A comparative analysis of the position of descendants where a deceased dies intestate and is survived by a spouse or spouses

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ABSTRACT

The order of intestate succession in South Africa is governed by the *Intestate Succession Act* 81 of 1987. Section 1(1)(c)(i) of this Act stipulates that if a deceased is survived by a spouse or spouses as well as descendants, the spouse shall receive either a child's share or an amount determined by the Minister of Justice, which is currently fixed at R250 000.00. The purpose of this study is to determine whether the prescribed fixed amount leads to the preferential treatment of the surviving spouse, sometimes to the detriment of the descendants. This study shows that the majority of estates lodged with the Master of the High Court are intestate, as the available statistics indicate that less than 25% of deceased estates are administered in terms of a will. The available statistics also indicate that the net worth of the majority of South Africans are worth less than R250 000.00, which leads to the conclusion that the descendants are completely excluded in the majority of intestate estates where the deceased was also survived by a spouse or spouses. The importance of this study is supported by section 28(1)(b) and (2) of the *Constitution of the Republic of South Africa*, 1996 which states that children have a right to care and the best interest of a child is of utmost importance in all matters concerning the child. This study also seeks to formulate a possible solution for the problem created by the minimum fixed amount awarded to the surviving spouse or spouses, through a comparative analysis between the South African law of intestate succession and the law of intestate succession in the Canadian province of Quebec. Quebec was chosen for this study because it consists of a mixed legal system, similar to South Africa, and Quebec's modern laws of intestate succession makes provision for both the surviving spouse as well as the descendants. This study focuses on the historic development of the law of intestate succession in both South Africa and Quebec. The purpose of this study is first to determine what lead to the enactment of the *Intestate Succession Act* and secondly to determine whether Quebec's laws on intestate succession could provide a possible solution and if so, whether these laws could easily be transplanted in South Africa. The comparative analysis indicates that South Africa and Quebec share many similarities in both the foundation and historic development of the laws of intestate succession, which suggests that certain of Quebec's laws could easily be transplanted to South Africa's laws.

KEY WORDS: Children; comparative study; Constitution; descendants; dower; inheritance; intestate succession; partners; surviving spouse

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LIST OF ABBREVIATIONS

AEA	*Administration of Estates Act* 66 of 1965
BAA	*Black Administration Act* 38 of 1927
CCLC	*Civil Code of Lower Canada* of 1886
CCQ	*Civil Code of Québec* of 1994
CRDP	Comprehensive Rural Development Programme
GHS	General Household Survey
IOL	Independent Online
ISA	*Intestate Succession Act* 81 of 1987
JCL	Journal of Constitutional Law
MPA	*Matrimonial Property Act* 88 of 1984
MSSA	*Maintenance of Surviving Spouses Act* 27 of 1990
PER	Potchefstroom Electronic Law Journal
SALRC	South African Law Reform Commission

Chapter 1: Introduction

In South Africa the order of succession in estates where the deceased died either without leaving a valid will,[1] or any will at all, or executed a valid will but the will either became wholly or partly inoperative, or the will did not dispose of all the deceased's assets,[2] is provided for in section 1(1)(a) to (f) of the *Intestate Succession Act*.[3] The *ISA* defines an intestate estate as "… any part of an estate which does not devolve by virtue of a will".[4] The purpose of this study is to determine whether the *ISA* gives preferential treatment towards a surviving spouse or spouses, albeit to the detriment of the descendants. Section 1(1)(c)(i) of the *ISA* is therefore of particular relevance for this study. Section 1(1)(c)(i) of the *ISA* stipulates that if the deceased is survived by a spouse as well as descendants, then the spouse will inherit a greater of the child's share or an amount determined by the Minister of Justice, which is currently fixed at R250 000.00.[5]

The rule in the *ISA* is short, concise, and easy to apply. For example, A dies intestate and he leaves behind his wife, B, to whom he was married in community of property[6]

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1 The formalities for a valid will is contained in section 2(1)(a) of the *Wills Act* 7 of 1953.
2 Paleker "Intestate Succession" 44.
3 81 of 1987 (hereinafter referred to as the *ISA*).
4 Section 1(4)(b) of the *ISA.*
5 Reg 920 and 921 in GN R10320 in GG 38238 of 24 November 2014.
6 There are two matrimonial property regimes in South Africa: Marriage in community of property; and marriage out of community of property. Parties are married in community of property if they were married without entering into a valid ante-nuptial agreement, prior to concluding the marriage, this type of marital regime is governed by ss 14 to 20 of the *Matrimonial Property Act* 88 of 1984 (hereinafter referred to as the *MPA*). A marriage in community of property means that the spouses will have a joint estate, they will share equally in their communal property and in both profit and loss. Parties are married out of community of property if they concluded a valid ante-nuptial agreement, prior to concluding the marriage, which will state that community of property and community of profit and loss is excluded from the marriage. A marriage out of community of property can either include or exclude the accrual system. The accrual system automatically applies to marriages out of community of property unless the ante-nuptial agreement specifically excludes the accrual system, in terms of s 2 of the *MPA*. The accrual is defined by s 4(1)(a) of the *MPA* as the amount by which the net value of the spouse's estate at the dissolution of the marriage exceeds the net value at the conclusion of the marriage. The spouse whose estate shows the lesser growth shall have an accrual claim against the other spouse at date of divorce or against the deceased spouse's estate, if the marriage devolves due to death, in terms of s 3(1) of the *MPA*. Parties may also conclude a post-nuptial agreement in terms of s 21 of the *MPA*, in order to change their marital regime. There are three different laws in South Africa which regulate the validity of marriages in South Africa and contain the requirements for how marriages may, legally, be concluded, these are the *Marriage Act* 25 of 1961, the *Recognition of Customary Marriages* Act 120 of 1998 and the *Civil Union Act* 17 of 2006.

and their two children, AB1 and AB2. A has an estate worth R1 000 000.00. B receives R500 000.00 in respect of her share of the joint estate, due to the marriage in community of property. The remainder of the estate is administrated by awarding R250 000.00 to B and R125 000.00 to each of the children in terms of section 1(1)(c)(i) of the *ISA*.

The outcome, however, is less ideal when applying the same principles to the following example: X is married in community of property to Y. X has two children born from a previous relationship, named X1 and X2. X dies without leaving a valid will. The only asset in X's estate is a house of which she obtained ownership in terms of the Comprehensive Rural Development Programme,[7] valued at R200 000.00. X1 is 25 years old and X2 is 17 years old at the date of X's death. Y never legally adopted the children, as is required in terms of the law.[8] Y will receive 50% of the estate due to their chosen matrimonial property regime, which amounts to R100 000.00 and he will receive the remaining R100 000.00 in terms of section 1(1)(c) of the *ISA*, because it is less than R250 000.00. The children of the deceased from a previous marriage will, therefore, not receive anything. Although there may exist a moral obligation on Y to care for, or maintain the children, there is no legal obligation on him to do so, as he never legally adopted them.

In terms of section 90 of the *Administration of Estates Act*,[9] a minor child[10] has the right to lodge a maintenance claim against the deceased estate at the office of the Master of the High Court. This is achieved by completing a J341[11] form and lodging

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[7] Hereinafter referred to as CRDP; Cabinet approved the CRDP on 12 August 2009; South African Government (date unknown) https://www.gov.za/about-government/government-programmes/comprehensive-rural-development-programme-crdp.

[8] Section 231(1) of the *Children's Act* 38 of 2005 (hereinafter referred to as the *Children's Act*).

[9] 66 of 1965 (hereinafter referred to as the *AEA*).

[10] Section 17 of the *Children's Act* states that a child shall become a major once he or she has reached the age of 18 years.

[11] A J341 form is an application form for maintenance which must be completed and lodged at the Master's office. The form must be signed by the applicant, the bank official, and a responsible person. The applicant is the person who is maintaining the minor child or the child himself if he is a major, the bank official confirms the banking details in which the maintenance should be paid and the responsible person confirms that the minor is in the care of the applicant. A responsible person can be a maintenance officer, schoolteacher, Minister of Religion, social worker or tribal authorities. The applicant must mark what he is applying for (allowance, school fees, hostel fees, travel fees, clothing, stationary, school uniform and other), supporting documents must be

the application with the Master of the High Court, along with any proof of the child's reasonable maintenance needs.[12] A child that has reached the age of majority can also lodge a maintenance claim with the Master of the High Court if he[13] can prove that he requires support.[14] The maintenance of children takes precedence over payments to heirs and legatees.[15] However, maintenance claims of surviving spouses enjoy the same order of preference as that of a dependent child, and if there are competing claims, those claims are proportionately reduced.[16] This means that the surviving spouse, Y, may also lodge a maintenance claim against the estate, which, if successful, will reduce the maintenance claims of the children, X1 and X2.

However, if the estate has already been administered, the children must then institute legal action against the heir or heirs by way of the *condictio indebiti*.[17] In this instance, the children must prove the amount that was overpaid to the heir or heirs.[18] Unfortunately, this is not a viable option for either of the children as the estate does not contain any funds. The Master of the High Court does not have the judicial power to attach the immovable property and sell it in execution, in order to maintain the children, nor can the Master of the High Court order that any share of the property be transferred to the children.[19] Additionally, the children may not be in the financial position to institute legal action against the heir, namely Y. If the children were to institute legal action against the surviving spouse, or the deceased estate, then it would be possible for Y to argue that the children must first approach

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attached to the application, such as quotes, invoices etc). The application will also contain the particulars of the applicant, the particulars of the minor and the name of estate and the estate reference number (which is the number that appears on the letter of authority or the letter of executorship). The minor must also sign the application form, if the minor is 10 years or older.

12 Section 90 of the *AEA*; Department of Justice and Constitutional Development (date unknown) http://www.justice.gov.za/master/m_forms/J341-ApplicationMinor.pdf.

13 Any reference to the male gender includes the female gender, but for the sake of convenience pronouns referring to male gender will be used such as he or him.

14 *Hoffmann v Herdan* 1982 2 SA 274 (T) para 49.

15 *Christie v Estate Christie* 1956 3 SA 383 (N) para 387.

16 Section 2 of the *Maintenance of Surviving Spouses Act* 27 of 1990.

17 *Bank v Sussman* 1968 2 SA 15 (O) para 294; *Conditio indebiti* is an action based on unjust enrichment, the plaintiff must allege and prove an enforceable claim in order to be entitled to sue under the *conditio indebiti*.

18 *Van Zyl v Serfontein* 1989 4 SA 741 (C) para 746.

19 Department of Justice and Constitutional Development 2019 http://www.justice.gov.za/master/about.htm.

the surviving parent, if there is one, for maintenance, before the children may claim against the spouse or the estate.[20]

The abovementioned scenario is a reality for a large group of South Africans as indicated in a survey published in 2017.[21] According to this survey, more than 30,4 million South Africans are living in poverty.[22] Also, 13,6% of the South African population own CRDP houses or subsidised housing.[23] According to Credit Suisse's Global Wealth Report of 2017 68% of South Africans fall within the lowest wealth category, which is estimated at R117 000.00.[24] The latest study published by the Department of Justice and Constitutional Development during 2016, determined that in 2015, on average, only 23.37% of deceased's left a will.[25] This means that the majority of South Africans die intestate, and that the majority of estates are, therefore, administered in terms of the *ISA*.

