Short notes on:

CUSTOMARY LAW OF SUCCESSION - WOMEN’S RIGHTS TO INHERIT PROPERTY

Introduction

Traditionally, women have been denied rights to property under the South African Customary Law of Succession as women were under the guardianship of the male in the family and did not have the legal capacity to either own or acquire property.

The customary rule was that succession is governed by the principle of male primogeniture, which meant that the eldest son of a family succeeded the entire estate after the death of a parent, to the exclusion of younger siblings, both male and female.

However, a lot of inroad has been made in improving the rights of women in this specific field.

Case law in the Constitutional Court

This principle of primogeniture succession was brought to light in the cases of Bhe v Khayelitsha Magistrate; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa which were all heard together in the Constitutional Court.

The application in the Bhe case was made on behalf of the two minor daughters of Ms Nontupheko Bhe and her deceased partner. It was argued that Section 23 of the Black Administration Act 38 of 1927 and the customary law rule of male primogeniture unfairly discriminated against the two children in that they prevented the children from inheriting the deceased estate of their late father. For similar reasons, Ms Shibi was prevented from inheriting the estate of her deceased brother in the Shibi case.

The South African Human Rights Commission and the Women’s Legal Trust were granted direct access to the Court in the third case which was brought in the public interest as a class action on behalf of all women and children prevented from inheriting for the above reason.

1 Kerr AJ The customary law of immovable property and of succession (1990)
2 (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)
3 (CCT 69/03) [2004] ZACC 18; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004)
4 (CCT 50/03) 2005 (1) SA 580 (CC)
The court found that the principle, and the disputed sections of legislation, does not acknowledge women’s rights and further infringes upon the fundamental right to equality and human dignity, to the extent that it excludes or hinders women from inheriting property.

**Progress made in legislation**

The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (the “Reform Act”) came into operation on 20 September 2010, and now gives effect to the decisions of the Constitutional Court in the above cases.

In order to bring legislation in line with the Constitution, the Reform Act abolishes the customary rule of primogeniture in as far as it applies to the law of succession and further extends the application of the Intestate Succession Act 81 of 1987 to the deceased estates of Africans who die intestate (without a will) and provides guidelines for interpreting the Intestate Succession Act in order to give effect to the new provisions and to ensure the protection of the rights of women to inherit.

A person can however still choose to enforce customary law of succession in terms of the Wills Act 48 of 1958 because we are all entitled to freedom of testation.

The question of which system of law should be applied must be determined by agreement among family members. However, where there is a dispute, such a dispute must be resolved by the Magistrates’ Court having jurisdiction.

**Other developments**

Section 6 of the Recognition of Customary Marriages Act 120 of 1988 which deals with equal status and capacity of spouses, and the Promotion of Equality and Prevention of Unfair Discrimination Act 52 of 2002, also help in enforcing women’s right to acquire, own and dispose of property.

Furthermore, when transferring property of a deceased person who died intestate, the Deeds Registries Act 47 of 1937 now requires that a “Particulars of Next-of-Kin Affidavit” listing all the intestate heirs in accordance with section 1(1) of the Intestate Succession Act, be lodged along with other transfer documents. This helps to ensure that no intestate heirs, including women, are unlawfully deprived of their right to inherit.
**Conclusion**

Following the *Bhe* decision and with all the legal developments, it seems that, practically, it has virtually no impact even on the adjudication of disputes concerning inheritance rights. Many estates are still administered informally by family members or traditional leaders in rural and semi-urban communities.

It is important for individuals to understand their rights when it comes to intestate succession and to seek legal advice when it is needed to enforce these rights. At SchoemanLaw Inc., we can assist in the administration of deceased estate in a fair and legal manner.