Treat Or Trick - The Impact of the Administration of Estates Amendment Act Number 6 of 1996 on Women's Property and Inheritance Rights in Zimbabwe

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Introduction

On the 16th of March 2013, over three-million Zimbabweans voted overwhelmingly in favour of a new Constitution. The Constitution is underpinned by the values and principles of gender equality. [1] Whilst it remains to be seen how far the new Constitution will result in real gender equality, concerns still lie with property and inheritance laws of Zimbabwe that despite some progressive laws, challenges are still found in the implementation and interpretation. The new Constitution states that the law to be administered by the courts of Zimbabwe is the law that was in force on the effective date. [2] This essentially means that the law as set out in the Lancaster House constitution remains in force as follows:

“Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of customary law, the law to be administered by the Supreme Court, the High Court and any other courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on the 10th of June 1891, as modified by subsequent legislation having in Zimbabwe the force of law.”[3]

Essentially customary and general law will continue to apply side by side. In 1997, the Zimbabwean legislature passed the Administration of Estates Amendment Act Number 6 of 1997 (the act) that would apply to estates of persons who die on or after the 1st of November 1997. The act presented a substantial departure from the then existing laws as it is premised on the fact that the major beneficiaries of a deceased estate are the surviving spouse and children, with the former inheriting immovable property which hitherto had been going to mostly the eldest son. However the act has not been without critics and challenges but in terms of creating equality, the intention of the legislature was to protect women and children. This was succinctly stated by the Honourable Mr Justice Chiweshe as follows:

“In reading the legislation governing deceased estates in so far as the rights of surviving spouses is concerned, it is important to bear in mind the intention of the legislature bearing in mind that this branch of law has in the last decade been the subject of much debate and controversy.................The chief driver of this process has been the desire by the legislature to protect widows and minor children against the growing practice by relatives of deceased persons to plunder matrimonial property acquired by spouses during the subsistence of the marriage.”[4]

The amendment also introduced a new section to the Deceased Estates Succession Act [5] under general law which states as follows:

“The surviving spouse of every person who dies wholly or partially intestate shall be entitled to receive from the free residue of the estate the house or other domestic premises in which the surviving spouse, as the case maybe lived immediately before the person’s death”, [6]
Given this stated desire, the major question remains whether or not the Act is or has achieved its stated objective. The objective of this paper therefore is to provide a reflection of whether or not the amendment has achieved its stated aim, that of protecting women and children from property grabbing and the need to ensure that they do not suffer undue hardship at the death of a spouse and a breadwinner. This objective becomes more significant given the high death rate due to HIV/AIDS in Zimbabwe. This paper is divided into five parts. Part one will put women's rights in Zimbabwe before and after 1980 into context and also outline the concept of legal pluralism. Part two will give demographic and socio-economic characteristics of Zimbabwe especially based on the ZDHS. Part three will discuss women's inheritance rights in Zimbabwe prior to the passing of the Administration of Estates Amendment Act Number 6 of 1997 and also give a framework of the challenges caused by the old law of inheritance. Part four will discuss the drivers of the process of change in the law; what influenced the change and the significance of the new law. Part five will look at the impact of the new law in the context of HIV/AIDS and conclude by stating that the right to health is a must for every Zimbabwean.

Part 1

Putting women's rights in Zimbabwe into context

The legal situation of women in Zimbabwe before 1980 and legal pluralism

Welshman Ncube notes that:

The colonization of Africa by European powers had profound implications for African law and African legal institutions. African legal orders were completely disrupted and replaced by European legal systems. In all areas affecting state power and security, the colonial governments imposed their legal systems and law. Accordingly, constitutional laws and criminal laws were completely Europeanized and all peoples in a particular country were subjected to the same foreign constitutional and criminal laws. [7]

The effect of this was that in the private realm, customary law was permitted to operate "except in circumstances where it ran counter to the interests of the colonial state or where it was believed to be contrary to European notions of justice and morality." [8] Therefore the notion of justice was squarely based on race and determined by the colonial power. Bennett succinctly puts it as thus:

There was also, no doubt, a desire on the part of the settlers to preserve tranquillity among a potentially hostile population and a conviction that European law was too complex to be administered by an unsophisticated people. [9]