In light of the available statistics, it is highly probable that the value of most deceased estates would be worth less than R250 000.00.[26] To the detriment of the descendants, as in the above scenario, the surviving spouse or spouses will therefore always inherit the entire intestate estate of the deceased, thus leaving the descendants with no inheritance. Therefore, the prescribed amount received by the surviving spouse or spouses, in terms of the *ISA*, may lead to the inequitable treatment of the descendants of the majority of South Africans.

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[20] Hahlo *The South African Law of Husband and Wife* 409.

[21] Statistics South Africa *Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015*.

[22] Statistics South Africa *Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015* 26.

[23] Statistics South Africa *General household survey* 11.

[24] Credit Suisse Research Institute 2017 https://www.credit-suisse.com/about-us-news/en/articles/news-and-expertise/global-wealth-report-2017-201711.html; Korhonen 2018 https://africacheck.org/factsheets/factsheet-wealth-south-africa/.

[25] Office of the High Court of South Africa *A Guide 2016* 29. Note that at the time of this study, these were the latest statistics available.

[26] There are no exact statistics regarding the estimated value of most deceased estates, at the time of this study, the statement made is derived from statistics taken from Statistics South Africa *Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015,* Credit Suisse's Global Wealth Report of 2017 and Statistics South Africa *General household survey.*

Considering the above, it may be suggested that the *ISA* favours the spouse over the descendants where the value of the estate is less than R250 000.00. The only legal recourse afforded to such descendants is a maintenance claim against the estate, or alternatively an unjustified enrichment claim against the heir.[27] These options are, however, only available if the descendants were dependant on the deceased. The descendants who were not dependant on the deceased do not have any legal recourse and will not be entitled to any inheritance, as the estate is too small for both the spouse and the descendants to inherit.

The *Constitution of the Republic of South Africa*, 1996[28] states that children have a right to care and that the best interest of a child is of utmost importance in all matters concerning the child.[29] The statistics provided above indicate that a large group of South Africans live in poverty and that the prescribed amount that the spouses receive in terms of the *ISA* will almost always lead to the exclusion of the descendants in these poverty-stricken areas. The *ISA* favours the surviving spouses over the descendants where the estate is worth less than R250 000.00. Therefore, *ISA* may potentially infringe on the rights of children, as well as adult descendants, who hail from impoverished families. Without a doubt, this potential infringement or limitation of rights must be addressed.

Chapter two of this study focuses on a desktop review of the historical development of the law of intestate succession and chapter three consists of an analysis of the *ISA*. The purpose of these two chapters are to determine whether the *ISA* is in line with the original intention of the legislator. Intestate succession in South Africa was previously based on the common law, as well as the *Succession Act*[30] which was deemed to be complex, unfair, and inequitable.[31] Our common law dictates that blood relatives are the natural heirs,[32] and consequently excluded spouses. It appears the legislature has attempted to rectify the inequality that the surviving

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27 Ndaba 2012 http://www.derebus.org.za/child-maintenance-parents-death/.
28 Hereinafter referred to as the *Constitution*.
29 Section 28(1)(b) and 28(2) of the *Constitution*.
30 13 of 1934 (hereinafter referred to as the *Succession Act*).
31 De Waal "Intestate Succession in South Africa" 258.
32 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 30.

spouses faced, by enacting the *ISA* as a remedial measure. One of the consequences of this development appears to be the unintended discrimination of descendants who are excluded from inheritance where the deceased estate is too small for them to inherit together with the surviving spouse or spouses.

Section 39(1) of the *Constitution* provides that courts, tribunals and forums may take foreign law into consideration when interpreting the *Bill of Rights*.[33] Section 39(2) of the *Constitution* further provides that the spirit, purport and objects of the *Bill of Rights* must be promoted when interpreting any legislation, or when developing the common law or customary law. This means that the courts may also consider foreign legislation when interpreting any legislation, or when developing the common law or customary law.[34] Chapter four of this study therefore encompasses a legal comparative approach, where the intestate laws of Canada, specifically the laws of Quebec, are compared to that of South Africa. The purpose of this comparison is to determine whether the intestate succession laws of Quebec can contribute to alleviating the discriminatory treatment of children, as created by the *ISA*, albeit unintentionally. Quebec is researched in this study as Canada also has a mixed legal system, similar to that of South Africa.[35] Furthermore, Quebec's law of intestate succession's developmental history has certain similarities to that of South Africa. The surviving spouses in Canadian provinces have, to some extent, faced similar types of discrimination than those in South Africa, prior to the enactment of the *ISA*.[36] However, their modern law of intestate succession differs from that of South Africa and it has been developed to such an extent that it makes provision for both the surviving spouse as well as the descendants.[37]

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[33] The *Bill of Rights* is contained in Chapter 2 of the *Constitution* and consists of s 7 to s 39.
[34] Goitum 2020 https://www.loc.gov/law/help/domestic-judgment/southafrica.php#_ftnref7.
[35] A mixed legal system is a legal system that developed from two or more legal families. See Mousourakis *Comparative Law and Legal Traditions* 152.
[36] Smith "Intestate Succession in Quebec" 53.
[37] Smith "Intestate Succession in Quebec" 53.

Chapter 2: Historical Development of Intestate Succession in South Africa

South Africa has a long history regarding the development of intestate succession, stretching from the late seventeenth century to the late twentieth century.[1] The historical development of the law of intestate succession in South Africa is discussed first, in order to explain why the *ISA* has been enacted. South African law comprises of a collection of "transplanted-laws" which contains a mixture of Roman-Dutch law, English common law, as well as customary law.[2] The *ISA* is a perfect example of the mixed legal system found in South Africa. Prior to 1994 the *ISA* consisted primarily of a combination of the rules contained in Roman-Dutch law, common law,[3] as well as the repealed *Succession Act*.[4] The *ISA* was further shaped through various precedents as produced by the Courts,[5] after the enactment of the *Constitution*. As mentioned, the common law and the *Succession Act* was deemed to be complex, unfair and inequitable, which lead to the enactment of the *ISA*.[6] The principles of these laws are discussed in this chapter in order to determine why the enactment of the *ISA* was necessary, as well as the purpose of the *ISA*.[7]

2.1 Intestate Succession Prior to the Intestate Succession Act

The South African law of intestate succession stems from two legal systems found in Dutch law, namely *Aasdomrecht*[8] and *Schependomsrecht*.[9] These two systems were introduced into South Africa, from Holland, when the Dutch East India

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1 De Waal "Intestate Succession in South Africa" 249.
2 Rautenbach 2008 *JCL* 119.
3 The common law refers to the law that consists of customs and precedents rather than written law contained in statutes. The common law principle referred to here is that the blood relatives are the natural heirs.
4 13 of 1934 (hereinafter referred to as the *Succession Act*).
5 The relevant case law is discussed in paras 2.4 and 2.5 below.
6 De Waal "Intestate Succession in South Africa" 258.
7 De Waal "Intestate Succession in South Africa" 258.
8 The *Aasdomrceht* is an old Fries legal system and is primarily based on the principle that the closest blood relative will inherit; a more detailed discussion will follow.
9 The *Schependendomsrecht* is an old Fries legal system and based on three main principles *goed klimt niet geern*, *het goed moet gaan aan de zyde daar van het ghekomen is* and representation *per stirpes add in finitum,* a detailed discussion will follow. See De Waal and Schoeman-Malan *Law of Succession* 14; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 22.

Company established a refreshment station in the Cape in 1652.[10] *Schependomsrecht* had a greater influence in the South African law, however, the law does exhibit traces of the *Aasdomsrecht* as well, and that is why both systems are discussed.[11]

The *Aasdomsrecht* was predominantly used in the northern side of the Ysel River in Holland.[12] The rules of intestate succession were based on the principle of *het naaste bloed erft goed*, which means that the closest blood relatives are eligible to inherit.[13] The principle is applied as follows: If the deceased died leaving behind descendants, the descendants would then inherit. In this context, descendants consists of children, grandchildren, great-grandchildren and onward. If the deceased died without leaving behind descendants, then the deceased's ascendants would inherit. The heirs would therefore be the deceased's parents or grandparents. Lastly, if the deceased died without leaving behind any descendants or ascendants, then the collaterals would inherit the deceased's estate. In this context collaterals are the siblings of the deceased.[14] The estate would be shared in equal parts between the heirs who were in the same degree of relationship to the deceased.[15] An example of this is as follows: A dies intestate. A is survived by the following family members: His wife, B; his granddaughter C; his brother E and his mother F. The sole heir, in terms of the *Aasdomsrecht*, is the descendant C. If C was predeceased, then the ascendant F would inherit. Lastly if C and F were both predeceased then the collateral E would inherit. The surviving spouse will only inherit if the deceased did not leave behind any blood relatives.[16]

The *Schependomsrecht* was predominantly used in the southern side of the Ysel River of Holland.[17] The division of the estate in terms of the *Schependomsrecht* is explained in the following example. A is the deceased and he is survived by his wife

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10 Rautenbach 2008 *JCL* 120.
11 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 22.
12 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 30.
13 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 30.
14 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 30.
15 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 31.
16 Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 564.
17 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 33.

B, child C, grandchild D1 (descendant from predeceased child D) and greatgrandchild EE1 and EE2 (descendants from predeceased child E and grandchild E1). C receives one third of the estate, D1 represents D and receives one third of the estate, EE1 and EE2 represent E and E1 and both receive one sixth of the estate. C would however have been the sole heir in terms of the *Aasdomsrecht*.[18] If the deceased was survived by both his parents and siblings but no descendants, the parents would inherit in equal shares. This is based on the principle of *het goed moet gaan aan de zyde daar van het ghekomen is*.[19] This principle stems from the idea that half of a person's estate came from his mother and the other half from his father.[20]

If the deceased was survived by only one parent and siblings, the siblings on the side of the deceased parent would inherit in equal shares.[21] This is based on the principle that *geen goed komt van een die left*,[22] which means that the deceased, presumably, did not receive anything from the parent who is alive and that is why the entire estate goes to the heirs of the predeceased parent.[23] If the deceased was survived by grandparents and siblings, then half of the estate will go to the children of the predeceased father and the other half would go to the children of the predeceased mother.[24] The grandparents would not inherit if there were siblings, as the principle of *goed klimt niet garen*[25] was applicable. Accordingly, the siblings or collaterals are the preferred heirs over the grandparents or ascendants.[26] This principle differs from the *Aasdomsrecht*, which prefers ascendants over collaterals, as illustrated above. However, if both the parents of the deceased were predeceased and the deceased was, for example, survived by his grandparents on his mother's

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[18] See Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 32-33. Because the *Aasdomsrecht* is based on the principle that the closest blood relative will inherit, C is the closest blood relative and therefore excludes F, H and I.

[19] When translated, this principle means that property must go back from whence it came.

[20] Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 564; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 36.

