



Legal Resources
Foundation

INHERITANCE

**Under Customary Law
&
General Law**

Know Your Rights

About this Pamphlet

Inheritance

This pamphlet gives you some basic facts on customary law and general law inheritance when a person dies without writing a will.

The pamphlet contains information on:

- Types of inheritance that are there.
- Ways to decide if customary law or general law of inheritance should apply.
- General rules on how property is shared under customary law and general law inheritance.
- The process of sharing or administering the estate.
- Some problems on inheritance.

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WHAT IS INHERITANCE?

Inheritance/Succession is the process of taking over the ownership or use of someone's property when that person dies. It refers to the process whereby the beneficiaries of a deceased person succeed to the property or assets which the deceased left behind at death.

The property of a person who dies is called his/her estate. This includes land, buildings, businesses, household goods, livestock, money and bank accounts; it also includes any debts that he/she owes. Beneficiaries can only succeed to the property or assets of a deceased person which remains after all the expenses and debts which the deceased had at the date of death are fully paid.

WHAT TYPES OF INHERITANCE ARE THERE?

The beneficiaries of a deceased estate are determined either in a valid will left by the deceased, or in terms of the rules of intestate succession. When the beneficiaries are determined in a valid will this is called testate succession and when the beneficiaries are determined by application of the rules of the general law or customary law as the case maybe, this is referred to as intestate succession.

With a will (Testate)

If a person leaves a will, stating how he or she wants the property shared after dying, then the court will see that it is shared in accordance with the will.

Without a will (Intestate)

If a person leaves no will, inheritance may follow the rules of customary law, or the rules of general law. Since these rules are different, it is important to know which rules will apply to you when you die.

Partly testate and partly intestate

This refers to situations where a person dies and leaves behind a will which does not deal with all his/her assets. It is possible for a person to die completely intestate or only partly intestate. An example of the latter is where a testator specially bequeaths one portion of his estate in a valid will, but omits to deal with the rest of his assets. In this instance the portion that has been bequeathed by will, will devolve testate in terms of the will, while the rest of the estate will devolve according to the rules of intestate succession.

CUSTOMARY LAW AND GENERAL LAW

Which law applies - Customary Law or General Law?

A person can die testate, intestate, or partly testate and partly intestate.

If there is no will and the deceased person was of African descent, then such person may either be subject to customary law or civil law.

The estates of people of African origin are by default subject to African customary law, unless they take steps to dissociate themselves from such law.

By contrast, the estates of people of non-African origin are by default subject to civil law.

All people of mixed blood are considered to be of non-African origin, unless they specifically chose customary law, which can be evident by:

- a) living at or frequently visiting their rural areas (kumusha);
- b) practicing African traditional religion;
- c) adopting traditional African values in their daily lives.

For married people of African descent, the following is considered:

- a) If the parties are married under general law – civil law would be applicable;
- Customary law is the law of African peoples, as it has been administered by the chiefs and the courts over the years. It varies from one ethnic group to another. However, the customary law of inheritance was changed by the Administration of Estates Amendment of 1997
- General law is the law which was brought to Zimbabwe by European settlers and has been added to by legislation and developed by court decisions. General law will always apply to anyone who is not African, because a non-African cannot have a customary law marriage. Even if lobola is paid, customary law of inheritance does not apply to non-Africans.

What if there is a dispute over which law to apply?

- The rules about which law applies are sometimes confusing.
- If someone in the family thinks that customary law should apply and someone else thinks general law should apply, the dispute can be taken to court, and the magistrate or judge will make a decision. The matter may also be brought before the Master for determination in terms of s68G (2).

WHAT DOES THE CONSTITUTION SAY ABOUT INHERITANCE?

Section 26 of the constitution provides that the state must take measures to ensure that in the event of dissolution of marriage through death provision is made for the necessary protection of any children or spouses. Though this section does not explicitly speak of inheritance it is assumed that the protection that is being referred to also includes protection of their inheritance rights.