The race criteria was reinforced through the years by the "repugnancy test". For instance, the Southern Rhodesia Order in Council of 1898 provided that in all civil cases between "natives", "native law and custom" were to be applicable in so far as they were not repugnant to natural justice or morality. Subsequent legislation defined the private realm as cases of adultery, lobolo (bride price), custody, guardianship of children, the devolution otherwise than by will of movable property and marriage contracted under customary law. [10] These issues are where concerns by women were found. Although not the focus of this paper, it is also interesting to note that anecdotal evidence shows that the customary law that existed during the time of colonization and that was carried forward to independence was a distorted version of that law which existed before colonization. The distortion manifested itself in court rulings. Section 3 of the then Customary Law and Local Courts Act stated that:

If a court of law entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings after having considered such submissions thereon as maybe made, and such evidence thereof maybe tendered, by or on behalf of the parties, it may, without derogation from any other lawful source which it may have recourse to, consult reported cases, text books and other sources, and may receive opinions orally or in writing, to enable it
to arrive at a decision in the matter...[11].

According to WLSA research, the construction of customary law by the courts had two profoundly negative effects. It has "firstly ... created a rigid, false and distorted version of the "customs' and "practices' of the people which bears but a distant relationship to the reality of peoples' lives". [12] The creation of general rules of customary law also resulted in the rich variety of African customary law being viewed as homogenous. [13] Colonization was accompanied by a loss of power by elders in communities. As observed by Rwezaura,

"What the elders and other witnesses gave as evidence of customary law was a distorted and rigid version of customary law designed to express their ideas of what the law should be and not what it really was.... Their versions were greatly influenced by the elders' anger and frustrations over their loss of political power and the challenges they were facing at the time from women and the young"[14]

Consequently the customary law that was fed into the system was that of perceived versions and not what was on the ground. In this context, "customs and tradition became a means by which the local rulers and family heads bargained with the colonial state for power in their communities." [15] The WLSA research also revealed that the spirit and letter of customary law was the preservation of the family at death of a spouse or parent. [16] The 1997 amendment was therefore an attempt to go back to the customary law as it originally existed.

The situation of women after 1980

The new government in 1980 chose to maintain legal pluralism in the new Constitution through section 89 of the Lancaster House Constitution as stated above. The effect of this section was to maintain customary law and general law as operating side by side. Both systems were at par. The new government moved swiftly to put in place a choice of law criteria that was not based on race. This came in the form of the Customary Law and Primary Courts Act of 1981 [17] that introduced a new criterion for the application of customary law. Section 3 of this act provided as follows:

3. (1) Subject to the provisions of this section and any other enactment, unless the justice of the case otherwise requires- (a) customary law shall be applicable in any civil case where- (i) the parties have expressly agreed that it should apply; or

(ii) having regard to the nature of the case and surrounding circumstances, it appears that the parties have agreed it should apply; or

(iii) having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should be apply; and

(b) the general law of Zimbabwe shall be applicable in all other cases.

Surrounding circumstances have been defined as the mode of life of the parties, the subject matter of the case, the understanding by the parties of the provisions of customary law or the general law of Zimbabwe as the case may be and the relative closeness of the case and the parties to customary or the general law of Zimbabwe. [18] This seemingly neutral choice of law process is largely based on social class but it did not resolve the issue of legal pluralism. The new Constitution maintains legal pluralism through Section 192.

The legal age of majority (LAMA)

LAMA became law on the 10th of December 1982. Its effect was to bestow full legal capacity on everyone in Zimbabwe upon turning 18 years. Prior to that Act, African women were perpetual minors who needed the
consent of their fathers or a guardian to be able to enter into a contract or sue in the courts.