[21] Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 564.

[22] When translated, this principle means that nothing comes from one who lives.

[23] Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 564.

[24] Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 564.

[25] When translated, this means that property does not like to climb, which meant that collaterals are preferred heirs over ascendants.

[26] De Waal "Intestate Succession in South Africa" 251.

side and a half-brother on his father's side, then the estate will be divided in equal shares between the predeceased parents.[27] The half-brother will receive the father's share and the grandparents will receive the mother's share in equal parts. The surviving spouse would still not inherit, even if the deceased did not leave any blood relatives, as the deceased's estate will go the *fiscus*.[28] It seems that the principles of the *Schependomsrecht* were similar to the *Aasdomsrecht*, in that heirs were also based on blood relations. However, the main difference is that representation *per stirpes* could take place in terms of the *Schependomsrecht* and the surviving spouse could never inherit, irrespective of whether the deceased did not leave behind any blood relatives,[29] as against *per capita* in the Aasdomsrecht.

The two different systems in one province caused some confusion and the *Political Ordinance* of 1580[30] as well as the *Interpretation* of 1594[31] was enacted as an attempt to unify the system of intestate succession in the province of Holland and West Friesland.[32] The *Ordinance* stated that representation in descendants would take place *per stirpes ad infinitum*, as is the case in the *Schependomsrecht*.[33] It repealed the common law to such an extent that it was in conflict with the *Ordinance*.[34] The *Ordinance* differed from the *Schependomsrecht* in that it limited representation in the other classes (collaterals and ascendants) to relatives removed up to and including four degrees from the deceased.[35] Relatives who were five degrees and more, inherited *per capita*[36] on the basis of the degree of relationship to the deceased, which is the same as the *Aasdomsrecht*.[37] The citizens of Northern Holland were dissatisfied by this attempt to unify the *Aasdomsrecht* and

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27 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 40.
28 The *fiscus* is the state treasury or the treasury of the emperor. See Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 564.
29 Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 564.
30 Hereinafter referred to as the *Ordinance*.
31 Hereinafter referred to as the *Interpretation*.
32 De Waal "Intestate Succession in South Africa" 254; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 45; De Waal and Schoeman-Malan *Law of Succession* 14.
33 Section 20 of the *Ordinance*; De Waal "Intestate Succession in South Africa" 254.
34 Section 19 of the *Ordinance*; De Waal "Intestate Succession in South Africa" 254.
35 Sections 22 and 28 of the *Ordinance*; De Waal "Intestate Succession in South Africa" 254.
36 *Per capita* means that each heir in their class will each inherit in equal share.
37 Section 28 of the *Ordinance*; De Waal "Intestate Succession in South Africa" 254.

Schependomsrecht and the *Aasdomsrecht* was reinstated by the *Placaat* of 1599.[38] The *Placaat* never became part of South African law and is therefore not discussed in this research.[39] In the Dutch East Indies and its outstations, the question arose of whether the *Aasdomsrecht* or *Schependomsecht* should be applied. The *Octrooi* of 1661[40] was consequently promulgated to address this question.[41]

The *Octrooi* introduced the *Schependomsrecht*, as contained in the *Ordinance*, to the Cape, as the Cape was an outstation for the East Indies.[42] The *Octrooi* differed from the *Ordinance* in that it declared that the surviving parent was now a competent intestate heir, which was also known as the *New Schependomsrecht*.[43] The *Schependomsrecht* excluded surviving spouses, as well as adopted children, as competent heirs as this system was based on blood relationships. Various legislative interventions were enacted to address these exclusions, which are discussed below.

The *Natal Act*[44] attempted to address the discrimination faced by women who were married out of community of property, as they were excluded as a competent heir in terms of the *Octrooi*. The *Natal Act* stated that the widow, to whom the deceased was married out of community of property, was an intestate heir.[45] The widow would receive half of the estate if the deceased did not leave any descendants, and she would receive one third of the estate if there were descendants.[46] The *Natal Act* only made provision for widows who were married out of community of property. The reason therefor was presumably because women who were married in community of property were already entitled to half of the joint estate, due to their marriage in community of property. The *Natal Act* was repealed by the *Succession Act* which declared the surviving spouse as a competent heir. The *Succession Act*

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38 De Waal and Schoeman-Malan *Law of Succession* 14.
39 De Waal and Schoeman-Malan *Law of Succession* 14.
40 Hereinafter referred to as the *Octrooi*.
41 Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 565.
42 Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 565.
43 De Waal "Intestate Succession in South Africa" 255.
44 22 of 1863 (hereinafter referred to as the *Natal Act*).
45 Section 5 of the *Natal Act*.
46 Section 5 of the *Natal Act*; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 67-68.

appeared to be an attempt to rectify the discrimination faced by the spouses who were excluded by the *Natal Act*, as well as the *Octrooi*.[47]

The *Succession Act* differentiated between four scenarios. The first scenario is where the deceased is survived by a spouse to whom he was married in community of property, as well as descendants.[48] The surviving spouse shall receive a child's share or so much as does not exceed R50 000.00[49] in value, together with the surviving spouse's share in the joint estate, whichever is the greater. The second scenario is where the deceased was survived by a spouse to whom he was married out of community of property, as well as descendants.[50] The spouse would receive R50 000.00 or a child's share, whichever is the greater.[51] The third scenario is where the deceased is survived by a spouse, whether they were married in or out of community of property, as well as a parent or sibling (whether full or half-blooded).[52] The spouse shall receive one half share of the deceased's estate or R50 000.00, whichever is the greater amount.[53] The fourth and final scenario is where the deceased is survived by his spouse, there are no descendants, siblings or parents, the surviving spouse will be the sole heir in this scenario.[54] It is important to consider who qualified as a descendant, as the number of descendants would influence the calculation of the distribution of the estate where the deceased was survived by a spouse as well as descendants.

Adopted children were initially not recognised as competent heirs because they were not related to the deceased by blood. The idea of adoption was a foreign concept in Roman-Dutch Law and only obtained legal recognition in South Africa in 1923.[55]

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47 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 68.
48 Section 1(1)(a) of the *Succession Act*; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 68.
49 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 68; The amount was initially £600, it was changed to R10 000.00 in terms of s 15 of the *General Law Further Amendment Act* 93 of 1962, and finally changed to R50 000.00 in terms of s 1 of the *Succession Amendment Act* 44 of 1982.
50 Section 1(1)(b) of the *Succession Act*.
51 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 69.
52 Section 1(1)(c) of the *Succession Act*.
53 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 69.
54 Section 1(1)(d) of the *Succession Act*.
55 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 83.

The *Aanneming van Kinderen Wet*[56] legally acknowledged and regulated adoption, but it did not afford adopted children the right to inherit.[57] The *Aanneming van Kinderen Wet* was repealed by the *Children's Act* of 1937. However, the principles regarding intestate succession remained the same.[58] Adopted children were recognised as competent heirs of their adoptive parents with the enactment of the *Children's Act* 33 of 1960, which repealed the *Children's Act* of 1937.[59] The only exclusion was that the adopted child could not inherit from any blood relations of his adoptive parents.[60] Adopted children were fully recognised as descendants of the adoptive parents with regards to intestate succession, upon the enactment of the *Child Care Act*.[61] The previous exclusion was no-longer applicable and section 20(2) of the *Child Care Act* stated that an adopted child shall, for all purposes, be deemed to be the legal child of the adoptive parent. The *Child Care Act* was repealed and replaced by the *Children's Act* 38 of 2005. This is the current legislation regulating the rights of children, and adopted children are still deemed to be the legal children of the adoptive parents for all purposes, in terms of section 242(3). The common law as well as legislation did not, initially, only exclude adopted children and it also distinguished between children born out of wedlock, in respect of intestate succession. Extra-marital children of the father were not recognised as legitimate heirs.[62] However, the extra-marital children of the mother were regarded as legitimate heirs.[63] The discrimination faced by extra-marital children regarding intestate succession was only rectified with the enactment of the *ISA* in 1988.

The law of intestate succession is described as a "rather complex legal mosaic"[64] as the law was established by various common-law principles, taken from the *New Schependomsrecht*, such as *het naaste bloed erft goed*, *het goed moet gaan aan*

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56 25 of 1923 (hereinafter referred to as the *Aanneming van Kinderen Wet*).
57 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 83.
58 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 83.
59 Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 83.
60 Section 74 of the *Children's Act* 33 of 1960; Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 83 – 84.
61 74 of 1983 (hereinafter referred to as the *Child Care Act*); Van der Merwe and Rowland *Die Suid-Afrikaanse Erfreg* 96.
62 Green v Fitzgerald 1914 AD 88; De Waal "Intestate Succession in South Africa" 257.
63 De Waal "Intestate Succession in South Africa" 257.
64 Corbet, Hofmeyer and Kahn *The Law of Succession in South Africa* 566.

de zyde daar van het ghekomen is, *goed klimt niet garen*, and three Dutch laws which are the *Political Ordinance*, the *Interpretation* and the *Octrooi*, and one statute, the *Succession Act*.[65] The *Succession Act* itself seemed to be overly complex as it distinguished between four different scenarios. These scenarios depended on the applicable marital regime of the deceased, which was in or out of community of property, and whether the deceased was survived by descendants, parents and/or siblings.[66] The law of intestate succession was not only difficult to establish and complex but it also contained inequities, as illustrated by the discrimination faced by fathers and their extra-marital children.[67] These serve as some of the reasons inspiring the calls for the reform of the law of intestate succession.[68]

One of the most influential contributions that aided the reform of the law of intestate succession was made by Van Der Westhuizen, who pleaded for the simplification and codification of the law of intestate succession.[69] Van Der Westhuizen argued that any codification of the intestate succession should be "generally fair" and not "unnecessarily complicated" nor "unnecessarily different" from the existing system.[70] The South African Law Commission[71] heeded to the calls for reform and launched an investigation. This resulted in the Working Paper, Law of Intestate Succession,[72] published in 1983 and the Review of the Intestate Succession Report[73] published in 1985.[74] In its Report, the South African Law Commission expressed the foundation on which the new dispensation should be based:

> The rules of intestate succession should be clear and easy to apply. Although the ideal is that the rules should always operate fairly, rules should not be made for unusual cases if such rules are complicated or difficult to apply. The way in which testators dispose of their

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65 De Waal "Intestate Succession in South Africa" 258
66 De Waal "Intestate Succession in South Africa" 256.
67 De Waal "Intestate Succession in South Africa" 258.
68 De Waal "Intestate Succession in South Africa" 258.
69 Swanepoel *Gedenkbundel* 26; De Waal "Intestate Succession in South Africa" 258.
70 Swanepoel *Gedenkbundel* 26; De Waal "Intestate Succession in South Africa" 258.
71 Now known as the South African Law Reform Commission (hereinafter referred to as the SALRC).
72 South African Law Commission, Working Paper 2, *Law of Succession: Intestate Succession*.
73 South African Law Commission, *Review of the Law of Succession: Intestate Succession Report* (hereinafter referred to as the Report).
74 De Waal "Intestate Succession in South Africa" 258.