CUSTOMARY LAW INHERITANCE

Where there is no will

Generally, the property will be shared among the spouse or spouses and the children. The law applies in the same way whether a customary law marriage was registered or not.

- If a man dies leaving a widow whose marriage was registered and another widow whose marriage was not registered, they will be treated the same. The woman who was married first will be the senior wife.
- If the couple lived together but the families did not conclude any negotiation, the marriage will not be recognised.

How will the property be shared?

The family will have to agree on how the property should be shared, but guidelines are laid down by the law.

- A plan must be drawn up, which will have to be approved by the Master/ magistrate.
- The executor must be sure that all the beneficiaries are going to be looked after.
- If the family does not agree, the Master/magistrate will make a decision which he thinks is fair, regard being given to the guidelines provided under s68F of The Administration of Estates Act to the extent that they may be applicable.

Each family has different members and different problems, but the Master/ magistrate will ensure that the following general rules are followed.

- If there is only one surviving spouse, she or he will inherit the house which she lived in at the time of the deceased's death together with all the household goods in the house, and the remaining property will be divided between the spouse and the children. The spouse will get a child's share or so much as does not exceed a specified figure whichever is greater. If the estate is small or just consists of the house, the children may get nothing.

- If there is more than one surviving wife and some children, each wife will inherit the house she was living in at the time of death and its household goods. The wives will share one third of the remaining property with the senior wife getting two thirds. All the children will divide the other two thirds of the remaining property equally. The amount inherited by each wife does not relate to her contribution to the matrimonial property.
- Where the wives live in separate houses, each wife should get ownership of or, if that is impracticable or not possible, a usufruct over the house (the right to stay at the house) she lived in at the time of the deceased person's death, together with all the household goods in that house;
- If there are surviving children but no surviving spouse, the children will share the net estate equally.
- where the deceased was a woman whose husband at the time of her death had more than one wife, and she is survived by her husband and had one or more children:
 - a. one-third of her net estate should devolve upon her husband; and
 - b. the remaining two-thirds of her estate should devolve upon her children in equal shares and any of their descendants per stripes;

It must be noted that in that instance there is no entitlement of the spouse to the household goods and the matrimonial house.

- If there is a surviving wife but no children, the wife will get the house which she was living in at the time of the deceased person's death and household property, plus half of the rest of the property. The other half will be shared equally among the surviving parents, brothers and sisters of the deceased.
- The children do not have to be listed in the death notice in order to inherit.

It is important to note that in the event that it is impracticable for the surviving spouse to get ownership of the house which she/he was living at the time of death of the deceased person, they may get what is called a usufruct which is the right to stay at the house.

GENERAL LAW INHERITANCE

Where there is no will

How will the property be shared?

The main principle is that the spouse and children will inherit.

- (a) If there is a surviving spouse and children:
 - The house in which the surviving spouse was living immediately before the death of the deceased person and household effects go to the spouse.
 - If the remainder of the property is worth less than an amount fixed by Statute. — it all goes to the spouse.
 - If the remainder of the property is worth more than the fixed amount it will be divided by the number of children plus the spouse (i.e. if there are 3 children, by 4; if there are 4 children by 5). This is called the “child’s share”.
 - Currently there is no specified amount and as such the remainder of the estate is shared equally between the surviving spouse and the children
- (b) If there is a surviving spouse and no children, but a surviving parent, brothers and sisters:
 - The house which the surviving spouse was living in immediately before the death of the deceased and household effects go to the spouse. On the remainder, half will go to the spouse and half to the surviving parents, brothers and sisters in equal shares.

- (c) If there are surviving children but no surviving spouse:
 - The children will share all the property equally.
- (d) If there is a surviving spouse, no surviving children or parents, but surviving brothers or sisters (including half brothers and sisters):
 - The spouse will get the house and household effects.
 - Of the remaining property, the spouse will get a half share, and the brothers and sisters will divide the other half share equally.

