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## THE PRESIDENCY

No. 433

21 April 2009

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:—

**No. 11 of 2009: Reform of Customary Law  
of Succession and Regulation of Related Matters Act , 2009.**



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Act No. 11, 2009 REFORM OF CUSTOMARY LAW OF SUCCESSION AND  
REGULATION OF RELATED MATTERS ACT, 2009

**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.

*(English text signed by the President.)*  
*(Assented to 19 April 2009.)*

# ACT

**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,

**P**arliament of the Republic of South Africa therefore enacts as follows:—

## Definitions

1. In this Act, unless the context indicates otherwise—

“**customary law**” means the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people; 5

“**descendant**” means a person who is a descendant in terms of the Intestate Succession Act, and includes—

- (a) a person who is not a descendant in terms of the Intestate Succession Act, but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child; and
- (b) a woman referred to in section 2(2)(b) or (c);
- “**house**” means the family, property, rights and status which arise out of the customary marriage of a woman; 5
- “**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); 10
- “**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 15
- “**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 that person’s will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2). 20

(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 a 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; 25
- (b) 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, if she survives him, be regarded as a descendant of the deceased; 30
- (c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased’s house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased. 35

### **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 referred to in paragraphs (a), (b) and (c) of section 2(2). 40

(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 referred to 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;” 45

(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: 50

- “(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 referred to 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.” 55

#### **Disposition of property allotted or accruing to woman 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 a woman.
- (2) Any reference in the will of a woman referred to 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 a woman, must be construed as including any child— 5
- (a) born of a union between the husband of such a woman and another woman entered into in accordance with customary law for the purpose of providing children for the first-mentioned woman's house; or
  - (b) born to a woman to whom the first-mentioned woman was married under customary law for the purpose of providing children for 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 referred to in subsection (1), from disposing 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 or a traditional leader in the area in which the Master has jurisdiction.
- (3) After the inquiry referred to in subsection (2), the magistrate or a traditional leader, as the case may be, 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 or a traditional leader, as the case may be, in making a recommendation referred to 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) The Cabinet member responsible for the administration of justice may make regulations regarding any aspect of the inquiry referred to in this section.

#### **Disposal of property held by traditional leader in official capacity**

6. Nothing in this Act is to be construed as amending any rule of customary law which regulates the disposal of the property which a traditional leader who has died held in his or her official capacity on behalf of a traditional community referred to in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003). 40

### 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—

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

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

### Short title and commencement

9. This Act is called the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, 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><b>1.</b> The amendment of section 4—  <i>(a)</i> by the substitution in subsection (1) for the words preceding paragraph <i>(a)</i> of the following words:            “In respect of the estate of a deceased person [<b>which is not governed by the principles of customary law</b>], or of any portion thereof, jurisdiction shall lie—”;            and  <i>(b)</i> by the deletion of subsection (1A).</p> <p><b>2.</b> The amendment of section 7 by the substitution in subsection (1) for paragraph <i>(a)</i> of the following paragraph:            “<i>(a)</i> 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><b>3.</b> The amendment of section 9 by the substitution in subsection (1) for the words preceding paragraph <i>(a)</i> of the following words:            “(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>	5 10 15 20 25 30 35 40 45
Act 81 of 1987	Intestate Succession Act, 1987	<p><b>1.</b> The amendment of section 1—  <i>(a)</i> by the substitution for subsection (2) of the following subsection:            “(2) Notwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and [<b>section 5(2) of the Children’s Status Act, 1987, illegitimacy</b>] sections 40(3) and <u>297(1)(f) of the Children’s Act, 2005 (Act No. 38 of 2005), 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>	50 55 60

No. and year of law	Short title	Extent of amendment
		<p>(b) by the substitution in subsection (4) for paragraph (b) of the following paragraph:  “(b) <b>‘intestate estate’</b> includes any part of an estate which does not devolve by virtue of a will [<b>or in respect of which section 23 of the Black Administration Act, 1927 (Act No. 38 of 1927), does not apply</b>];” and</p> <p>(c) by the insertion in subsection (4), after paragraph (e), of the following paragraph:  “(eA) <u>A person referred to in paragraph (a) of the definition of ‘descendant’ contained in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, shall be deemed—</u>  <u>(i) to be a descendant of the deceased person referred to in that paragraph;</u>  <u>(ii) not to be a descendant of his or her natural parent or parents, except in the case of a natural parent who is also the parent who accepted that person in accordance with customary law as his or her own child, as envisaged in the said definition, or was, at the time when the child was accepted, married to the parent who so accepted the child; and”;</u> and</p> <p>(d) by the insertion after subsection (5) of the following subsection:  “(5A) <u>If a person referred to in paragraph (a) of the definition of ‘descendant’ contained in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, is deemed to be a descendant of the deceased person referred to in that paragraph, or is deemed not to be a descendant of his or her natural parent, the deceased person shall be deemed to be an ancestor of the person referred to in that paragraph, or shall be deemed not to be an ancestor of that person, as the case may be.</u>”</p>
Act 27 of 1990	Maintenance of Surviving Spouses Act, 1990	<p><b>1.</b> The amendment of section 1 by the substitution for the definition of “survivor” of the following definition:  “<b>‘survivor’</b> means the surviving spouse in a marriage dissolved by death, and includes a spouse 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));”.</p>