> estates in their wills gives an indication of what the community regards as equitable rules for succession.[75]

The recommendations in both the Working Paper and the Report were accompanied by empirical research on the contents of wills, which were lodged at the Master's office.[76] Presumably, the purpose was to determine what the community regards as equitable rules for succession.[77] This all lead to the enactment of the *ISA*, a piece of legislation that contains all the relevant legal rules of intestate succession.[78]

2.2 After the Enactment of the Intestate Succession Act

The *ISA* came into operation on 18 March 1988, and repealed and replaced the *Octrooi* as well as the *Succession Act*. In terms of the *ISA*, the surviving spouse is the sole heir if the deceased did not leave behind any descendants.[79] The surviving spouse will receive an amount of the intestate estate that does not exceed the amount fixed by the Minister of Justice, which is currently fixed at R250 000.00,[80] or a child's share, whichever is the greater value, and the descendants will receive the residue of the estate.[81] The descendants will receive the entire estate if the deceased did not leave a surviving spouse.[82] The *ISA* differs from the *Succession Act* in that it makes provision for a higher minimum fixed amount that the spouse must receive, and the surviving spouse does not share the intestate estate with the parents or the siblings of the deceased. Before its most recent amendments, the *ISA* did, however, continue to exclude partners in same-sex unions, as well as spouses married in terms of customary law, and Muslim and Hindu rites. As

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75 The Report para 3.4; De Waal "Intestate Succession in South Africa" 258.
76 De Waal "Intestate Succession in South Africa" 258.
77 It should be noted that Black South Africans had limited freedom of testation in terms of ss 23(1)-(2) of the *Black Administration Act* 38 of 1927, which means that the empirical studies done on the contents of wills could not reflect the true will and intention of the majority of South Africans, and that the research was therefore incomplete. This, however, falls outside of the scope of this study and will not be discussed further.
78 De Waal "Intestate Succession in South Africa" 259.
79 Section 1(1)(a) of the *ISA*.
80 The amount was R125 000.00, but increased to R250 000.00 on 24 November 2014.
81 Sections 1(1)(c)(i) and (ii) of the *ISA*.
82 Section 1(1)(b) of the *ISA*.

illustrated in paragraph 2.3 below, the *ISA* specifically excluded black South Africans from its application.

2.3 The Application of Customary Law in Intestate Succession

Customary law is expressly recognised in section 211 of the *Constitution*. Section 30 of the *Constitution* contains one's right to participate in cultural life and section 31 protects the right to enjoy one's culture. This emphasises the recognition that customary law enjoys in South Africa. The estates of black South Africans were previously excluded from the *ISA*, as section 1(4)(b)(ii) stated that the *ISA* would not be applicable if "section 23 of the *Black Administration Act* is applicable."[83] Section 23 of the *BAA* governed the customary testate and intestate succession of black South Africans. The intestate estate would either be distributed in terms of customary law or in terms of the regulations of the *BAA*.[84] There are numerous customary law systems governing intestate succession in the context of South African customary law. Two distinct features are however prominent in all systems.[85] These two features include the principle of male primogeniture, which refers to the principle that the first-born male must inherit the entire estate, as well as the principle that the male descendants are favoured over the female descendants.[86]

Consequently, black women not only suffered discrimination under customary law rites, but also under the *ISA* and the *BAA*. The Courts seemed reluctant to infringe in the cultural rights of the indigenous communities, as protected under the *Constitution*, especially when considering western norms and values, such as gender equality.[87] This is seemingly evident in the matter of *Mthembu v Letsela*.[88] The question before the Court in the *Mthembu* case concerned whether or not the customary rule of succession, primarily the principle of male primogeniture, was discriminatory towards black women, and whether it contravened the equality

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[83] Black Administration Act 38 of 1927 (hereinafter referred to as the *BAA*).
[84] Schoeman-Malan 2007 *PER* 10.
[85] Schoeman-Malan 2007 *PER* 10.
[86] Schoeman-Malan 2007 *PER* 10.
[87] Rautenbach 2008 *JCL* 122.
[88] *Mthembu v Letsela* 2000 3 SA 867 (SCA) (hereinafter referred to as *Mthembu*).

provisions of section 8 of the *Interim Constitution of South Africa*,[89] which is now contained in section 9 of the *Constitution*.[90] The deceased was survived by his extra-marital daughter, his father, mother and three sisters.[91] The deceased's property was inherited by his father, in terms of the customary law rules of succession and in accordance with Regulation 2 of the *Regulations of the Administration and Distribution of the Estates of Deceased Blacks*.[92] The mother of the extra-marital daughter of the deceased approached the Court for an order declaring the customary rule of male primogeniture, as well as Regulation 2 of the *Regulations for the Administration and Distribution of the Estates of Deceased Blacks,* as unconstitutional.[93] The Court *a quo* held that the deceased's customary male heir had an obligation in terms of customary law to maintain the plaintiff and her daughter, which kept the principle of male primogenitor in line with the *Constitution*.[94] The Supreme Court, however, did not decide the matter on gender and based its decision on the legitimacy of the daughter, as any illegitimate child is disinherited in terms of customary law.[95] The discrimination experienced by woman in respect of the customary law rules of succession was ultimately rectified in the Constitutional Court case of *Bhe v Magistrate Khayelitsha/Shibi v Sithole,*[96] which is discussed below.

2.4 The Influence of the Constitution on Customary Law and the Intestate Succession Act

Section 23 of the *BAA* and the principle of male primogeniture were declared unconstitutional in the *Bhe/Shibi* case as it infringed on the right to equality as contained in section 9 of the *Constitution*.[97] In *Bhe v Magistrate Khayelitsha*[98] the

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89 *Interim Constitution of South Africa Act* 200 of 1993.
90 *Mthembu* para 4-5.
91 *Mthembu* para 2.
92 *Mthembu* para 3.
93 *Mthembu* para para 4.
94 *Mthembu* para 8.
95 *Mthembu* para 15.
96 *Bhe v Magistrate Khaeyelitsha |Shibi v Sithole* 2005 1 SA 580 (CC) (hereinafter referred to as *Bhe/Shibi*).
97 *Bhe/Shibi* para 68.
98 *Bhe v Magistrate, Khayelitsha* 2004 2 SA 544 (C) (hereinafter referred to as *Bhe*).

deceased was survived by two minor extra-marital daughters who were excluded from inheriting on the principle of male primogenitor, as well as their illegitimacy.[99] The High Court concluded that the legislative provisions that excluded the two daughters of the deceased were unconstitutional and invalid, and that section 1 of the *ISA* is applicable to the administration of black estates, until the legislature has corrected the defects of section 1(4)(b) of the *ISA* that excludes the application of section 1 of the *ISA* from the administration of black estates.[100] In *Shibi v Sithole*[101] the deceased was survived by his sister (Ms Shibi) and two male cousins.[102] The two male cousins were the legitimate heirs in terms of the relevant customary laws and Ms Shibi was consequently excluded as an heir.[103] The High Court reached a similar decision to that of the *Bhe* case by stating that the *ISA* is applicable in the administration of black estates until the legislature has corrected the defects of section 1(4)(b) of the *ISA*.[104]

Both Ms Bhe and Ms Shibi approached the Constitutional Court for confirmation of the orders made by the High Court. In the *Bhe/Shibi* case Ngcobo J stated that greed and poverty undermined the traditional obligation of the male heirs to maintain the surviving spouse(s) and children of the deceased, and that the children and spouse(s) of the deceased are, therefore, no longer cared for.[105] In the *Bhe/Shibi* case the Constitutional Court ordered that the *ISA* is applicable to all intestate estates and provided guidelines to situations where the deceased is survived by more than one spouse, in terms of customary law.[106] The guidelines given by the Court are that the estate shall be divided equally between the spouses if the deceased was not survived by descendants.[107] If the deceased was survived by more than one spouse and descendants, then each spouse shall receive a child's

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[99] *Bhe* para 2.
[100] *Bhe* para 36-37.
[101] *Shibi v Sithole* (O) (unreported) case number 7292/2001 of 19 November 2003 (hereinafter referred to as *Shibi*).
[102] *Bhe/Shibi* para 21.
[103] *Bhe/Shibi* para 21.
[104] *Bhe/Shibi* para 27.
[105] *Bhe/Shibi* para 237.
[106] *Bhe/Shibi* para 125.
[107] *Bhe/Shibi* para 125.

share, however if the child's share is less than the prescribed minimum amount, currently set at R250 000.00, then the estate must be divided equally between the spouses and the descendants will not inherit.[108] Section 1(4)(b)(ii) of the *ISA* was substituted by section 8 of the *Reform of Customary Law of Succession and Regulation of Related Matters Act*[109] which provides that the intestate estate of any person who is subject to customary law shall devolve in terms of the *ISA*.

2.5 The Influence of the Constitution on the Intestate Succession Act regarding Religious Marriages as well as Same-Sex and Hetero Sexual Life Partners

South Africa is culturally diverse, yet the *ISA* excluded spouses who have concluded marriages in terms of Muslim and Hindu rites, if such a marriage has not also been registered in terms of the *Marriage Act*.[110] This was addressed in the cases of *Daniels v Campbell,*[111] *Hassam v Jacobs*[112] and *Govender v Ragavaayah*.[113]

In the *Daniels* case, the applicant, Mrs Daniels approached the Constitutional Court for confirmation of an order of the Cape High Court[114] which declared certain provisions of the *ISA* and the *Maintenance of Surviving Spouses Act*[115] as unconstitutional and invalid, for failing to include persons married in terms of Muslim rites as spouses for purposes of the said Acts. In the alternative, appeal against the interpretation given to the word "spouse" should the application for confirmation fail.[116]

Mrs Daniels, was married in terms of Muslim rites in 1977. The marriage, which was monogamous, was not solemnised by a marriage officer as appointed in terms of

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[108] *Bhe/Shibi* para 136.
[109] 11 of 2009 (hereinafter referred to as the *Reform Act*).
[110] 25 of 1961 (herein after referred to as the *Marriage Act*). See s 29A of the *Marriage Act*; De Waal "Intestate Succession in South Africa" 270.
[111] *Daniels v Campbell* 2004 JOL 12545 (CC) para 1 (hereinafter referred to as *Daniels*).
[112] *Hassam v Jacobs* 2008 JOL 22098 (C) para 4 (Hereinafter referred to as *Hassam*); De Waal "Intestate Succession in South Africa" 268.
[113] *Govender v Ragavaayah* 2009 3 SA 178 (D) paras 1 and 7 (hereinafter referred to as *Govender*).
[114] *Daniels v Campbell* 2003 9 BCLR 969 (C).
[115] 27 of 1990 (hereinafter referred to as the *MSSA*).
[116] *Daniels* para 1.

