse of such person, 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 magistrate**; 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 be reported to the **Master magistrate**.

(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 magistrate** who shall take such steps as may be necessary and practicable to obtain a correct death notice.

(3) The **Master magistrate** 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, **or if an interested party objects to, or there is a dispute regarding the administration of an estate, or if the magistrate is of opinion that minors or persons without full legal capacity may be prejudiced,** to submit to **him the magistrate** 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 magistrate** 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 person shall furnish the **Master magistrate** with proof of the death.

(5) The Minister may by notice in the Gazette amend subsection (1) and section 12A by adjusting the amount in order to take account of fluctuations in the value of money.

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 the notice of death is given to a magistrate in terms of section 7 or as soon as the death it comes to his such person's knowledge that notice of death has been given to a magistrate,** transmit or deliver such document **and a copy of the notice of death** to the Master.

(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 **and inform the person who transmitted the will and any magistrate to whom the death has been reported of the Master's refusal to accept the document.**

(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), 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 Inventories

(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 death of a person is reported to the Magistrate in terms of section 7**, the surviving spouse of such person, 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, **when the death is reported or** within fourteen days after **such person becomes aware of the reporting of** the death or within such further period as the **Master magistrate** 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 or more 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; and
- (c) deliver or transmit such inventory to the **Master magistrate**.

(2) The **Master magistrate** 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 as provided in paragraph (b) of the said sub-section and to deliver or transmit to **him, the Magistrate** 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 **or her** 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~~ **the magistrate**, within the period specified in the notice, an inventory in the prescribed form of all the property known by him **or her** to have been in the possession of the deceased upon the said premises at the time of his **or her** 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.

[S. 10 repealed by s. 1 of Act 12 of 1984.]

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 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 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 **is liquidated or distributed in terms of section 12A**: 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, executor or ~~person directed to liquidate and distribute the estate~~ **liquidator in terms of section 12A**, 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, curator or **person liquidator**: 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.

(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 **upon the death of a person who is not ordinarily resident in the Republic or the Magistrate** 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~~.

(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 **or magistrate** in an amount determined by the Master **or magistrate** for the proper performance of his **or her** functions.

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

- (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 undertaking he **or she** shall not, without the special authority of the Master **or magistrate**, 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 47 (1) of the Liquor Act, 1928 (Act 30 of 1928), 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 **or magistrate** may direct.

(7) The provisions of sub-sections (3), (4) and (5) of section *twenty-three*, sections *twenty-six*, *twenty-eight*, *thirty-six*, *forty-six*, and sub-paragraph (ii) of paragraph (b) of sub-section (1) of section *fifty-four* shall *mutatis mutandis* apply with reference to interim curators.

12A Deceased estates which may be liquidated or distributed without letters of executorship

(1) The surviving spouse of a deceased, if the deceased is survived by a spouse, and all the heirs of the deceased, or the nominee or nominees of a spouse or an heir, in this section referred to as the liquidator, may subject to subsection (2), liquidate and distribute the estate without letters of executorship if each liquidator has reason to believe that

- (a) the gross value of the estate is less than R100, 000; and**
- (b) no interested party objects to the plan of liquidation or distribution; and**
- (c) there is no dispute regarding the plan of liquidation or distribution; and**
- (d) no minors or persons without full legal capacity will be prejudiced by the plan of liquidation or distribution.**

(2) Before liquidating or distributing the estate the liquidator must draw up a plan of liquidation or distribution and allow all heirs and all creditors that to the knowledge of the liquidator will not be paid in full 14 days after the plan has been made available to them to comment on the plan of liquidation and distribution.

(3) The liquidator must be able to account for the liquidation and distribution if required to do so within ten years after the distribution and to submit any will in terms whereof a distribution has been made.

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

(1) Except as provided in section 12A, Nno person shall liquidate or distribute the estate of any deceased person, except under letters of executorship granted ~~or signed and sealed~~ under this Act, or under an endorsement made under section *fifteen*, ~~or in pursuance of a direction by a Master.~~

(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.

14 Letters of executorship to executors testamentary

(1) The Master, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** shall, subject to the provisions of sub-section (2) and sections **12A, sixteen, seventeen** and *twenty-two*, 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, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** shall, subject to the provisions of sub-section (2) and sections **12A, sixteen, seventeen** and *twenty-two*-

- (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
- (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, or 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, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** shall, subject to the provisions of subsections ~~(3)~~, (5) and (6) **and section 12A-**

- (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 **or magistrate** 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 **or magistrate** 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 **or magistrate** fail so to take out 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 (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 at a time and place specified in the notice, for the purpose of recommending to the Master **or magistrate** for appointment as executor or executors, a person or a specified number of persons.