The first test for LAMA came in the Katekwe vs. Muchabaiwa case. This case highlighted the tensions between customary law and general law. In that case, the Supreme Court held that due to LAMA, a father of an African woman who reached the age of 18 had no *locus standi* to sue for seduction damages. Rather, it was the seduced woman herself who could sue in her own right. The then Chief Justice also stated *obiter* that an African father could no longer claim *lobola* (bride price) for a major daughter as follows;

“As I see it, what the Legal Age of Majority Act has done with regard to roora is this: The major daughter will say to her father, "Father I want to get married, You have no right to stop me. I do not require your consent because I have majority status. But if you want lobola you are free to negotiate with my prospective husband. If he agrees to pay roora that is a contract, an agreement between you and my prospective husband.....If he refuses to pay roora, I shall go ahead with my marriage"[19]"

On the face of it, African women had been emancipated by LAMA but in reality, the Katekwe case highlighted the power struggle between general and customary law. Both have competing claims and it was made clear in the case that an African father still maintained the right to sue under customary law for a daughter who is seduced whilst still a minor, that is, below the age of 18 years. The challenge posed by the power struggle is made more poignant by the observation that,

“The Chief Justice’s conclusion leads to the somewhat ridiculous result that an African minor's rights and duties would, at all times be governed by customary law concepts of minority while on attaining the age of majority by the general law concepts of majority. That would mean that one system of law applies ....as long as a person remains a minor, and another system (the general law) takes over on attainment of majority. African minor girls on attaining the age of eighteen years would “graduate” to a large extent from the operation of customary law”. [20]

In the infamous Magaya vs. Magaya case of 1999 [21] the Supreme Court held that it was not discriminatory for the court to rule that an African woman had no right to inherit property from her late father since the Constitution permitted this discrimination. Other laws that deal with the rights of women include the following:

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<th>Date of commencement</th>
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<tr>
<td>5 July 1907</td>
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<td>1 November 1997</td>
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<td>10 June 1891</td>
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<td>20 June 1986</td>
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<td>12 February 1992 and part 111 November 1997</td>
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<td>1 January 1951</td>
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<td>21 June 1929 Part 11 and 10 June 1891 Part 111</td>
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<td>19 January 1979</td>
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<td>26 June 1992</td>
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It is important to note that some of the laws were enacted during the colonial era and therefore have lost touch with reality. Zimbabwe is a signatory to CEDAW, the AU Optional Protocol to the Rights of Women in Africa and the SADC Protocol on Gender and Development. There is also in place a gender policy that recognises the need to instil values of equality in all facets of life. As stated in the introduction, what remains to be seen is whether a progressive legal framework translates into real change for women's rights. At the time of writing, Zimbabwe is undergoing a process where all laws are being aligned with the provisions of the new Constitution.

Part 2

Demographic and socio-economic characteristics of Zimbabwe

Although the prevalence rate of HIV infection in Zimbabwe declined from around 34% to around 13.4% by 2011, Zimbabwe is still one of the countries worst affected by HIV/AIDS. [22]. By 2009, an estimated 1.1 million adults and children were living with HIV/AIDS. The principal mode of transmission is heterosexual intercourse at 92%.[23] 15% of Zimbabwean adults are infected with women constituting 18% and men 12%. [24] For women the peak age is between 30-34 years at 29% and for men, 45-49 years at 30%. [25] Eight out of 10 women and men believe that a wife is justified in asking her husband to use a condom if she knows that he has an STI. [26] The ZDHS also noted a correlation between marital status and HIV prevalence with high infection rates among widows at 56% and widowers at 61%. [27]

Given the correlation between violence and HIV infection, the study revealed that 30% of women between the ages of 15-49 have experienced physical violence since the age of 15 years. The most common
perpetrator of the violence is a current or former husband and partner. [28] 22% of women who have had sexual intercourse reported that their first sexual encounter was through force and coercion. [29] 27% of women have experienced sexual violence with a former spouse or partner being the most common perpetrator. [30] Four out of five women believe that a husband is justified in beating his wife for among other reasons, refusal to have sexual intercourse with him. [31]

The median age of first marriage for women is 19.7 years and for men it stands at 24.8 years. [32] 11% of currently married women are married to men who are in a polygamous union whilst 5% of men are in a polygamous union. [33] As far as economic empowerment is concerned, 63% of women do not own a house; 27% own a house jointly with someone else; 9% of women own a house in their own right. [34] In terms of women's participation in politics and decision making, the most worrying factor is the fact that in 2008, the percentage of women in Parliament dropped from 34% in 2000 to 18.1%. This means therefore that there are a few women who can influence positive change in the upper echelons of power.