Note: It does not matter how old the children are, they are all treated equally. Children born outside the marriage are entitled to inherit.

ADMINISTERING AN ESTATE

The process of paying the debts and sharing out the property of a person who has died is called administering his or her estate. This has to be done under the supervision of the court to make sure that the law of inheritance is followed.

Steps to be followed to administer the estate

When customary law is applied, the magistrates court (Civil and customary division) will supervise the administration of the estate.

It must be noted that the Master of High Court can administer estates governed by both general and customary law. However magistrates courts cannot administer estates governed by general law.

- A close family member must report to the magistrates court, customary law division; they should take with them the deceased's marriage certificate and the death certificate.
- The family member will be given three different forms to be filled:
 - Notice of Death
 - Preliminary Inventory

When general law is applied the High Court will supervise the administration of the estate.

- The family must report to the Master's Office at the High Court.
- They will fill in a death notice form and a preliminary inventory, which is a list of all the deceased's property.
- The court will appoint an executor who will usually be the widow or widower.

NB: If the deceased's property is worth less than a set amount the court will ask one member of the family to act as executor to administer and distribute the property. After paying the debts and before distributing property, the executor will have to pay a tax to the court. This mode of winding up an estate is called summary administration. Usually a certificate of authority is issued upon compliance with requirements.

If the estate is worth more than a set amount it can be administered under letters of administration. This is known as full administration. The family will be called to an edict meeting to choose an executor.

What is an executor/executrix

- An executor (male) or executrix (female) is a person appointed by the court to look after the deceased person's property and share it out to the beneficiaries (people who get a share of the property) according to the law. The executor also pays the debts using money from the estate.
- The executor must follow the instructions of the court.
- The executor is not entitled to inherit any property simply because he/she is executor. An executor is not disqualified from inheriting if he/she is a beneficiary.

Who can be an executor?

- The family can decide who the executor will be, but the court must agree.

The surviving spouse is preferred where there is competition unless good reasons exist against his/her appointment.

A child or creditor qualify for appointment

- The law usually encourages the family to choose the widow or widower as executor as she or he will be familiar with assets.

What does the executor do?

- The executor will be guided by the court, which will tell him or her what to do and how to do it.
- An executor must first be issued with Letters of Administration by the Master
- The executor prepares another list of all the items of property owned by the deceased and states the value of each.[Executor's Inventory]
 - (a) Open a bank account in the name of the estate.
 - (b) Settle claims and follow up on debtors.
 - (c) Prepare a statement of accounts showing the assets (all property of any kind) of the estate and the liabilities (all claims against the estate or money owed by it).
- The executor must then draw up an inheritance plan and submit it to the court.

What is an Inheritance Plan?

- This is a plan which the executor draws up to show how the property of the deceased person will be shared.

- The executor cannot just share the property in any way he or she wants. The property must be shared in such a way that it reflects what the family has agreed on or it follows the guidelines laid down in the law as already discussed.
- The executor is expected to consult with the family members when drawing up the plan in the case of customary law inheritance.
- When the plan has been approved, the executor will be given the authority to transfer properties and money to the beneficiaries.

What if the family does not agree to the executor's inheritance plan?

- The court will try to help the members of the family and the executor reach an agreement that is fair.
- If they cannot agree, the court will share the property according to the guidelines given above.

What does the executor get?

- The executor may claim from the estate any expenses he or she had to pay to fulfill the duties of an executor.
- The executor does not inherit anything just because of being an executor unless he/she is a beneficiary.
- Sometimes the executor may be a brother or sister of the deceased; in such a case, the executor will not be entitled to inherit anything from the estate if there is a surviving wife and children.

What happens after the plan is approved?

- When the plan has been approved, the court will give the executor the power to distribute the property.
- Before the plan is approved a tax of 4% of the gross value of the estate must be paid to the court.
- The executor must then share out the property exactly in the way the plan describes.
- If the executor does not follow the plan, he can be charged with a criminal offence.

