

REPUBLIC OF SOUTH AFRICA

REFORM OF CUSTOMARY LAW OF SUCCESSION AND REGULATION OF RELATED MATTERS BILL

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill published in Government Gazette No. 30815 of 25 February 2008)
(The English text is the official text of the Bill)*

(MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT)

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and to amend certain laws in this regard; and to provide for matters connected therewith.

PREAMBLE

SINCE a widow in a customary marriage whose husband dies intestate does not enjoy adequate protection and benefit under the customary law of succession;

AND SINCE certain children born out of a customary marriage do not enjoy adequate protection under customary law;

AND SINCE section 9 of the Constitution provides that everyone has the right to equal protection and benefit of the law;

AND SINCE social circumstances have so changed that the customary law of succession no longer provides adequately for the welfare of family members;

AND SINCE the Constitutional Court has declared that the principle of male primogeniture, as applied in the customary law of succession, cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights,

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—
 “**customary law**” means the customs and usages traditionally observed among the indigenous African peoples of South Africa which form part of the culture of those peoples; 5
 “**descendant**”, in relation to a deceased person, includes a person who, in terms of customary law, was a dependant of the deceased immediately before the death of the deceased; 10

“house” means the family and property, rights and status which commence with, attach to, and arise out of, the customary marriage of a woman;

“Intestate Succession Act” means the Intestate Succession Act, 1987 (Act No. 81 of 1987);

“spouse” includes a partner in a customary marriage that is recognised in terms of section 2 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);

“traditional leader” means a traditional leader as defined in section 1 of the Traditional Leadership and Governance Framework Act, 2004 (Act No. 41 of 2004);

“this Act” includes any regulation made under section 5; and

“will” means a will to which the provisions of the Wills Act, 1953 (Act No. 7 of 1953), apply.

Modification of customary law of succession

2. (1) The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of a will of such a person, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2).

(2) In the application of the Intestate Succession Act—

- (a) where the person referred to in subsection (1) is survived by a spouse, as well as a descendant, such spouse must inherit a child’s portion of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of justice by notice in the *Gazette*, whichever is the greater;
- (b) a woman, other than the wife of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children to the house of his wife must, if she survives him, be regarded as a descendant of the deceased;
- (c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children to the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.

Interpretation of certain provisions of Intestate Succession Act

3. (1) For the purposes of this Act, any reference in section 1 of the Intestate Succession Act to a spouse who survived the deceased must be construed as including every spouse and every woman contemplated in paragraphs (a), (b) and (c) of section 2(2).

(2) For the purposes of this Act and in the application of section 1(1)(c) of the Intestate Succession Act, the following subparagraph must be regarded as having been added to that section:

- “(iii) where the intestate estate is not sufficient to provide each surviving spouse and woman contemplated in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008, with the amount fixed by the Minister, the estate shall be divided equally between such spouses;”.

(3) In the determination of a child’s portion for the purposes of dividing the estate of a deceased in terms of the Intestate Succession Act, paragraph (f) of section 1(4) of that Act must be regarded to read as follows:

- “(f) a child’s portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or have died before the deceased but are survived by their descendants, plus the number of spouses and women contemplated in paragraphs (a), (b) and (c) of section 2(2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008.”.

Disposition of property allotted or accruing to wife in customary marriage

4. (1) Property allotted or accruing to a woman or her house under customary law by virtue of her customary marriage may be disposed of in terms of a will of such woman.

(2) Any reference in the will of a woman contemplated in subsection (1) to her child or children and any reference in section 1 of the Intestate Succession Act to a descendant, in relation to such woman, must be construed as including any child— 5

(a) born of a union between the husband of such woman and another woman entered into in accordance with customary law for the purpose of procreating children for the house of the first-mentioned woman; and

(b) born to a woman to whom the first-mentioned woman was married under customary law for the purpose of providing children to the first-mentioned woman's house. 10

(3) Nothing in this section is to be construed as preventing any person subject to customary law, other than the woman contemplated in subsection (1), to dispose of assets in terms of a will. 15

Dispute or uncertainty in consequence of nature of customary law

5. (1) If any dispute or uncertainty arises in connection with—

(a) the status of or any claim by any person in relation to a person whose estate or part thereof must, in terms of this Act, devolve in terms of the Intestate Succession Act; 20

(b) the nature or content of any asset in such estate; or

(c) the devolution of family property involved in such estate, the Master of the High Court having jurisdiction under the Administration of Estates Act, 1965 (Act No. 66 of 1965), may, subject to subsection (2), make such a determination as may be just and equitable in order to resolve the dispute or remove the uncertainty. 25

(2) Before making a determination under subsection (1), the Master may direct that an inquiry into the matter be held by a magistrate in the area in which the Master has jurisdiction.