(2) If the Master **or magistrate** 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 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 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.~~

(4)

[Sub-s. (4) substituted by s. 1 (b) of Act 15 of 1978 and deleted by s. 4 (e) of Act 86 of 1983.]

(5) The Master **or magistrate** 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 **or magistrate** 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 **or magistrate** 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.

(6) Nothing in this section contained shall authorize the Master **or magistrate** to grant letters of executorship to any person who is legally incapacitated to act as executor of the estate of the 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 **or magistrate**, the Master **or magistrate** shall, in making any appointment, give preference to-

(a) the surviving spouse or his **or her** nominee; or

- (b) if no surviving spouse is so nominated or the surviving 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 **or magistrate** 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~~

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

22 The Master **or magistrate** may refuse to grant, endorse or sign and seal letters of

executorship in certain cases

(1) If it appears to the Master **or magistrate** or if any person having an interest in the estate lodges with the Master **or magistrate** 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 **or magistrate** until-

- (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 **or magistrate** 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*~~, 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 **in a case under section 25** by a declaration under oath that letters of executorship have not already been granted ~~or signed and sealed~~ 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~~, as the case may be.

23 Security for liquidation and distribution

(1) Subject to the provisions of **an order of court section ~~twenty-five~~**, every person ~~who has not been nominated by will to be an executor~~ shall, before letters of executorship are granted, ~~or signed and sealed~~, and thereafter as the Master, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** may require, find security to the satisfaction of the Master **or magistrate** in an amount determined by the Master **or magistrate** for the proper performance of his **or her** functions: Provided that if such person is **or will be assisted in the administration of the estate by -**

- (a) **any person duly admitted to practise as an attorney in any part of the Republic;**
- (b) **any accountant or auditor registered under the Public Accountants and**

- Auditors Act 80 of 1991:**
- (c) any associate general accountant of the South African Institute of Chartered Accountants;**
 - (d) any board of executors or trust company which, on 27 October 1967, was licensed as such under the Licences Act, 1962 (Act 44 of 1962), and carrying on business of which a substantial part consisted of the liquidation or distribution of the estates of deceased persons;**
 - (e) any bank or mutual bank registered in of the Banks Act 94 of 1990 or the Mutual Banks Act 124 of 1993;**
 - (f) any person exempted by the Minister under subsection (2)**

~~a parent, spouse or child of the deceased~~, he **or she** shall not be required to furnish security unless the Master **or magistrate** specially directs that he **or she** shall do so.

(2) **The Minister may by notice in the Gazette exempt a person or category of persons from furnishing security unless specially directed by the Magistrate to lodge security, if it appears to the Minister that the person or persons should be exempted from furnishing security in the light of the capabilities, financial standing and trustworthiness of the person or 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 **or magistrate** 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

Master or magistrate in an amount determined by the Master or magistrate, for the proper performance of his or her functions.

(4) The Master or magistrate 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 or magistrate 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 or magistrate for the proper performance of his or her functions, has accounted to the satisfaction of the Master or magistrate for any property, the value of which was taken into consideration when the amount of such security was assessed, the Master or magistrate 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 Republic

(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)-

- ~~(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 or her powers under subsection (1) unless-

- ~~(a) an affidavit made by such person and containing such particulars as may be prescribed has been lodged with the Master 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, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** 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 **magistrate**

(1) An executor who has been ordered thereto by the Master **or magistrate** 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, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** may allow, lodge with the Master **or magistrate** 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 **or magistrate**,

within fourteen days after he **or she** has come to know of such property, or within such further period as the Master **or magistrate** may allow, lodge with the Master **or magistrate** an additional inventory so signed by him **or her** showing the estimated value thereof.

(2) If in any inventory lodged with the Master **or magistrate** 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 **or magistrate** has reason to believe is not a reasonably correct estimate thereof, the Master **or magistrate** may, at the expense of the estate, order that property to be appraised by an appraiser or any other person approved by the Master **or magistrate**.

28 Banking accounts

(1) An executor-

- (a) shall, unless the Master, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** otherwise directs, as soon as he **or she** has in hand moneys in the estate in excess of R100, open a cheque account in the name of the estate with a banking institution 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 banking institution or a building society 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 banking institution or a building society.

(2) Every executor shall whenever required by the Master, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** to do so, notify the Master **or magistrate** in writing of the banking institution or building society and the office or branch thereof with which he **or she** has opened an account referred to in subsection (1); and furnish the Master **or magistrate** 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 **or magistrate** under subsection (2), has notified the Master **or magistrate** of the office or branch of the banking institution or building society 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 **or magistrate**.