the *Marriage Act*.[117] The applicant's husband died intestate in 1994.[118] Mrs Daniels was advised by the Master of the High Court that she could not inherit in terms of the *ISA* because she was married in terms of Muslim rites and was, therefore not a "surviving spouse".[119] A claim for maintenance in terms in terms of the *MSSA* was also rejected on the same basis.[120] The High Court determined that Mrs Daniels was not a "spouse" or "survivor" for purposes of the relevant legislation, because her marriage was not recognised as a valid marriage in terms of South African law.[121] Van Heerden J held that marriages concluded in accordance with Muslim rites have not been recognised by South African courts as valid, firstly because such marriages are potentially polygynous and therefore contrary to public policy, irrespective of whether the marriage was in fact monogamous, and secondly because the marriage was not solemnised by a marriage officer as required by the *Marriage Act*.[122]

The Constitutional Court held, in a majority judgment, that the word "spouse" in its ordinary meaning included parties in a Muslim marriage, such a reading of the word corresponds with how the word is generally understood and used.[123] The historic judicial exclusion of parties to a Muslim marriage from the interpretation of the term "spouse" did not flow from the ordinary linguistic meaning of the word but rather from a particular cultural and racial approach.[124] This interpretation is discriminatory and was no longer sustainable in light of the constitutional values of equality, tolerance, and respect for diversity.[125] The purpose of the *ISA* and *MSSA* was to provide relief for vulnerable sections of the population, such as widows, and the purpose of these Acts would be frustrated, should widows be excluded from protection purely based on the fact that their marriage was solemnised in terms of Muslim rites and not the *Marriage Act*.[126] It was held that the *ISA* and *MSSA* were

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[117] *Daniels* para 3.
[118] *Daniels* para 8.
[119] *Daniels* para 8.
[120] *Daniels* para 8.
[121] *Daniels* para 9.
[122] *Daniels* para 9.
[123] *Daniels* para 19.
[124] *Daniels* para 19.
[125] *Daniels* paras 20-21.
[126] *Daniels* para 22.

to be interpreted as to include a party to a monogamous Muslim marriage as a spouse, and in so doing these Acts were not invalid nor unconstitutional. The High Court judgment of invalidity and unconstitutionality was therefore not upheld.[127]

The *Daniels* case specifically recognised parties in a monogamous Muslim marriage as spouses for purposes of the *ISA* and the *MSSA*. The *ISA* only referred to the entitlement of a "spouse" to inherit and not spouses and the *Reform Act* only provided for the division of assets between spouses in a polygynous customary marriage.[128] Naturally, this caused problems for persons in polygynous unions concluded in terms of Muslim law.[129]

Section 1(4)(f) of the *ISA* excluded widows from a polygynous marriage in terms of Muslim law. The constitutionality hereof was, however, challenged in the *Hassam* case.[130] In this case, the deceased was married to two wives in terms of Muslim private law.[131] The applicant, Mrs. Hassam, was the first wife of the deceased.[132] The executor rejected the applicant's claim asserting that the applicant was not entitled to a share of the deceased's estate, as the marriage was polygynous and the applicant was, therefore not recognised as a "survivor" in terms of the *MSSA* and "spouse" in terms of the *ISA*.[133] In terms of section 39(2) of the *Constitution*, when a court is interpreting legislation and developing common or customary law, it is obliged to do so by promoting the spirit, purport and objects of the *Bill of Rights*.[134] The Court found that the exclusion of widows in a polygynous Muslim marriage, in the aforementioned Acts could not be justified and was in conflict with section 9 of the *Constitution*.[135] The Court declared that the word "survivor" in the *MSSA*, includes a surviving partner in a polygynous Muslim marriage, it was further declared that section 1(4)(f) of the *ISA* was inconsistent with the *Constitution* to the

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[127] *Daniels* para 37.
[128] Section 3(1) of the *Reform Act.*
[129] De Waal "Intestate Succession in South Africa" 270.
[130] *Hassam* para 4; De Waal "Intestate Succession in South Africa" 268.
[131] *Hassam* para 2.
[132] *Hassam* para 2.
[133] *Hassam* para 3.
[134] *Hassam* para 14.
[135] *Hassam* para 19.

extent that it made provision for only one spouse in a Muslim marriage.[136] The declaration made by the High Court, in respect of the unconstitutionality of section 1(4)(f) was confirmed by the Constitutional Court.[137]

The *Daniels* and *Hassam* cases address the discrimination faced by parties who concluded marriages in terms of Muslim law,[138] and the *Govender* case addresses the discrimination faced by parties who entered into marriages in terms of Hindu rites.[139] In the *Govender* case the applicant was married to the deceased in terms of Hindu rites, but the marriage was never registered.[140] The executor of the estate did not indicate the applicant as a surviving spouse and heir in the liquidation and distribution account, which the applicant disputed.[141] The applicant sought a declaratory order that a widow, who was married in terms of Hindu rites, should also be regarded as a "spouse" in terms of the *ISA*.[142] Section 15(3) of the *Constitution* indicates that legislation may recognise certain religious marriages, and it was argued that the legal recognition of a marriage is not a prerequisite for a person to qualify as a "spouse" under the *ISA*.[143] The Court noted that the Constitutional Court had, in recent years, extended the ambit of the word "spouse" to permanent same sex-life partners who maintained a reciprocal duty of support toward each other.[144] Also taking into consideration *Gory v Kolver*,[145] and both the *Daniels* and *Hasam* cases,[146] the Constitutional Court recognised marriages in terms

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[136] *Hassam* paras 20-21 and 23.
[137] *Hassam v Jacobs* 2009 5 SA 572 (CC) para 57.
[138] The question does arise whether the judiciary was correct in amending the rules of succession in religious marriages, as the rules of succession in terms of Islamic law differ from the *ISA*, however this falls outside of the scope of this study in will not be discussed further.
[139] The question does arise whether the judiciary was correct in amending the rules of succession in religious marriages, as the rules of succession in Hindu law differ from the *ISA*, however this falls outside of the scope of this study in will not be discussed further.
[140] *Govender* para 12.
[141] *Govender* para 16.
[142] *Govender* para 7.
[143] *Govender* para 28.
[144] *Govender* para 23.
[145] *Gory v Kolver* 2007 3 BCLR 249 (CC) (hereinafter referred to as *Gory*).
[146] *Govender* paras 34 and 40.

of Muslim rites. The application succeeded and the declaration sought by the applicant was granted.[147]

Section 1(1) of the *ISA* only recognised heterosexual spouses, but not partners in a permanent same-sex life partnership.[148] In the *Gory* case the applicant was in a permanent same-sex life partnership with the deceased and maintained that he and the deceased undertook reciprocal duties of support towards each other.[149] The deceased was survived by his parents and the applicant. The applicant challenged the constitutionality of section 1(1) of the *ISA* and contended that he was the sole heir.[150] The High Court found that the applicant had proven that he and the deceased had indeed assumed reciprocal duties of support, based on their life partnership.[151] The High Court declared that the omission in section 1(1) of the *ISA* after the word "spouse", of the words

> or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support[152]

is inconsistent with the *Constitution* and declared that the applicant was the sole heir.[153] The Constitutional Court confirmed the declaration of the High Court and declared that the *ISA* should be read as if the following words appear after the word "spouse",

> or partner in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support.[154]

Same-sex partners obtained the right to conclude a union with the enactment of the *Civil Union Act*,[155] which means that they are deemed spouses under the said Act and the *ISA* is applicable to same-sex spouses.[156] The judgment of the *Gory*

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147 *Govender* para 44.
148 *Govender v Ragavaayah* 2007 3 BCLR 249 (CC) para 19; De Waal "Intestate Succession in South Africa" 271.
149 *Gory* para 2; *Gory v Kolver* 2006 7 BCLR 775 (T) (hereinafter referred to as *Gory v Kolver*) para 1.
150 *Gory v Kolver* para 1.
151 *Gory v Kolver* para 18.
152 *Gory v Kolver* 787I.
153 *Gory v Kolver* 787I.
154 *Gory* 276H.
155 17 of 2006 (hereinafter referred to as the *Civil Union Act*).
156 Section 13 of the *Civil Union Act*.

case is still applicable, irrespective of the fact that the same-sex partners are afforded the opportunity to conclude a civil union. The *ISA* still excludes hetero-sexual life partners as eligible heirs. [157] It seems, however, that this may soon change, based on the recent Western Cape High Court ruling in the matter of *Bwanya v the Master of the High Court*.[158]

Ms Bwanya was in a heterosexual life partnership with Mr Ruch from 2014, until Mr Ruch passed away in 2016.[159] Mr Ruch had a will when he died but the only heir was his pre-deceased mother, which meant that his estate would be administered in terms of the *ISA*.[160] The *ISA* does not recognise heterosexual life partners as eligible heirs, this means that Ms Bwanya is not entitled to inherit in terms of the *ISA*.[161] Ms. Bwanya therefore approached the High Court seeking *inter alia* an order to declare the omission of the words

> or a partner in a permanent opposite-sex life partnership in which the partners had undertaken a reciprocal duty of support and had been committed to marrying each other[162]

after the word "spouse", wherever it appears in section 1(1) of the *ISA*, as invalid and unconstitutional.[163] Alternatively, declaring the omission in section 1(1) of the *ISA* of the words "or opposite-sex life partnership", wherever the Constitutional Court read in the words "same-sex life partnership" as unconstitutional and invalid.[164] Ms Bwanya alleged that she and the deceased were in a permanent life partnership,[165] the deceased maintained her during their relationship, and that they

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[157] *Laubscher v Duplan* 2016 JOL 37002 (CC) para 87.

[158] *Bwanya v the Master of the High Court* 2021 (1) SA 138 (WCC) (hereinafter referred to as *Bwanya*); Venter 2020 https://www.iol.co.za/pretoria-news/news/heterosexual-couples-to-receive-same-recognition-as-same-sex-counterparts-in-intestate-succession-16a1e3d3-a4c0-4ffc-bf7b-6487b00149aa; Evans 2020 https://www.news24.com/news24/southafrica/news/landmark-inheritance-ruling-for-opposite-sex-life-partnerships-20201002.

[159] *Bwanya* paras 5 and 42; Venter 2020 https://www.iol.co.za/pretoria-news/news/heterosexual-couples-to-receive-same-recognition-as-same-sex-counterparts-in-intestate-succession-16a1e3d3-a4c0-4ffc-bf7b-6487b00149aa.

[160] *Bwanya* para 42.

[161] Sections 1(1)(a) and (b) of the *ISA*.

[162] *Bwanya* para 2.

[163] *Bwanya* para 2.

[164] *Bwanya* para 3.

[165] *Bwanya* para 13.

intended to marry each other.[166] Ms Bwanya's counsel argued that there was a contractual duty on Mr Ruch to maintain Ms Bwanya, which duty continued after his death.[167] Counsel further argued that there was no rational basis why opposite-sex life partners are not afforded the same relief as same-sex life partners.[168] Counsel also argued that the provisions in the *ISA* which preclude Ms Bwanya from being an eligible heir are infringing on her rights to human dignity[169] and equality,[170] because the provisions discriminate on Ms Bwanya based on sex, gender, marital status, and sexual orientation.[171] Magona J stated that there is an absence of protection for cohabitants in life-long heterosexual partnerships, and the issues raised by Ms Bwanya's counsel were long outstanding.[172] The High Court found that the words

> or partner in a permanent life partnership in which the partners have undertaken reciprocal duties of support[173]

should be read-in wherever the word "spouse" appears in the *ISA*.[174] The Court further determined that the remedy shall not be applied retrospectively and shall only be applied from the date the Constitutional Court rules in favour of the High Court's order.[175]

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[166] *Bwanya* paras 18-22, 23-24; Venter 2020 https://www.iol.co.za/pretoria-news/news/heterosexual-couples-to-receive-same-recognition-as-same-sex-counterparts-in-intestate-succession-16a1e3d3-a4c0-4ffc-bf7b-6487b00149aa; Evans 2020 https://www.news24.com/news24/southafrica/news/landmark-inheritance-ruling-for-opposite-sex-life-partnerships-20201002.