(3) After the inquiry contemplated in subsection (2), the magistrate must make a recommendation to the Master who directed that an inquiry be held. 30

(4) The Master, in making a determination, or the magistrate in making a recommendation contemplated in this section, must have due regard to the best interests of the deceased's family members and the equality of spouses in customary and civil marriages. 35

(5) Any determination made under this section must be made with due regard to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).

(6) The Cabinet member responsible for the administration of justice may make regulations regarding any aspect of the inquiry contemplated in this section.

Disposal of property acquired and held by traditional leader in official capacity 40

6. Nothing in this Act is to be construed as amending any rule of customary law which regulates the disposal of the property of a traditional leader who has died and which was acquired and held by such traditional leader in his or her official capacity.

Property rights in relation to certain customary marriages

7. (1) A marriage under the Marriage Act, 1961 (Act No. 25 of 1961), does not affect the proprietary rights of any spouse of a customary marriage or any issue thereof if the marriage under the Marriage Act, 1961, was entered into— 45

(a) on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)); and 50

(b) during the subsistence of any customary marriage between the husband and any woman other than the wife of the marriage under the Marriage Act, 1961 (Act No. 25 of 1961).

(2) The widow of the marriage under the Marriage Act, 1961, contemplated in subsection (1), and the issue thereof have no greater rights in respect of the estate of the 55

deceased spouse than she or they would have had if the marriage under the Marriage Act, 1961, had been a customary marriage.

Amendment of laws

8. The laws mentioned in the Schedule are hereby amended to the extent indicated in the third column of that Schedule.

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Short title and commencement

9. This Act is called the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

(Amendment of laws)

(Section 8)

No. and year of law	Short title	Extent of amendment	
Act 66 of 1965	Administration of Estates Act, 1965	<p>1. The amendment of section 4—</p> <p>(a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:</p> <p style="padding-left: 40px;">“In respect of the estate of a deceased person [which is not governed by the principles of customary law], or of any portion thereof, jurisdiction shall lie—”;</p> <p style="padding-left: 40px;">and</p> <p>(b) by the deletion of subsection (1A).</p> <p>2. The amendment of section 7 by the substitution in subsection (1) for paragraph (a) of the following paragraph:</p> <p style="padding-left: 40px;">“(a) the surviving spouse of such person or <u>more than one surviving spouse jointly</u>, or if there is no surviving spouse, his or <u>her</u> 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; and”.</p> <p>3. The amendment of section 9 by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:</p> <p style="padding-left: 40px;">“(1) If any person dies within the Republic or if any person ordinarily resident in the Republic at the time of his or <u>her</u> death dies outside the Republic leaving any property therein, the surviving spouse of such person or <u>more than one surviving spouse jointly</u>, or if there is no surviving spouse, his or <u>her</u> nearest relative or connection residing in the district in which such person was ordinarily resident at the time of his or her death, shall, within fourteen days after the death or within such further period as the Master may allow—”.</p>	<p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p> <p>35</p> <p>40</p> <p>45</p>

No. and year of law	Short title	Extent of amendment	
Act 81 of 1987	Intestate Succession Act, 1987	<p>1. The amendment of section 1—</p> <p>(a) by the substitution for subsection (2) of the following subsection:</p> <p>“(2) Notwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and [section 5(2) of the Children’s Status Act, 1987 (Act No. 82 of 1987), illegitimacy] sections 40(3) and 297(1)(f) of the Children’s Act, 2005 (Act No. 38 of 2005), <u>having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.</u>”;</p> <p>(b) by the substitution in subsection (4) for paragraph (b) of the following paragraph:</p> <p>“(b) ‘intestate estate’ includes any part of any estate which does not devolve by virtue of a will [or in respect of which section 23 of the Black Administration Act, 1927 (Act 38 of 1927), does not apply];” and</p> <p>(c) by the substitution in subsection (4)(e) for the words preceding subparagraph (i) of the following words:</p> <p>“(e) <u>an adopted child, including a child adopted in accordance with customary law, shall be deemed—</u>”.</p>	<p>5</p> <p>10</p> <p>15</p> <p>20</p> <p>25</p> <p>30</p>
Act 27 of 1990	Maintenance of Surviving Spouses Act, 1990	<p>1. The amendment of section 1 by the substitution for the definition of “survivor” of the following definition:</p> <p>“‘survivor’ means the surviving spouse in a marriage dissolved by death, and includes a <u>wife of a customary marriage which was dissolved by a civil marriage contracted by her husband in the customary marriage to another woman on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988));</u>”.</p>	<p>35</p> <p>40</p> <p>45</p>

MEMORANDUM ON THE OBJECTS OF THE REFORM OF CUSTOMARY LAW OF SUCCESSION AND REGULATION OF RELATED MATTERS BILL, 2008

1. PURPOSE OF BILL AND BACKGROUND INFORMATION

The Bill emanates from an investigation and report of the South African Law Reform Commission (SALRC). The purpose of the Bill is—

- (i) to abolish the customary rule of primogeniture in as far as it applies to the law of succession in order to bring it in line with the Constitution; and
- (ii) to give effect to the judgment of the Constitutional Court in the case of *Bhe and Others v The Magistrate, Khayelitsha and Others CCT 49/03*, *Shibi v Sithole and Others CCT 69/03*, which declared the principle of male primogeniture incompatible with the Bill of Rights.