The most poignant factor however remains the disproportionate effect of HIV/AIDS on women with life expectancy for women standing at 47 years and 60% of Zimbabwean adults living with HIV were females. The gap for women aged between 15-24 years is even wider standing at 77%. The reasons still remain rooted in gender inequalities. Therefore, passage of any law that promotes and protects the rights of women such as the Administration of Estates Amendment Act Number 6/97 can potentially reduce the devastating effects of HIV/AIDS on women.

Part 3

Women's inheritance rights in Zimbabwe prior to the Administration of Estates Amendment Act Number 6/97

At independence in 1980 inheritance rights were firmly rooted in one's race as aptly stated by Professor Stewart that, "....at independence, the right to inherit from the estate of a deceased relative to a very large extent depended on the race of the deceased". [35] The immovable property forming part of an estate of a person governed by customary law would be inherited by an heir in their individual capacity through the provision of Section 7 of the then African Wills Act which provided that:

"The heir at African law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will."

The concept of heir was squarely rooted in patriarchal norms as follows:

"This meant that the intestate estate of a deceased African male would go to the eldest son as his heir or in the absence of a son, to the nearest male relative of the deceased.................A surviving wife or wives had no direct access to a share in the estate and were dependant on enforcing the customary law duty of support". [36]

General Law on the other hand favoured the rights of the surviving spouse and children. The LAMA potentially gave African women rights to claim seduction damages if they were 18 at the time of seduction. This victory of sorts also gave African women an opportunity to inherit from their father's estates but it took court intervention to interpret these rights in view of LAMA.

Gains and draw backs through court cases
The interpretation of LAMA in relation to property and inheritance rights revealed a pattern of inconsistency and at times it even depended on who was sitting in the court at that particular time. This did not augur well for the rights of women to inherit as gains made were reversed through court cases as will be shown below.

**Chihowa v Mangwende**

Bursting with confidence in LAMA, the first case on inheritance to interpret the implications on the concept of heirship was the Chihowa v Mangwende case. [37] The Supreme Court unequivocally ruled that due to LAMA, females had acquired the same capacity to inherit as is possessed by male heirs. It was argued that there was nothing in the wording of LAMA which remotely suggests that for the purposes of inheritance, a woman can still be regarded as a perpetual minor. The words used were clear and unambiguous. Therefore a female was appointed heir to her father's estate.

**Vareta v Vareta**

In Vareta v Vareta[38], a differently constituted Supreme Court departed fundamentally from the Chihowa case reasoning without expressly stating whether or not it had overruled the former. The Supreme Court held that one attribute of customary law is generally that the eldest son is the natural heir of his deceased's father's estate. For the court, it followed that where there is a son, he is preferred to the daughter even if the daughter is the elder. The court reasoned that this aspect of customary law remained unaffected by LAMA.

**Mwazozo v Mwazozo**

In the Mwazozo v Mwazozo case, [39] the Supreme Court went further than the Vareta case and looked at the patrilineal nature of the Shona people and went on to state that allowing daughters to inherit would result in son-in-laws benefiting and that women would use their wealth not for the benefit of the deceased's family but for themselves.

**Masango v Masango - Duty of care**

In the Masango v Masango case, [40] the Supreme Court had occasion to discuss the duty of care by the heir that an heir owes a duty of support to the dependants of a deceased person. The duty of care took the form of providing suitable alternative accommodation for the widow and her children in fulfilment of the customary law obligation of care and support. What constituted alternative accommodation was never discussed and this meant that even a home in a rural area would constitute alternative accommodation.

Therefore, the cases discussed above reveal the following factors:

1. That the gains brought about by the Chihowa case of allowing females to inherit from their late father's estate was eroded in the Vareta case.
2. That the eldest male was the preferred heir to the estate and inherited immovable property in their personal capacity.
3. That a widow had no right under customary law to inherit from her late husband's estate.
4. That the heir had a duty of care towards the widow and dependants but this was not clearly defined in terms of immovable property. As long as the heir provided "suitable" accommodation, this would suffice.
Problems with the old law of inheritance under customary law