[167] *Bwanya* para 27; Venter 2020 https://www.iol.co.za/pretoria-news/news/heterosexual-couples-to-receive-same-recognition-as-same-sex-counterparts-in-intestate-succession-16a1e3d3-a4c0-4ffc-bf7b-6487b00149aa.

[168] *Bwanya* para 29.

[169] Section 10 of the *Constitution*.

[170] Section 9 of the *Constitution*.

[171] *Bwanya* paras 50-51.

[172] *Bwanya* para 212; Venter 2020 https://www.iol.co.za/pretoria-news/news/heterosexual-couples-to-receive-same-recognition-as-same-sex-counterparts-in-intestate-succession-16a1e3d3-a4c0-4ffc-bf7b-6487b00149aa.

[173] *Bwanya* para 225.

[174] *Bwanya* para 225; It should be noted that Ms. Bwanya also approached the High Court for an order to declare the provisions of the *MSSA* which preclude her from claiming maintenance as unconstitutional and invalid, however the Court determined that the relief sought against the *MSSA* could not stand based on the doctrine of *stare decisis*, the High Court was bound to the decision of *Volks v Robinson* 2005 5 BCLR 446 (CC), that the reciprocal duty of maintenance or support must have been by operation of law.

[175] *Bwanya* para 224.

The laws governing the order of intestate succession initially discriminated against the surviving spouse, as is seen from paragraph 2.1 above. This was finally rectified by the legislator through the enactment of the *ISA*. The *ISA* was constitutionally flawed as it did not recognise parties who concluded a marriage in terms of customary law, Hindu or Muslim rites, same-sex partnerships or heterosexual partnerships, as surviving spouses. The Courts addressed the mentioned discrimination and broadened the definition of the phrase "surviving spouse" to include parties who concluded a marriage in terms of customary law, Hindu or Muslim rites, same-sex partnerships or heterosexual partnerships. The following chapter will analyse section 1(1)(c) of the *ISA*, by taking into consideration the estimated general net worth of South African families, through looking at available statistics.

Chapter 3: An analysis of section 1(1)(c) of the *Intestate Succession Act*

The enactment of the *ISA* and the abovementioned constitutional developments addressed the inequality and discrimination that surviving spouses[1] faced through common law, customary law as well as legislation. This chapter analyses section 1(1)(c) of the *ISA* by looking at how section 1(1)(c) of the *ISA* is applied, as well as the available statistics regarding how many intestate deceased estates are reported at the office of the Master of the High Court. It is also necessary to consider the available statistics regarding the general net worth of South African families, in order to determine the scale of intestate estates that are worth less than the fixed amount of R250 000.00 (and is allocated to the surviving spouse)[2] as this may lead to the exclusion of descendants as heirs. The purpose of this analyses is to determine whether the legislator inadvertently placed the surviving spouses in a more favourable position than the descendants by allocating a minimum fixed amount to the surviving spouse or spouses. The application of the *ISA* as well as its constitutional development is discussed with reference to *Cele v Cele*.[3]

The *Cele* case consisted of seven applicants, six of which were the children of the deceased, who applied to the High Court to set aside the sale of the immovable property that was sold by the surviving spouse.[4] The applicants' parents were married in 1961. This marriage was in community property in terms of section 22(6) of the *BAA*.[5] The immovable property was registered in their father's name in 1985.[6] Their mother died in 1991 and their father remarried in 1994 (in community of property) and their father died in 2001.[7] The immovable property was worth R43 000.00 and consisted of the entirety of their deceased father's estate.[8] Both

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1 The phrase "surviving spouses" should be read to include spouses who concluded a marriage in terms of customary law, Hindu, as well as Muslim rites, same-sex partners and heterosexual partners.
2 Section 1(1)(c)(i) of the *ISA*.
3 *Cele v Cele* (O) (unreported) case number 8488/2015 of 9 January 2017 (hereinafter referred to as *Cele*).
4 *Cele* para 1.
5 *Cele* para 2.
6 *Cele* para 4.
7 *Cele* para 4.
8 *Cele* para 8.

parents died intestate.[9] The surviving spouse sold the immovable property between July and August of 2014 and the property was transferred into the names of the purchasers on 7 November 2014.[10] The issues that the Court had to determine were whether:[11]

a) The descendants were entitled to inherit from either intestate estates; and

b) The immovable property was lawfully inherited by the surviving spouse in terms of section 1(1)(c) of the *ISA*.

The applicants argued that the immovable property did not form part of the communal property,[12] and they relied on Lesotho case law, specifically the case of *Motsamai v Motsamai*.[13] The facts of the *Motsamai* case are quite similar to the *Cele* case. The applicant was the first-born son of the deceased, from the deceased's first marriage.[14] The respondent was the second wife of the deceased, whom the deceased had married in terms of civil rites.[15] The deceased died intestate and married the respondent after he divorced the applicant's mother.[16] The Court had to determine who the lawful heir was, by first establishing whether European or customary law is applicable.[17]

The applicant argued that the respondent was not entitled to the land of the deceased and based his argument on Basotho customary law, dictating that the lawful heir is the first-born male child from the first marriage.[18] The respondent argued that the customary law was not applicable because the parties were married in terms of civil law and in community of property, and therefore abandoned the customary mode of life.[19]

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9 *Cele* para 5.
10 *Cele* para 4.
11 *Cele* para 5.
12 *Cele* para 5.
13 *Motsamai v Motsamai* (CIV/APN/166/2008) (hereinafter referred to as *Motsamai*).
14 *Motsamai* para 2.
15 *Motsamai* para 3.
16 *Motsamai* para 3.
17 *Motsamai* para 4.
18 *Motsamai* para 5.
19 *Motsamai* para 5.

The Court considered whether the parties to the marriage had abandoned the customary mode of life in exchange for a European mode of life.[20] The Court also considered section 5(2) of the *Land (Amendment) Order* 1992 which states that a widow has the same land rights as that of her late husband if they were married in community of property.[21] Accordingly, the application was dismissed.[22]

The court in the *Cele* case analysed the *Motsamai* case and determined that it had no authority for the applicant's argument, which was that the property of the deceased did not form part of the joint estate of the deceased and the respondent, in terms of customary law.[23] In deciding this matter, the court relied on the *ISA* and referred to the judgments of *Bhe* and *Shibi*.[24] It was determined that the surviving spouse had a right to ownership to the immovable property in terms of section 1(1)(c) of the *ISA*, as the property was worth less than the fixed amount awarded to a surviving spouse, together with her marital relationship with the deceased.[25] The descendants would have had a right to the residue of the estate if the value of the estate had been more than the fixed amount.[26]

Section 1(1)(c)(i) of the *ISA* is clear, as well as the courts' application thereof. A surviving spouse (or spouses) is entitled to a minimum fixed amount, currently set at R250 000.00.[27] The descendants are only allowed to inherit the residue of the estate, if any.[28] According to the available statistics, on average only 23% of estates that are registered have wills.[29] The means that the majority of estates registered are administered in terms of the *ISA*. It is necessary for the purposes of this study to also discuss the estimated general nett worth of estates in South Africa, in order

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[20] *Motsamai* para 4.
[21] *Motsamai* para 4.
[22] *Motsamai* para 9.
[23] *Cele* para 9.
[24] *Cele* para 9; both cases were discussed in para 2.4 above.
[25] *Cele* para 10.
[26] Section 1(c)(ii) of the *ISA.*
[27] Reg 920 and 921 in GN R10320 in GG 38238 of 24 November 2014.
[28] Section 1(c)(ii) of the *ISA.*
[29] Office of the High Court of South Africa *A Guide 2016* 29.

to determine if the minimum fixed amount allocated to the spouses is fair and reasonable.

During 2015, more than 30.4 million people in South Africa were living under the upper bound poverty line, which is around 55.5% of the population.[30] This means that they received an income of less than R992.00 per person per month.[31] Living in poverty does not necessarily mean that a person's estate does not contain any tangible assets, as 13.6% of the South African population have CRDP houses or received subsidised housing, in terms of a 2018 survey.[32] The estate of a deceased person who was poverty stricken may therefore contain immovable property. However, the value of the property will be less than R250 000.00. This means that even if the deceased had descendants, the surviving spouse will always be the sole heir entitled to the immovable property in terms of section 1(1)(c)(i) of the *ISA*.

Credit Suisse's Global Wealth Report of 2017 indicated that 68% of South Africans fall within the lowest wealth category which is estimated at R117 000.00.[33] This would mean that the assets in the intestate estates within the given 68% would be allocated towards the surviving spouses, and there would not be any residue left for descendants. Descendants have no inheritance claims if there is no residue left in the intestate estate, after the fixed amount has been paid to the surviving spouse or spouses. The only legal recourse available to a descendant is to lodge a claim for maintenance against the estate.[34]

A maintenance claim of a child takes precedent over the inheritance of an heir or legatee.[35] However, once an estate has already been wound-up, the guardian of a minor child or an adult child, in his personal capacity, must lodge a claim in terms

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30 STATS SA 2017 http://www.statssa.gov.za/?p=10334; Statistics South Africa *Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015* 26.

31 STATS SA 2017 http://www.statssa.gov.za/?p=10334.

32 Statistics South Africa *General household survey* 11.

33 Credit Suisse Research Institute 2017 https://www.credit-suisse.com/about-us-news/en/articles/news-and-expertise/global-wealth-report-2017-201711.html; Korhonen 2018 https://africacheck.org/factsheets/factsheet-wealth-south-africa/.

34 Ndaba 2012 http://www.derebus.org.za/child-maintenance-parents-death/.

35 *Christie v Estate Christie* 1956 3 SA 383 (N) para 387.

of the *condictio indebiti* against the heir.[36] This means that the descendant will have to litigate, which is often an expensive process. Furthermore, the onus rests on the descendant to prove the amount that was allegedly overpaid to the heir.[37] If an estate is worth less than R250 000.00, the Master of the High Court will issue a letter of authority and the estate will be administered in terms of the provisions of section 18(3) of the *ADA*. The estate is usually deemed as finalised, after the letter of authority has been issued, unless an account of the assets and liabilities have been requested by the Master.[38] This means that the descendants are not afforded an opportunity to object to the distribution of the assets, as they would have if the estate was worth more than R250 000.00.[39] They are, therefore, not given an opportunity to lodge a maintenance claim and their only available option is to litigate.

