

CHAPTER 31:03
SUCCESSION (RIGHTS OF THE SURVIVING SPOUSE AND INHERITANCE FAMILY PROVISIONS)

ARRANGEMENT OF SECTIONS

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Act 66, 1970.

An Act to amend the law relating to estates of deceased persons and to provide for matters ancillary thereto or connected therewith.

[Date of Commencement: 14th December, 1970]

1. Short title

This Act may be cited as the Succession (Rights of the Surviving Spouse and Inheritance Family Provisions) Act.

2. Interpretation

(1) In this Act, unless the context otherwise requires-

"**annual income**" means, in relation to the net estate of a deceased person, the income that the net estate might be expected at the date of the making of an order under section 6, when realized, to yield in a year;

"**court**" means the High Court of Botswana;

"**death duties**" means estate duty and every other duty leviable or payable on death;

"**net estate**" means all the property of which a deceased person had power to dispose by his will (otherwise than by virtue of a special power of appointment) less the amount of his funeral, testamentary and administration expenses, debts and liabilities and estate duty payable out of his estate on his death;

"**son**" and "**daughter**" include the son or daughter of the deceased *en ventre sa mère* at the date of the death of the deceased;

(2) For the purposes of this Act any relationship by adoption under the provisions of the Adoption of Children Act shall be equivalent to blood relationship.

3. Act not to apply to estates administered in accordance with customary law

The provisions of this Act shall not extend to the estate of any person who dies either wholly or partly intestate where the rights of succession to such estate are determinable in accordance with customary law.

4. Amendment of law of intestacy

(1) The surviving spouse of every person who, after the commencement of this Act, dies either wholly or partly intestate is hereby declared to be an intestate heir of the deceased spouse according to the following rules-

- (a) if the spouses were married in community of property and if the deceased spouse

leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as, together with the surviving spouse's share in the joint net estate, does not exceed P5000 in value (whichever is the greater);

- (b) if the spouses were married out of community of property and if the deceased spouse leaves any descendant who is entitled to succeed *ab intestato*, the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed P5000 in value (whichever is the greater);
- (c) if the spouses were married either in or out of community of property and the deceased spouse leaves no descendant who is entitled to succeed *ab intestato* but leaves a parent or a brother or sister (whether of the full or half blood) who is entitled so to succeed the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed P10 000 in value (whichever is the greater);
- (d) in any case not covered by paragraph (a), (b) or (c), the surviving spouse shall be the sole intestate heir.

5. Variation

The court may on the application of any person who would, but for the provisions of this Act, be entitled to a greater part of the estate in respect of which the deceased died intestate order that the share of the surviving spouse under this Act be calculated as if to the estate in respect of which the deceased died intestate there were added the estate which the deceased left by will to the surviving spouse.

6. Power of court to order payment out of net estate of deceased for benefit of surviving spouse or child

(1) Where, after the commencement of this Act, a person dies domiciled in Botswana leaving-

- (a) a wife or husband;
- (b) a daughter who has not been married or who is, by reason of some mental or physical disability, incapable of maintaining herself;
- (c) an infant son; or
- (d) a son who is, by reason of some mental or physical disability, incapable of maintaining himself,

then, if the court on application by or on behalf of any such wife, husband, daughter or son (hereinafter referred to as a "dependant") is of opinion that the disposition of the deceased's estate effected by his will, is not such as to make reasonable provision for the maintenance of that dependant, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the deceased's net estate disposed of by will for the maintenance of that dependant:

Provided that no application shall be made to the court by or on behalf of any person in any case where the disposition of the deceased's estate effected as aforesaid is such that the surviving spouse is entitled to not less than two-thirds of the income of the net estate and where the only other dependant or dependants, if any, is or are a child or children of the surviving spouse.

(2) The provision for maintenance to be made by an order shall, subject to the provisions of subsection (4), be by way of periodical payments and the order shall provide for their termination not later than-

- (a) in the case of a wife or husband, on her or his remarriage;
 - (b) in the case of a daughter who has not been married, or who is under disability, on her marriage or the cesser of her disability, whichever is the later;
 - (c) in the case of an infant son, on his attaining the age of 21 years;
 - (d) in the case of a son under disability, on the cesser of his disability,
- or, in any case, on his or her earlier death.

(3) Periodical payments made under subsection (2) to any one dependant shall not be at an annual rate which exceeds the annual income of the net estate, and, where payments are so made to more than one dependant in respect of the same period, the aggregate of the annual rates at which those payments are made shall not exceed the annual income of the net estate.