Perhaps the most compelling case for reform to the old law of inheritance was the Magaya v Magaya case[41] which was a clarion call for action to reform the law. The Magaya case has been well documented by WLSA Zimbabwe[42]. Coming to the Supreme Court as an appeal, the court concluded that the appointment of male heirs remained unaffected by LAMA and expressly overturned the Chihowa v Mangwende judgement. More poignantly the court ruled that even if the practice of preferring male heirs was discriminatory, it did not contravene Section 23 of the Lancaster Constitution that allowed discrimination based on sex in the distribution of a deceased person's estate under customary law. [43]

Venia Magaya looked after her family for most of her life. She contributed to the acquisition of her parent's house and took comfort in her father's words that she would get the house upon his death due to her contribution. At the then Community Court, Venia was appointed heir to her late father's estate. This appointment was set aside on appeal to the then District Court and instead, Nakayi, a half-brother who had made no contribution to the acquisition of the property was appointed heir. Nakayi proceeded to sell the house leaving Venia homeless and heartbroken. [44] The Supreme Court judgment was the last death knell for Venia who shortly thereafter fell sick and passed on.

Venia Magaya's case was heard in the Supreme Court in 1999, two years after the passing of the Administration of Estates Amendment Act but the reason why the law was not applied in that case was because the new act applies to estates of persons who die on or after the 1st of November 1997. The Magaya case is however a clear illustration of why the law needed to change to protect women and children from a patriarchal system that misplaced trust on male heirs.

The other major reason for change was that the WLSA research on inheritance and anecdotal evidence suggested that male heirs upon inheriting immovable property in their own right would swiftly proceed to sell the house. The only legal requirement was that they provide alternative accommodation. The issue was not about the quality of the accommodation but the very fact of providing such. This could mean that dependants and the surviving wife could be moved from an urban area where the children could access schools, health institutions and other amenities much easier to an area that was not yet fully developed. [45]

Part 4

Drivers of change of the law of inheritance

In 1991-1992, WLSA Zimbabwe conducted research on inheritance in Zimbabwe. [46] The research was influenced in part by the need to gather enough views of Zimbabwean society due to the lack of a common position or at the very least a correct position of the customary law of inheritance. In 1987, a Succession Bill had been drafted but it was not pushed through due to divergent views and therefore research was necessary to establish current laws, practices and possible solutions. [47] More importantly:

Media reports gave graphic tales on the plight of women and children on the death of a husband. Women themselves approached Government departments and NGOs for assistance in protecting what they perceived as their rights, on the death of their husbands. It became apparent that there was conflict between the widows expectations, those of in-laws and those of children, especially where there were step children. It seemed that when a person died, especially a male, the in-laws descended on the surviving spouse and took all property and sometimes threw the widow out of her home. [48]

The same realisation on why the legislature brought changes to the law as recognised by Justice Chiweshe in the Chihowa case therefore drove WLSA Zimbabwe to conduct the research.
The WLSA research provided significant data on the inheritance practices and customs of two of the major groupings in Zimbabwe— the Ndebele and the Shona. The study also revealed that, "...the customary law as recorded in the books and as applied by the superior courts is more myth than reality, myths that were self-fuelled and internally reconfirmed by the judicial processes and by academic writers. In this context, it would appear that most of what is today presented as customary law in the field of succession is a distorted and constructed version of custom which bears little resemblance to the practice of the people." [49]

In other words, what the research showed was that the overriding consideration in customary practices of inheritance was the preservation of the estate through an eldest male child but also ensuring that the widow was well looked after and not chased away from her husband's home. Armed with empirical evidence, the legislature passed the Administration of Estates Amendment Act Number 6/97 making the surviving spouse and the children the major beneficiaries of a deceased estate under customary law.

Current customary law of inheritance - Treat or trick?

