

MATTERS ARISING FROM THE REPORT OF THE PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT

In the Report of the Portfolio Committee on Justice and Constitutional Development, which was published in the ATC of 13 August 2008, concern is expressed about “three areas that may not have been adequately addressed in the Bill”. The matters are dealt with separately below:

1. The fairness of allocating a child’s portion to a woman known as a “seed-raiser”

1.1 In terms of clause 2(2) a woman other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse’s house, must be regarded as a descendant of the deceased.

1.2 Strictly speaking, clause 2(2) does not prescribe the extent of the share the woman other than the spouse will obtain. That clause seeks to ensure that such woman is also included when the intestate estate is divided.

1.3 Clause 3 seeks to prescribe how the women and spouses referred to in paragraphs (a), (b) and (c) of clause 2(2) will inherit: In terms of Clause 3(1) any reference in section 1 of the Intestate Succession Act to a spouse who survived the deceased, must be construed as including every woman and spouse referred to in those paragraphs.

1.4 Thus, where section 1(1)(a) of the Intestate Succession Act provides that where a person dies intestate and “is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate”, the estate will be divided equally between the woman and spouses involved.

1.5 In terms of section 1(1)(c), where a person dies intestate and “is survived by a spouse as well as a descendant... such spouse (*i.e. any of the wives or spouses referred to in clause 2 of the Bill*) shall inherit a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed...by the Minister of Justice...”. the determination of a child’s share is provided for in clause 3(3) of the Bill. That provision ensures that, in the case where a person dies intestate and is survived by a spouse as well as a descendant, the spouses will share equally in the intestate estate.

1.6 A woman known as a “seed-raiser” will therefore inherit on par with the spouse of the deceased.

2. The failure to take into account consideration “marriages from the grave”

2.1 The matter of levirate unions (*ngena* (Xhosa and Zulu), *stinela* (Pedi) and *kinela* ((Tswana))¹ was discussed by the Select Committee. The union in question poses certain challenges, one of which is that the Master would be in a predicament to decide whether or not an intestate estate can be wound up at all if there is a possibility that a child, which for all purposes is to be regarded as the deceased's child, may be born in the future and whether such a child should share in the intestate estate.

2.2 It is suggested that the matter of intestate succession of children born from levirate unions be further investigated by the Law Reform Commission, in conjunction with the Department of Justice. The Commission and the Department must report their findings to the Select Committee in due course .

3. The lack of definition around the proposed regulations in respect of Clause 5 of the Bill

3.1 Clause 5(5) of the Bill grants the Minister of Justice wide powers to make regulations regarding any aspect of the inquiry of the Master to resolve disputes and remove uncertainties regarding an intestate estate. The Ministers power appears to be too wide. The bill should guide the exercise of the power by clearly stating parameters.

3.2 It is suggested that clause 5(5) be replaced with the following:

- (5) The Minister may make regulations regarding—
- (a) the instances where the Master must direct that an inquiry be held by a Magistrate; and
 - (b) any matter which it may be necessary to ensure that the disputes or uncertainties contemplated in subsection (1) are resolved or removed, as the case may be, in a just and equitable manner.

3.3 Subsection (2) of clause 5 should also be amended by indicating that the Master's discretion is subject to the regulations (proposed clause 5(5)).

¹ I.e. the institution in terms of which a widow takes a consort from among her deceased husband's kinsmen, normally on of his younger brothers, for the purpose of bearing a child for her house. Bennett TW, Customary Law of South Africa (2004), p. 345.