The available statistics suggest that the majority of deceased estates are administered in terms of the *ISA*. The majority of South Africans have an estate valued less than R250 000.00. This means that in cases where the deceased is survived by a spouse and/or spouses as well as descendants, the descendants will be excluded from inheriting. This does not exclusively affect impoverished families. For example, if the the gross value of a deceased estate is R1 150 000.00, this estate consists of a vehicle worth R50 000.00, a home worth R1 000 000.00, furniture worth R50 000.00 and an investment to the amount of R50 000.00. The estate debt consists of: R45 000.00 for vehicle finance; R600 000.00 owed on the bond registered over the immovable property; an outstanding credit card debt of R15 000.00; the executor's fee of R40 250.00;[40] the Master's fee of R2 000.00;[41] notice to the creditors of the deceased to lodge any claims against the estate;[42] as well as the notice that the liquidation and distribution account is open for

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[36] *Bank v Sussman* 1968 2 SA 15 (O) para 294.
[37] *Van Zyl v Serfontein* 1989 4 SA 741 (C) para 746.
[38] The Master of the High Court 2020 https://www.justice.gov.za/master/faq.html.
[39] Sections 35(4) and (5) of the *AEA*.
[40] Section 51(1)(b) of the *AEA*; R 8(1)(a) of the *AEA*; The executors fee is currently statutorily set at 3.5% of the gross value of the estate.
[41] Reg 2(a)(1) in GN R1161 in GG 41224 of 3 November 2017.
[42] Section 29(1) of the *AEA*.

inspection[43] which is published in the Government Gazette, amounting to R75.64 in total;[44] and the Beeld (or any other local newspaper where the deceased resided at the date of his death) amounting to R656.72 in total. Postages and Petties are set at R260.00.[45] The total administration costs and debt amount to R709 151.36. The total nett value available for distribution to the heirs amounts to R440 848.64. In this example the deceased was married in community of property which means that this is a joint estate. Therefore 50% of the value of the estate belongs to the deceased's estate and the remaining 50% belongs to the surviving spouse due to the marriage in community of property. The total nett value of the deceased's estate amounts to R220 424.32, which means that the surviving spouse is entitled to the entire estate, and if the deceased left descendants they would be excluded from inheriting, as the nett value of the estate was worth less than the prescribed fixed amount of R250 000.00. The example given can by no means be described as an impoverished estate or family, yet the outcome is the same, as the example given in chapter 1. This leads to the conclusion that the exclusion of descendants as heirs, which is caused by the minimum fixed amount of R250 000.00 payable to the surviving spouse of spouses, is not just limited to impoverished families.

As stated above, the legal remedies available to descendants who were dependant on the deceased are limited to either a maintenance claim or a claim in terms of the *conditio indebiti*, which can be an expensive process. There are no legal remedies available for descendants who were not dependant on the deceased. The following chapter investigates the laws of intestate succession in Canada, specifically the province of Quebec, in order to attempt to find a solution to this problem. The problem is created by the prescribed amount allocated to surviving spouses in terms of section 1(1)(c)(i) of the *ISA*, which may lead to the exclusion of descendants inheriting from an intestate estate.

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[43] Section 35(5)(a) of the *AEA*.
[44] GN 643 in GG 42189 of 25 January 2019 5.
[45] Bezuidenhout *Chief Master's Directive* 4 of 2016 2.

Chapter 4: Comparative analyses between intestate succession of South Africa and Quebec

The *Constitution* enables courts to consider foreign law when interpreting legislation, and when developing the common law as well as customary law.[1] The purpose of this chapter is to consider the development of intestate succession in the Canadian province of Quebec. Additionally, a comparative study is conducted in order to determine whether the legislation of Quebec can potentially provide insight to alleviate the problems reflected in chapter 3 above. The history of the law of intestate succession in the province of Quebec consists of four stages.[2] The first stage is the period of uncodified civil law received from France, the second stage is uncodified civil law in terms of the British regime, the third is the *Civil Code of Lower Canada*, and the last stage is the *Civil Code of Québec*.[3]

4.1 The Period of uncodified civil law received from France

Quebec City was founded by the French in 1608 and it was a small French colony known as the Colony of New France.[4] Intestate succession was governed by French customary law.[5] The colony was declared a Royal Colony in 1663, and the *Custom of Paris* [6] was declared to be the law of the Colony by the Royal Edicts of 1663 and 1664.[7] The *Custom of Paris* reduced the French customary law to writing in 1580 and this consisted of 362 articles.[8]

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1 Sections 39(1)-(2) of the *Constitution*.
2 Smith "Intestate Succession in Quebec" 53.
3 Smith "Intestate Succession in Quebec" 53.
4 Smith "Intestate Succession in Quebec" 53.
5 Smith "Intestate Succession in Quebec" 52; Bélanger 2005 http://faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/CivilCode-QuebecHistory.htm.
6 Bélanger 2005 http://faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/CivilCode-QuebecHistory.htm; The French customs were reduced to writing and referred to as the *Custom of Paris*, which was enacted in 1510 and revised in 1580.
7 Smith "Intestate Succession in Quebec" 53; Bélanger 2005 http://faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/CivilCode-QuebecHistory.htm.
8 Bélanger 2005 http://faculty.marianopolis.edu/c.belanger/quebechistory/encyclopedia/CivilCode-QuebecHistory.htm; the *Custom of Paris* initially consisted of 362 articles, of which only 257 were in force in 1857; Smith "Intestate Succession in Quebec" 53.

The *Custom of Paris* defined succession as the transfer of the rights and obligations of the deceased, to the person or persons who are nearest to the deceased and capable of succeeding.[9] The word succession is also used to describe the estate, rights, and charges, which the deceased left at the time of his death and which accrues after the deceased's death.[10] Article 128 of the *Custom of Paris* distinguished between three types of succession i.e. testamentary succession; legal succession; and irregular succession.[11] Legal succession favoured the nearest relatives of the deceased as competent heirs, while irregular succession favoured certain persons or the State or Crown, in the absence of heirs who were related to the deceased.[12] Article 161 of the *Custom of Paris* stated that every succession would devolve to the nearest relative to the deceased, who were capable of succeeding the deceased.[13] The surviving spouse would only inherit if the predeceased spouse did not leave any blood relatives.[14] The surviving spouse was therefore placed second last only to the State or Crown.[15]

The law of succession was complex as it did not deal with succession as a whole but applied different rules depending on both the nature of the property, and on the manner in which the deceased had acquired it.[16] The law of succession is not discussed in its entirety as it is sufficient for purposes of this study to note that descendants and other blood relations would inherit in intestate succession, to the exclusion of the surviving spouse,[17] much like the common law principles that were initially applied to the South African law of intestate succession.[18] The difference is

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9 Arts 126 of the *Custom of Paris*; Doucet *The Fundamental Principles of the Laws of Canada* 72 and 81; Art 159 of the *Custom of Paris* contains various provisions for when a person is deemed unworthy to inherit, being *inter alia* a person who was convicted of killing the deceased, the worthiness of heirs falls outside the scope of this study and will not be discussed.

10 Arts 126-127 of the *Custom of Paris*; Doucet *The Fundamental Principles of the Laws of Canada* 72.

11 Doucet *The Fundamental Principles of the Laws of Canada* 72.

12 Art 130 of the *Custom of Paris*.

13 Doucet *The Fundamental Principles of the Laws of Canada* 81.

14 Art 151 of the *Custom of Paris*; Doucet *The Fundamental Principles of the Laws of Canada* 78; Hahlo 1973 *Osgoode Hall Law Journal* 459.

15 Hahlo 1973 *Osgoode Hall Law Journal* 459.

16 Arts 143-47 and 179-86 of the *Custom of Paris*; Smith "Intestate Succession in Quebec" 54; *Doucet The Fundamental Principles of the Laws of Canada* 77.

17 Smith "Intestate Succession in Quebec" 53.

18 See para 2.1 above.

that surviving spouses in New France were protected by the law of dower and often by marriage contracts.[19] No such protection was available to surviving spouses in South Africa.[20]

Dower was the customary law right of a widow to derive income from the property that her husband brought into the marriage, as well as his inheritances.[21] The widow therefore had a *usufruc*t over the property while the property itself passed to the children, unless the parties concluded an agreement that stated otherwise, prior to the marriage.[22] The widow would be entitled to one-third of the income if she bore children from the marriage, and half of the income if there were no children born from the marriage.[23] This right was granted to the surviving wife by either customary law or contract.[24] The husband received a similar right, known as *tenancy by the curtesy*, however, he would only receive this right if children were born from the marriage.[25] The parties could choose to substitute the customary dower with a predetermined dower, meaning a sum of money by way of a marriage contract.[26] The wife could only renounce the customary dower by way of a marriage contract.[27] The dower took precedence over all other claims over the predeceased husband's property and remained attached to the land even after the property was sold by the husband.[28] Dower therefore provided lifelong security to spouses, albeit sometimes to the detriment of creditors.[29] The laws surrounding dower rights were amended during the British regime of the mid-1830's, as discussed below.

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19 Smith "Intestate Succession in Quebec" 53-54.
20 See para 2.1 above.
21 Baillargeon *A Brief History of Women in Quebec* 15; Belshaw *Canadian History: Post-Confederation* 348.
22 Art 216 of the *Custom of Paris*; Doucet *The Fundamental Principles of the Laws of Canada* 96;
23 Hahlo 1973 *Osgoode Hall Law Journal* 463.
24 Art 216 of the *Custom of Paris*; Doucet *The Fundamental Principles of the Laws of Canada* 96.
25 Hahlo 1973 *Osgoode Hall Law Journal* 463; Litman and Ziff 2016 https://www.thecanadianencyclopedia.ca/en/article/dower.
26 Baillargeon *A Brief History of Women in Quebec* 15.
27 Baillargeon *A Brief History of Woman in Quebec* 46.
28 Baillargeon *A Brief History of Woman in Quebec* 46.
29 Dubinsky, Perry and Yu *Within and Without the Nation: Canadian History as Transnational History* 153.