(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 the executor's** duly authorized agent.

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

(6) The Master, **after documents have been transmitted to the Master in terms of section 35(6), or the magistrate** 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 **or magistrate**, 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 property~~, 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) **and shall be included in a plan under section 12A(2)**.

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, unless, in the case of property of a value not exceeding R5 000, the **Master magistrate** 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 **or her** 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.

31 Late claims

If any person fails to lodge his or her claim against any deceased estate before the expiry of the period specified in respect of that estate under sub-section (1) of section *twenty-nine*, he or she shall-

- (a) if he or she lodges his or her claim thereafter and does not satisfy the Master, if documents have been transmitted to the Master in terms of section 35(6), or the magistrate that he or she has a reasonable excuse for the delay, be liable for any costs payable out of the estate, in connection with the reframing of any account or otherwise, as a result of the delay; and
- (b) whether or not he or she lodges his or her claim thereafter, not be entitled in respect of his the claim to demand restitution from any other claimant of any moneys paid to such other claimant at any time or before he or she lodged his the claim, as the case may be, in pursuance of a valid claim against the estate.

32 Disputed claims

- (1) If an executor disputes any claim against the estate, he or she may, by notice in writing-
 - (a) require the claimant to lodge, in support of his or her claim, within a period specified in the notice, an affidavit setting forth such details of the claim as the executor may indicate in the notice; and
 - (b) with the consent of the Master, if documents have been transmitted to the Master in terms of section 35(6), or the magistrate, require the claimant or any other person who may in the opinion of the Master or magistrate be able to give material information in connection with the claim, to appear before the Master or magistrate or any other magistrate ~~or Master~~ nominated by the Master or magistrate, at a place and time stated in the notice, to be examined under oath in connection with the claim.

(2) At an examination under paragraph (b) of sub-section (1), the person concerned may be questioned by the magistrate or Master before whom the examination takes place, and by the executor and any heir or the attorney or advocate acting on behalf of the executor or any heir.

(3) If any claimant fails without reasonable excuse to comply with any notice under sub-section (1), or having appeared in answer to any 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, his or her claim may be rejected by the executor.

(4) Any magistrate or Master before whom any such examination takes place shall take care to be taken a record thereof and shall, at the request of the executor or of the claimant and at the expense of the estate, or of the claimant, as the case may be, furnish the executor or claimant with a copy of such record.

35 Liquidation and distribution accounts

(1) 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, if documents have been transmitted to the Master in terms of subsection (6), or the magistrate may in any case allow,

submit to the Master, if documents have been transmitted to the Master in terms of subsection (6), or to the magistrate in duplicate 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 or magistrate, 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, if documents have been transmitted to the Master in terms of subsection (6), or to the magistrate a supplementary account in the prescribed form.

(2) The Master or magistrate 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 or magistrate, 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 or magistrate 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~~ account.

(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.

(4) Every executor's account shall, ~~after the Master has examined it~~, lie open at the office of the Master magistrate, ~~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 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 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, if documents have been transmitted to the Master in terms of subsection (6), or the magistrate 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 or magistrate may, if he or she finds it necessary, direct the executor to give notice, in such manner and to such persons as the Master or magistrate 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 shall cause to be affixed in some public place in or about ~~his~~ the magistrate's 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 both copies of each account his or her certificate that the account has lain open in his or her office for inspection in accordance with this section, retain one copy of the account and transmit the other copy of the account and the rest of the magistrate's file regarding the estate to the Master.

(6A) After the magistrate's file has been transmitted to the Master in terms of subsection (6) the magistrate shall transmit any documents received in connection with the estate 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 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 and ~~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
 - (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,

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.

36 Failure by executor to lodge account or to perform duties

(1) If any executor fails to lodge any account with the Master, **if the documents have been transmitted to the Master in terms of section 35(6), or the magistrate** as and when required by this Act, or to lodge any voucher or vouchers in support of such account or any entry therein in accordance with a provision of or a requirement imposed under this Act or to perform any other duty imposed upon him **or her** by this Act or to comply with any reasonable demand of the Master **or magistrate** for information or proof required by him **or her** in connection with the liquidation or distribution of the estate, the Master **or magistrate** 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.

(2) The costs adjudged to the Master **or to the magistrate** or to such person shall, unless otherwise ordered by the Court, be payable by the executor, *de bonis propriis*.

...