The amendment act introduced radical changes to the customary law of inheritance. Unlike the heir under the old law who was male and inherited immovable property in their personal capacity, the heir under the new law inherits the deceased persons' name and tsvimbo/intonga[50] and any traditional articles which under customary law, pass on to his heir on the person's death. [51] The act specifically recognises an unregistered customary law union as a full marriage for purposes of inheritance. [52] Under ordinary circumstances a man is not allowed to marry polygamously and monogamously. However one of the challenges that Zimbabwe faces due to dualism on marriage laws is the fact that some men marry under customary law and proceed to marry another wife under general law. If the letter of the law is followed, that means the customary law wife is not recognised since this is considered as bigamy. The act recognises that if a man is married under an unregistered customary law union and without dissolving it he goes on to marry another wife in terms of general law, both shall be regarded as valid marriages for purposes of inheritance. [53] The inheritance pattern is guided by the following: [54]

1. If the deceased person is male and has two or more wives and had one or more children; one-third of his net estate is divided between the surviving wives in the proportions, two shares to the first or senior wife and one third share to the second or other wives. This is based on the assumption that the senior or first wife was present in the deceased's life for much longer and therefore contributed more. The remaining two-thirds are shared between his child or children and in the event that any child predeceased him and left children, they inherit their parent's share. [55] This excludes household goods and contents and immovable property.
2. If the deceased was male and is survived by two or more wives, regardless of whether there are any children or not, in addition to sharing the one third, the wives get the following: if the wives live in separate houses, each wife gets ownership or if that is impracticable, a usufruct over the house that each wife lived in at the time of the deceased's death together with all household goods and contents. If the wives lived together in one house at the time of death, they should get joint ownership of or if that is impracticable, a joint usufruct over the house and household goods and contents in that house.
3. Where the deceased person is survived by one spouse and one or more children, the surviving spouse will get ownership of or if that is impracticable a usufruct over the house which the spouse lived at the time of the deceased's person's death, together with all household goods in the house and a share in the remainder of the net estate.
4. If the deceased person is 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, then one-third of her net estate goes to the surviving husband; the remainder of her net estate devolves around her child or children in equal shares and any descendants per stirpes. [56]
5. If the deceased is not survived by a spouse or child, the net estate goes to the deceased's surviving parents, brothers and sisters in equal shares.
6. If the deceased person is survived by one spouse but no children, the surviving spouse gets ownership of or if that is impracticable a usufruct over the house in which the spouse lived in at the time of deceased's death together with all household goods and contents; half of the remainder of the estate and the balance is shared by the deceased's surviving parents; brothers and sisters if any in equal shares.
7. If the deceased person is not survived by a spouse but had one or more children, the net estate goes to her or his child or children in equal shares and descendants per stirpes.

Significance of the new law of inheritance for women's inheritance rights

The new law of inheritance as confirmed by the WLSA research is premised on preserving the family and ensuring that widows are not evicted by greedy and unscrupulous relatives. The new law though not perfect
is a significant departure from the old law of inheritance that awarded immovable property to a male heir who more often than not proceeded to sell the property and provide mediocre alternative accommodation to the dependants of the deceased person under the guise of providing suitable alternative accommodation. In reality, the new law awards ownership of immovable property or if that is not practical, a usufruct which means that a surviving spouse becomes the new owner or is given the right to stay on the property.

But challenges still abound and if not addressed, they will derail progress on inheritance and property rights in Zimbabwe. The new law presents significant challenges in relation to certain issues such as proving the existence of an unregistered customary law union and the requirement that a spouse must have been physically present at the house at the time of death. Taken to its logical conclusion, it means that a spouse who for one reason or the other was not present would not be entitled to inherit. The High Court has also ruled in the Chimhowa[57] case that the surviving spouse cannot inherit a house to which she made no contribution as this was not the intention of the legislature. In that case dealing with Section 3A of the Deceased Estates Succession Act which also gives ownership of immovable property to a surviving spouse (and is an equivalent to the Administration of Estates Act inheritance under customary law where there is only one wife) the surviving spouse was given a life time usufruct. It is worth noting that Section 3A does not have a clause on impracticability or usufruct.