2. OBJECTS OF BILL

2.1 *Clause 2(1)* extends the application of the Intestate Succession Act, 1987 (Act No. 81 of 1987), to deceased estates of Africans who die intestate. These estates were previously dealt with in terms of the repealed Black Administration Act, 1927. *Clause 2(2)* deals with the different scenarios which present themselves in terms of customary law and how the Intestate Succession Act, 1987, must be applied in these scenarios, for instance how the variety of supporting marital unions in customary law must be dealt with. In terms of the Intestate Succession Act, 1987 (Act No. 81 of 1987), children born out of unions entered into by or on behalf of males and those entered into by women for purposes of raising children or increasing the number of off-spring of the deceased do not qualify to inherit the intestate estates of their fathers because they are regarded as extra-marital children. *Clause 2(2)* entitles a woman who has entered into a union with a man for the purpose of raising children and a woman who has entered into a union with another woman so that the latter woman can procreate children, to be regarded as a descendant for the purposes of the application of the Intestate Succession Act, 1987.

2.2 *Clause 3* seeks to provide how the Intestate Succession Act is to be interpreted in order to give effect to provisions proposed in the Bill.

2.3 *Clause 4(1)* provides for the property accruing to a woman or her house under customary law by virtue of her customary marriage to devolve in terms of a will. (If she dies without a will, her property will devolve in terms of the Intestate Succession Act, 1987.) In terms of *clause 4(2)* any reference in a will of such a woman to a “child” and any reference in section 1 of the Intestate Succession Act to a “descendant” in relation to such a woman who dies without a will, must be interpreted to include any child born out of any ancillary union entered into in terms of customary law for the purpose of raising or increasing the number of children for such woman or her house.

2.4 *Clause 5* contains procedures for resolving disputes and uncertainties pertaining to the devolution of family property, among others. Disputes or uncertainties in connection with the devolution of family property will be determined by the Master of the High Court having jurisdiction. The Master may also refer a matter to a magistrate who must hold an inquiry into the matter and make recommendations to the Master.

2.5 *Clause 6* excludes succession to property acquired or held by a traditional leader in his or her official capacity from the application of the Intestate Succession Act, 1987. This property will remain subject to customary law.

2.6 *Clause 7* is a savings clause and deals with the following matter: Before 2 December 1988 a man married by customary law could enter into a civil marriage with another woman, thereby dissolving the customary marriage. The Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988), which came into effect on 2 December 1988, prohibits customary marriage spouses from concluding civil marriages, except with each other. *Clause 7* provides that, in the event of the death of a husband who has entered into a civil marriage before 2 December 1988 with a woman other than the customary law wife, the customary law wife and the issue of the customary marriage must inherit on par with the civil marriage widow and the issue from that marriage.

2.7 *Clause 8* refers to a Schedule in which the provisions of the Administration of Estates Act, 1965, the Intestate Succession Act, 1987, and the Maintenance of Surviving Spouses Act, 1990, are amended consequentially, as a result of the provisions of the Bill.

2.8 *Clause 9* contains the short title and commencement provisions.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

The SALRC published a Discussion Paper which was widely distributed and which elicited comments from a variety of interested parties, including prominent non-governmental and community-based organisations concerned with women's issues and customary law regarding the envisaged legislation. A series of workshops were also held which were attended, among others, by traditional leaders in all the provinces. A follow-up consultative meeting of expert role-players was also held during which the Bill was discussed. The SALRC's consultation process was comprehensive and extensive.

4. IMPLICATIONS FOR PROVINCES

None.

5. ORGANISATIONAL AND PERSONNEL IMPLICATIONS

None.

6. FINANCIAL IMPLICATIONS FOR THE STATE

None.

7. COMMUNICATIONS IMPLICATIONS

None.

8. PARLIAMENTARY PROCEDURE

8.1 The State Law Advisers and the Department of Justice and Constitutional Development are of the opinion that the Bill must be dealt with in accordance with the procedure established by subsection (1) or (2) of section 76 of the Constitution since it falls within a functional area listed in Schedule 4 to the Constitution (indigenous law and customary law).

8.2 The State Law Advisers are of the opinion that the Bill must be referred to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains provisions relating to customary law or customs of traditional communities.