38 Taking over by surviving spouse of estate or portion thereof

(1) The Master, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** may, if-

- (a) one of two 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 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 **or magistrate** 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 **or the magistrate**, 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 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.

(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, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** 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.

(1A) The Master, if documents have been transmitted to the Master in terms of section 35(6), or the magistrate may certify that a person is a guardian of a minor according to customary law whereupon such a person is regarded as a natural guardian of the minor for the purposes of this Act.

(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, 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.

...

47 Sales by executor

Unless it is contrary to the will of the deceased, an executor shall sell property (other than property of a class ordinarily sold through a stock-broker or a bill of exchange or property sold in the ordinary course of any business or undertaking carried on by the executor) in the manner and subject to the conditions which the heirs who have an interest therein approve in writing: Provided that-

- (a) in the case where an absentee, a minor or a person under curatorship is heir to the property; or
- (b) if the said heirs are unable to agree on the manner and conditions of the sale,

the executor shall sell the property in such manner and subject to such conditions as the Master, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** may approve.

48 Extension of time and compounding of debts

An executor may accept from a debtor of the deceased estate who is unable to pay his **or her** debt in full, any reasonable part of the debt in discharge of the whole debt or grant any debtor of the deceased estate an extension of time for the payment of his **or her** debt in so far as this is compatible with the provisions of section *thirty-five*: Provided that if the debt exceeds two hundred rand, an executor shall, subject to the terms of the will (if any) of the deceased, not accept a part of the debt in discharge of the whole debt, unless he **or she** has been authorized to do so by the Master, **or if documents have been transmitted to the Master in terms of section 35(6), by the magistrate.**

49 Purchases by executor of property in estate, or mortgaged or pledged to the deceased

- (1) If any executor or his **or her** spouse, parent, child, partner, employer, employee or agent

purchases any property in the estate which he **or she** has been appointed to liquidate and distribute, the purchase shall, subject to the terms of the will (if any) of the deceased, and, in the case of an executor who is the surviving spouse of the deceased, to the provisions of section *thirty-eight*, be void, unless it has been consented to or is confirmed by **the court or the Master, if documents have been transmitted to the Master in terms of section 35(6), or the magistrate or by the Court.**

(2) An executor may, in his **or her** capacity as such, and subject to the consent of or confirmation by the Master, **if documents have been transmitted to the Master in terms of section 35(6), or by the magistrate,** buy in any property mortgaged or pledged to the deceased.

50 Executor making wrong distribution

(1) Any executor 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 liquidator in terms of section 12A who fails to comply with the provisions of that section shall-

- (a) be personally liable to make good to any heir and to any 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 liquidator's failure to comply 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.**

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.

(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.

...

53 Absence of executor from Republic

An executor shall not be absent from the Republic for a period exceeding 60 days unless-

- (a) the Master, **if documents have been transmitted to the Master in terms of section 35(6), or the magistrate** has before **his the executor's** departure from the Republic granted **him the executor** permission in writing to be absent;
- (b) **he the executor** complies with such conditions as the Master **or magistrate** may think fit to impose; and
- (c) **he the executor** has given such notice of his **or her** intention to be so absent as the Master **or magistrate** may have directed.

54 Removal from office of executor

(1) An executor may at any time be removed from **his** office-

(a) by the Court-

(i)

[Sub-para. (i) deleted by s. 16 (a) of Act 86 of 1983.]

(ii) if he **or she** has at any time been a party to an agreement or arrangement whereby he **or she** has undertaken that he **or she** will, in his **or her** capacity as executor, grant or endeavour to grant to, or obtain or endeavour to obtain for any heir, debtor or creditor of the estate, any benefit to which he **she** is not entitled; or

(iii) if he **or she** has by means of any misrepresentation or any reward or offer of any reward, whether direct or indirect, induced or attempted to induce any person to vote for his **or her** recommendation to the Master as executor or to effect or to assist in effecting such recommendation; or

(iv) if he **or she** has accepted or expressed his **or her** willingness to accept from any person any benefit whatsoever in consideration of such person being engaged to perform any work on behalf of the estate; or

(v) if for any other reason the Court is satisfied that it is undesirable that he **or she** should act as executor of the estate concerned; and

(b) by the Master-

(i) if he **or she** has been nominated by will and that will has been declared to be void by the Court or has been revoked, either wholly or in so far as it relates to his **or her** nomination, or if he **or she** has been nominated by will and the Master is of the opinion that the will is for any reason invalid; or

(ii) if he **or she** fails to comply with a notice under section 23 (3) within the period specified in the notice or within such further period as the Master **or magistrate** may allow; or

(iii) if he **or she** is convicted, in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged instrument or perjury, and is sentenced therefor to serve a term of imprisonment without the option of a fine, or to a fine exceeding twenty rand; or

(iv) if at the time of his **or her** appointment he **or she** was incapacitated, or if he **or she** becomes incapacitated to act as executor of the estate of the deceased; or

(v) if he **or she** fails to perform satisfactorily any duty imposed upon him **or her** by or under this Act or to comply with any lawful request of the Master **or magistrate**; or

(vi) if he or she applies in writing to the Master to be released from his or her office.