In the case of Ndoro v Ndoro and Another,[58] there was a dispute as to whether or not the surviving wife was residing at the matrimonial home at the time of death. The surviving wife was employed in another town and hence when her husband passed away, she was not physically present at the matrimonial home at that time. The court ruled that the applicant was not living in the house immediately before the death of her husband and therefore she fell outside the ambit of Section 3A of the Deceased Estates Succession Act. She was therefore only entitled to a child’s share. The Ndoro case demonstrates the challenges posed by lack of clarity in the law. If it is taken to its logical conclusion it may mean that every spouse who did not live in the house immediately before death of the other spouse for whatever reason will only get a child's share. It is the writer's submission that this could not possibly have been the intention of the legislature. It would mean that if a spouse stays in another area for work purposes, they would be taken as having abandoned the matrimonial home.[59]

Part 5

**Impact of the new law of inheritance on women's property and inheritance rights in the context of HIV/AIDS**

In March and April 2011, WLSA Zimbabwe conducted a baseline study on strengthening the legal framework to enhance women’s access to property and inheritance rights in the context of HIV/AIDS. The study revealed the following: property grabbing cases were high among women who are HIV positive as compared to those who are negative. 42% of the respondents who faced property grabbing were women who were HIV positive; 27% were women who are HIV negative; 15% were women who do not know their status and 16% were men. The link therefore between HIV/AIDS and the law remains poignant.

Lack of access to economic resources remains a key driver to infection with HIV. In its research on gender, HIV/AIDS and the law from a rights based approach, [60] Most women have turned to sex work after losing all they had worked for when their husband died and they were disowned by the husband's family. They resort to unprotected sex since it "pays" more. Put simply, the economic hardships that they endure makes them engage in transactional sex. Although some have tried to engage in income generating projects
others are lured back into sex work. The situation has been worsened by the economic down turn in Zimbabwe beginning in 1998. By engaging in unprotected sex, they increase the risk of infection or re-infection with HIV. Therefore, the new law if applied in context will mean that widows are protected not only from property grabbing through the provisions of the Deceased Persons Family Maintenance Act[61] but through ensuring that the wealth that a family works for remains within the family. Thus widows are given economic choices and options.

Conclusion

HIV is no longer just a medical condition but affects a person's socio-economic wellbeing. By putting in place progressive laws on property and inheritance rights, it ensures that women who are disproportionately affected by HIV/AIDS have access to justice which will in turn protect their socio-economic rights. As the adage goes, rights are indivisible and this equally applies to women infected with HIV/AIDS. This is buoyed by the new Constitution which in section 76 recognizes that every Zimbabwean has the right to have access to basic health-care services.

[1] Section 3 ( g)
[2] Section 92
[3] Section 89
[4] Chimhowa and another vs. Chimhowa and others HH-183-12 at page 4 and 5
[5] Chapter 6:02
[6] Section 3A Prior to this, the surviving spouse had no such explicit right to inherit the immovable property
[8] Id
[12] Inheritance in Zimbabwe: Laws, customs and practices
[13] Id
[15] Id
[16] See generally: Inheritance in Zimbabwe: Law, custom and practices

[17] This has since been replaced by the Customary Law and local Courts Act

[18] Section 3 (2)

[19] Page 19


[21] 1999(1) ZLR 100 (S)


[23] Ibid

[24] Ibid page 215


[26] Ibid page 189

[27] Ibid page 221

[28] Ibid page 252

[29] Ibid.


[31] Ibid page 231

[32] Ibid page 47

[33] Ibid

[34] Ibid page

[35] Inheritance in Zimbabwe: The quiet revolution page 8

[36] Ibid pages 11 and 12

[37] 1987(1) ZLR 138

[38] SC 126-90

[39] SC 121/94

[40] SC 66-86
See generally Venia Magaya’s sacrifice: A case of custom gone awry

This particular reference to a deceased’s person estate under customary law has since been repealed but the effect of Section 23 remains the same in that it allows discrimination in matters of personal law.

Op Cit

See note 38 supra

See generally, Inheritance in Zimbabwe: Laws, customs and practices

Ibid page 3

Ibid

Ibid page 63

Knobkerrie

Section 68C

An unregistered customary law union meets all the requirements of a customary law union save for registration. It is given limited recognition in terms of Section 3 of the Customary Marriages Act Chapter 5:07.

Section 68 (3)

Section 68 F

This is known as per stirpes inheritance

See note 37

HH-183-12

HH-198-12

WLSA has filed a case before the High Court seeking a liberal interpretation of Section 3A as a too strict interpretation leads to injustice.

See generally WLSA: Challenging the status quo: Gender, HIV/AIDS and the law in Zimbabwe; A rights based approach

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