What if the executor has problems?

- The court officials are expected to guide the executor, by explaining what must be done.
- Sometimes the court officials will be very busy and may not take time to explain everything.
- You can get more information from Legal Resources Foundation.
- It is possible to pay a professional executor to do the work for you, but this will be expensive. Only licensed executors are allowed to take money for doing this work. Most legal practitioners are licensed as executors and there are firms of executors as well.

SOME PROBLEMS ON INHERITANCE

Can a minor person inherit property?

Yes, a minor child can inherit, but the property will have to be looked after by the child's guardian.

- If there is a responsible person, such as the other parent, who becomes the guardian, any money can be held in a bank account in the child's name, with the guardian as signatory.
- If the guardian is someone else, or in some cases even if it is the parent, the court may insist on paying any money inherited by a minor into the Guardian's Fund. This is a public fund administered by the High Court. The money will be kept until the child is 18 years and then paid to him or her with interest. If the legal guardian needs money for the maintenance of the child he or she can claim it monthly from the fund. In practice, however, the fund tends to pay only for school fees and uniforms.

If a man dies who has a civil marriage and a customary law marriage

- It is against the law for a man to register a marriage with one woman under customary law and with another woman under civil law. He is committing the crime of bigamy. If he wants more than one wife they must all be married under customary law. However, we know that there are many men who do this anyway, and so the new inheritance law makes an exception, and in certain circumstances, both widows may inherit.

If such a man dies, this is what will happen:

- If the customary law wife was married first and her marriage was registered, the civil law wife will be counted as a second customary law wife and will be able to inherit from the deceased estate.

but

- If the civil law wife was married first, the customary law wife will not be recognised as a wife and will not be able to inherit anything. General law will be applied.
- If there is a customary law wife whose marriage was not registered she will inherit where the union was concluded before the civil marriage. But if it was concluded after the civil marriage she will not inherit.

Dispute over a house shared by two wives

Sometimes a man has two customary law wives. They may both make use of a house in **town** when they are visiting. Or a man may have recently put a new wife in his town house. It may not be clear who will inherit the house in town.

The law says whichever wife was living in a house inherits it. However, often wives share the use of a town house while also having their rural homes. Surely, it would not be fair to give the town house to the wife who happened to be in it at the time the husband died. A dispute of this sort will have to be decided by the court.

Spouses may inherit jointly if they were staying at the same house at the time of the deceased person's death.

Property Grabbing

Sometimes people ignore what the law says and take property belonging to the deceased person. They say they have a right to take the property according to custom among other reasons.

These people will be breaking the law. No one can take any property which belonged to a person who has died unless they have permission from the court to take that property. Section 10 of the Deceased Persons Family Maintenance Act protects the rights of a deceased person's children and surviving spouse to continue occupying the immovable property which they were occupying, using the household goods and effects, implements, tools,

vehicles which they were using, employing or using any animals which were kept on such immovable property.

Anyone who interferes with these rights commits a criminal offence that attracts a fine or imprisonment or both. The family can therefore report the case to the police.

- If the family does not want to report to the police they can apply to the court for an order which directs the person who is keeping the property to return it. This is called a **spoliation order**. Anyone who ignores a court order is in contempt of court and may be sent to prison.

PENSIONS AND LIFE ASSURANCE

These ordinarily do not form part of the deceased person's estate and will not be looked after by the executor. Generally they are disbursed in accordance with the relevant Pension Fund regulations

The pension must be claimed by the surviving spouse or if there is more than one widow, be shared amongst them. If there is no spouse, the children may claim the pension.

A Life Assurance policy usually states who is to benefit. That person is the one to whom the money is paid out.

Other Pamphlets available from LRF

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The LRF has pamphlets and leaflets on a broad range of legal topics. If you would like further information and legal advice please contact your nearest LRF Centre.

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