(2) Before removing an executor from **his** office under sub-paragraph (i), (ii), (iii), (iv) or (v) of paragraph (b) of sub-section (1), the Master shall forward to him or her by registered post a notice setting forth the reasons for such removal, and informing **him** the executor that he or she may apply to the Court within thirty days from the date of such notice for an order restraining the Master from removing him or her from his or her office.

(3) An executor who has not been nominated by will may at any time be removed from **his** office by the Master if it appears that there is a will by which any other person who is capable of acting and consents to act as executor has been nominated as executor to the estate which he or she has been appointed to liquidate and distribute: Provided that if the non-production or non-disclosure of the will prior to the appointment of such first-mentioned executor has been due to the fault or negligence of the person therein nominated executor, the person so nominated shall be personally liable, at the instance of the Master or any person interested, to make good all expenses which have been incurred in respect of the appointment of such first-mentioned executor.

(4) The Court removing any executor from **his** office may declare him or her incapable, during the period of his or her life or such other period as it may determine, of holding office as an executor.

(5) Any person who ceases to be an executor shall forthwith return his or her letters of executorship to the Master.

...

(Section 73)

(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** section 19 shall be deemed to be omitted.

...

74 — Foreign letters of tutorship or curatorship

~~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.~~

75 Notifications in respect of tutors and curators

The Master shall, whenever he or she has granted ~~or signed and sealed~~ 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~~ 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) Every appointment by the Master **or magistrate** of an executor, curator or interim curator, and every decision, ruling, order, direction or taxation by the Master **or magistrate** 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.

(2) Every decision, ruling, order, or direction by a magistrate under this Act shall be subject to review by the Master after notice to the magistrate, and the Master may confirm, set aside or vary the appointment, decision, ruling, order, or direction, as the case may be.

97 Master's **and magistrate's** costs

All costs incurred by the Master **or magistrate** 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 magistrate** *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 magistrate** *de bonis propriis* be refunded to him **or her** or be paid out of the said fund.

98 Recovery of costs ordered to be paid *de bonis propriis* by executor, etc

Whenever any executor, tutor, curator, interim curator or surety has been ordered to pay *de bonis propriis* the costs of any proceedings instituted by the Master **or magistrate**, the Master may, if he **or she** is unable to recover the said costs from any property belonging to the executor, tutor,

curator, interim curator or surety, recover them from the property in the deceased estate or the property subject to the administration of the tutor or curator, as the case may be.

99 Master or magistrate incapacitated from being executor, etc

No Master or magistrate 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 magistrate's office

No act or omission of any Master or magistrate or of any officer employed in a Master's or magistrate's office shall render the State or such Master, magistrate, 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, magistrate, 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 24, 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.]

~~(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.~~

~~(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

(aA) wilfully gives false information in terms of section 7; or

(b) wilfully makes any false inventory under this Act; or

(c) wilfully submits to or lodges with a Master **or magistrate** any false account under this Act; or

(d) wilfully makes any false valuation for the purposes of this Act; or

(e) when being interrogated under oath under section *thirty-two*, makes, relative to the subject in connection with which he 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

(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

(fa) being a liquidator, wilfully distributes any estate otherwise than in accordance with the provisions of section 12A, or of the relevant will; or

(g) contravenes or fails to comply with the provisions of section 9 (1) or (3), 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,**

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 not exceeding two thousand rand or to imprisonment for a period not exceeding seven years or to both such fine and such imprisonment;
- (ii) in the case of an offence referred to in paragraph ~~(a)~~, (b), (c), (d) or (e), to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment;
- (iii) in the case of an offence referred to in paragraph (f), ~~(fa)~~, or (g), to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding twelve months or to both such fine and such imprisonment;
- (iv) in the case of an offence referred to in paragraph (h), to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment; and
- (v) in the case of an offence referred to in paragraph (i), to a fine not exceeding fifty rand or to imprisonment for a period not exceeding three months or to both such fine and such imprisonment.

(2) The court convicting any person for failure to perform any act required to be performed by him **or her** 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.