(4) Where the value of a deceased's net estate does not exceed P10 000, the court shall have power to make an order providing for maintenance, in whole or in part, by way of a lump sum payment.

(5) In determining whether, and in what way, and as from what date, provision for maintenance ought to be made by an order, the court shall have regard to the nature of the property representing the deceased's net estate and shall not order any such provision to be made as would necessitate a realization that would be improvident having regard to the interests of the deceased's dependants and of the person who, apart from the order, would be entitled to that property.

7. Matters for consideration of court

(1) The court shall, on any application made under this Act, have regard to any part, present or future capital or income from any source of the dependant of the deceased to whom the application relates, to the conduct of that dependant in relation to the deceased and otherwise, and to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependant, to persons interested in the estate of the deceased, or otherwise.

(2) The court shall also, on any such application, have regard to the deceased's reasons, so far as ascertainable, for making the dispositions made by his will, or for not making any provision, or any further provision, as the case may be, for a dependant, and the court may accept such evidence of those reasons as it considers sufficient including any statement in writing signed by the deceased and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to accuracy or otherwise of the statement.

8. Time within which application must be made

(1) Except as provided by the following provisions of this section or section 10, an order under this Act shall not be made except on an application made within six months from the date on which representation in regard to the deceased's estate is first taken out.

(2) If it is shown to the satisfaction of the court that the limitation to the said period of six months would operate unfairly-

- (a) in consequence of the discovery of a will or codicil involving a substantial change in the disposition of the deceased's estate (whether or not involving a further grant of representation);
- (b) in consequence of a question whether a person had an interest in the estate, or as to the nature of an interest in the estate, not having been determined at the time when representation was first taken out; or
- (c) in consequence of some other circumstances affecting the administration or distribution of the estate,

the court may extend that period.

(3) The provisions of this Act shall not render the executors testamentary of the deceased liable for having distributed any part of the estate of the deceased after the expiration of the said period of six months on the ground that they ought to have taken into account the possibility that the court might exercise its power to extend that period, but this subsection shall be without prejudice to any power to recover any part of the estate so distributed arising by virtue of the making of an order under this Act.

(4) Notwithstanding anything contained elsewhere in this Act where a person domiciled in Botswana has died before the commencement of this Act in circumstances in which if he had died after the commencement of this Act the court could have made an order under section 6

the court may, if it thinks fit and on application made within six months of this Act coming into force, make an order if distribution of the deceased estate has not been completed.

9. Effect and form of order

(1) Where an order is made under this Act, then for all purposes, the will or the law relating to intestacy, or both the will and the law relating to intestacy, as the case may be, shall have effect and shall be deemed to have had effect as from the deceased's death, subject to such variations as may be specified in the order for the purpose of giving effect to the provision for maintenance thereby made.

(2) The court may give such consequential directions as it thinks fit for the purpose of giving effect to an order made under this Act, but no larger part of the net estate shall be set aside or appropriated to provide by the income thereof the provision for maintenance thereby made than such a part as, at the date of the order, is sufficient to produce by the income thereof the amount of the said provision.

(3) A copy of every order made under this Act shall be sent to the Master of the High Court for entry and filing, and a memorandum of the order shall be endorsed on, or permanently annexed to, the probate or letters of administration under which the estate is being administered.

10. Variation of orders

(1) On an application made at a date after the expiration of the period specified in section 8(1) or, as the case may be, of that period as extended under section 8(2) the court may make such an order as is hereinafter mentioned, but only as respects property the income of which is at that date applicable for the maintenance of a dependant of the deceased, that is to say-

- (a) an order for varying the previous order on the ground that any material fact was not disclosed to the court when the order was made, or that any substantial change has taken place in the circumstances of the dependant or of a person beneficially interested in the property under the will or, as the case may be, under the law relating to intestacy; or
- (b) an order for making provision for the maintenance of another dependant of the deceased.

(2) An application to the court for an order under subsection (1)(a) may be made by or on behalf of a dependant of the deceased or by the trustees of the property or by or on behalf of a person beneficially interested under the will.

11. Act not to affect certain exemptions from transfer duty

The amount in respect of which any exemption from transfer duty is allowable under the provisions of paragraph (b), (c) or (f) of section 20 of the Transfer Duty Act shall be determined as if this Act has not been passed.