4.2 The Period of uncodified civil law in terms of the British regime

The territory of New France was ceded to the British by way of the *Treaty of Paris* 1763.[30] The *Quebec Act* of 1774[31] was established to provide certainty as to which private law applied.[32] The *Quebec Act* confirmed that the existing uncodified civil law would remain the basic private law of Quebec, and the *Custom of Paris* therefore remained the governing private law.[33] However, in the 1830's the British merchants objected to the dower that was granted to woman in terms of the *Custom of Paris*, as they argued that it infringed on their freedom of contract.[34] A special council was founded in 1838 that made an order that greatly changed the law regarding dower.[35] A widow's dower would only have precedence over any creditor if the dower that was created by a marriage contract was registered at the registration office, and the lands to which the dower applied were clearly identified.[36] Widows could also consent to the alienation of the property on which the dower would apply, where they could previously only renounce the right in terms of a marriage contract.[37] The final change was that the widow could only apply the dower to land owned by her husband at the time of his death.[38]

The *Custom of Paris* was abolished in France in 1804 and replaced by the *Code Civil* of 1804, although it remained the governing law of Quebec until 1866.[39] It was decided, in the middle of the nineteenth century, to codify the private law of Quebec, in the style and plan of the French *Code Civil*.[40] The *Code Civil* is based largely on Roman law, with one difference adopted from the French customary law.[41] The difference is that property did not necessarily succeed to the nearest

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30 Smith "Intestate Succession in Quebec" 54.
31 The *Quebec Act* of 1774 (hereinafter referred to as the *Quebec Act*).
32 Smith "Intestate Succession in Quebec" 54.
33 Smith "Intestate Succession in Quebec" 55.
34 Baillargeon *A Brief History of Women in Quebec* 46.
35 Baillargeon *A Brief History of Women in Quebec* 47.
36 Baillargeon *A Brief History of Women in Quebec* 47-48.
37 Baillargeon *A Brief History of Women in Quebec* 48.
38 Baillargeon *A Brief History of Women in Quebec* 48.
39 Smith "Intestate Succession in Quebec" 56.
40 Smith "Intestate Succession in Quebec" 56.
41 Smith "Intestate Succession in Quebec" 57.

relative within a certain class of heirs.[42] Succession that would be distributed to ascendants or collaterals would be divided into two, the maternal and paternal sides each side receiving one half share of the property.[43] This was known as the principle of *la fente*.[44] The private law of Quebec was codified in the *Civil Code of Lower Canada*, in 1866.[45]

4.3 The Civil Code of Lower Canada of 1866

The *CCLC* followed the *Custom of Paris* in that the surviving spouse could only inherit if there were no other heirs.[46] The *CCLC*, however, abolished the rules that were applied to different properties, which lead to the law being less complex.[47] Rights of dower were still granted to widows and children in respect of part of the deceased husband's property.[48] The widow received a lifelong *usufruct* and the children received ownership, over half of the immovable property belonging to the deceased at the time of the marriage as well as half of the immovable property he acquired from his ascendants during the marriage.[49] The inheritance rights of surviving spouses were changed by amendments made to the *CCLC* in 1915,[50] however, the surviving spouse had to abandon his/her dower right in order to be able to succeed.[51] The summary of the application of intestate succession that follows, is of the *CCLC* as amended in 1915.

Succession was based on four classes.[52] The first class consisted of the surviving spouse and descendants of any degree, however, it was only relevant if there were descendants.[53] This means that the surviving spouse would not inherit the entire

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42 Smith "Intestate Succession in Quebec" 57.
43 Arts 1426-1436 of the *CCLC*; Smith "Intestate Succession in Quebec" 57.
44 *La fente* translates to the split.
45 Smith "Intestate Succession in Quebec" 56-57.
46 Smith "Intestate Succession in Quebec" 57.
47 Smith "Intestate Succession in Quebec" 54.
48 Smith "Intestate Succession in Quebec" 57.
49 Art 1434 of the *CCLC*; Smith "Intestate Succession in Quebec" 58.
50 Smith "Intestate Succession in Quebec" 57.
51 Art 624c of the *CCLC*; Popovici and Smith *Freedom of Testation and Family Claims in Canada* 9.
52 Smith "Intestate Succession in Quebec" 58.
53 Smith "Intestate Succession in Quebec" 58.

succession,[54] if there were not any descendants. If the deceased was survived by a spouse and descendants, the surviving spouse would receive one-third of the succession, the descendants would receive the remaining two-thirds.[55] Descendants would share equally amongst those in the same degree, and the principle of representation applied to surviving descendants in direct line of the predeceased descendant.[56] This means that the surviving descendants in the direct line of the predeceased descendant took that descendant's share.[57] The second class would apply if there were no descendants.

The second class was made up of three categories, which consisted of the surviving spouse, ascendants, and collaterals.[58] The deceased's parents were classified as "privileged ascendants" and the deceased's siblings and their descendants were classified as "privileged collaterals".[59] Each category was treated equally, which meant that if there was a single member in each category, each would get an equal share (one-third) of the succession, or if there were only two members in two categories, each would get half of the succession, and if there was only one member in one category, that member would inherit the whole succession.[60] There was limited representation within the privileged collaterals.[61] This meant that if the deceased was survived by siblings A and B, they would each inherit equally, if he was survived by sibling A and sibling B's children B1 and B2, A would inherit half of the succession and B1 and B2 would each inherit one-quarter of the succession. However, if the deceased was survived by both A and B's children, A1 and B1, B2 and B3, each would inherit in equal shares. This is because the children of the deceased did not inherit by way of representation but in their own right as collaterals of equal degree.[62] Representation was only limited to the children of the privileged

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[54] Succession means the mass of assets and liabilities that belonged to the deceased, it is referred to in common law as the estate; Smith "Intestate Succession in Quebec" 59.
[55] Art 624b of the *CCLC*; Smith "Intestate Succession in Quebec" 59;
[56] Art 619-624 of the *CCLC*; Smith "Intestate Succession in Quebec" 59.
[57] Smith "Intestate Succession in Quebec" 59.
[58] Art 616 of the *CCLC*; The term "ascendants" and "collaterals" are discussed in chapter 2.1 above; Smith "Intestate Succession in Quebec" 59.
[59] Smith "Intestate Succession in Quebec" 59.
[60] Art 624a, 626 to 628, 631 of the *CCLC*; Smith "Intestate Succession in Quebec" 59.
[61] Art 622 of the *CCLC*; Smith "Intestate Succession in Quebec" 59.
[62] Arts 622 and 624 of the *CCLC*; Smith "Intestate Succession in Quebec" 59.

collaterals, for example, if B was only survived by his grandchild BB1, A was survived by his children A1 and A2, A1 and A2 would inherit the entire succession and BB1 would be excluded.[63] If the deceased left half-siblings, the principle of *la fente* would apply, the relevant part of the succession would be split equally between the maternal and paternal lines, the half-siblings in each line would share each half.[64]

The third class of succession was known as the ordinary ascendants, referring to the ascendants other than the parents of the deceased. They could only inherit if there was no one in the first two classes.[65] The principle of *la fente* was also applied here, the succession was divided in two and the ascendants on the paternal and maternal side would each inherit one-half.[66] The share would go to the ascendant or ascendants in the closest degree of each side, without representation.[67] This meant that if the one side did not have any ancestors, its share of the succession would go to the closest collateral relatives on that side.[68] Relatives beyond the twelfth degree did not inherit.[69] The whole succession would only go to one side if the other side did not have any ascendants or collaterals.[70]

The fourth class was the ordinary collaterals, referring to collaterals other than the siblings and their children.[71] The principle of *la fente* was also applied and succession was therefore divided into two halves, one for the paternal side, and one for the maternal side. The closest collateral relative or relatives on each side took the succession of that side. This was again only limited to relatives to the twelfth degree, and if there were no collateral relatives on a side the other side would inherit the whole succession.[72] The Crown would inherit the succession if neither of the four classes could be applied.[73] This was known as an "irregular" succession as the

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63 Smith "Intestate Succession in Quebec" 59.
64 Art 633 *CCLC*; Smith "Intestate Succession in Quebec" 60.
65 Art 628 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.
66 Art 629 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.
67 Art 634 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.
68 Art 634 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.
69 Art 635 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.
70 Art 635 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.
71 Art 634 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.
72 Art 635 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.
73 Art 636 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.

succession did not automatically go to the Crown but required legal proceedings.[74] There were also "anomalous" successions. This was applied when the deceased died intestate without leaving a surviving spouse or any descendants, a surviving ascendant who donated an asset to the deceased was given the right to succeed to the asset donated, if it still formed part of the succession.[75]

4.4 The Civil Code of Québec of 1994

The *CCLC* was in place from 1866 to 1994, when it was replaced and repealed by the *Civil Code of Québec* of 1994,[76] which contains Quebec's modern law of intestate succession.[77] There are some important developments that took place in family law, while the *CCLC* was still in force. These important developments are still in force in the modern law of Quebec, and are discussed below, as they have an impact on the division of the succession, where the deceased was married.[78]

The default marriage regime was community of property, which changed in 1970 to partnership of acquests.[79] The latter marital regime distinguished between acquests and private property. Private property includes property owned prior to marriages and property acquired during the marriages either by gift or a will, and any other property acquired during the marriage is an acquest.[80] The surviving spouse is entitled to half of the nett value of the deceased spouse's acquests.[81] Parties may still elect to either be governed by separation of property or they may opt for community of property.[82] The family patrimony was created in 1989, each spouse is entitled to half of the value of the family patrimony, irrespective of who owns the relevant assets.[83] The parties cannot exclude this right with a prior agreement,

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74 Smith "Intestate Succession in Quebec" 60.
75 Art 630 of the *CCLC*; Smith "Intestate Succession in Quebec" 60.
76 *Civil Code of Québec* 1994 (hereinafter referred to as the *CCQ*).
77 Smith "Intestate Succession in Quebec" 61.
78 Smith "Intestate Succession in Quebec" 61-62.
79 Smith "Intestate Succession in Quebec" 61.
80 Smith "Intestate Succession in Quebec" 61.
81 Smith "Intestate Succession in Quebec" 61.
82 Smith "Intestate Succession in Quebec" 61.
83 Arts 414 to 426 of the *CCQ*, A portion of the *CCQ* was enacted in 1980 the full *CCQ* was enacted in 1991 but enforced in 1994; Smith "Intestate Succession in Quebec" 61.

however, it can be renounced once the right has arisen.[84] The following assets form part of the family patrimony: principal and secondary residence; furniture in the residence; motor vehicles used for family travel; and entitlements under certain pension and retirement plans.[85]

The family patrimony does not formally change the rules of intestate succession, rather it creates an obligation either against the estate or the surviving spouse.[86] If the deceased owned most of the family patrimony assets, there exists an obligation of succession and a right by the surviving spouse, which may cumulate with her succession rights.[87] Alternatively, if the surviving spouse owned most of the family patrimony, the deceased's right to share in the family patrimony forms part of his succession and the heirs may claim against the surviving spouse.[88] The marital regime and the family patrimony applies to civil unions as well as marriages.[89] Civil unions were legally recognised in 2002, and are governed by Articles 521.1 to 521.19 of the *CCQ*.[90] The *Civil Marriage Act* of 2005 was enacted in 2005, which allows same-sex couples to marry.[91] *De facto* spouses do not have any of the abovementioned rights, patrimonial property is not applied, nor do they have a right to inherit or to claim support at the end of the relationship.[92]

In Quebec law, since 1980, no distinction is made between children born out of wedlock nor between adopted children.[93] It was determined in 1989 that claims of support survive the death of the debtor of the claim.[94] Articles 684 to 695 of the

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84 Smith "Intestate Succession in Quebec" 61.
85 Smith "Intestate Succession in Quebec" 61.
86 Smith "Intestate Succession in Quebec" 61.
87 Art 654 of the CCQ; Smith "Intestate Succession in Quebec" 61.
88 Smith "Intestate Succession in Quebec" 61.
89 Smith "Intestate Succession in Quebec" 62; Religious marriages are also legally recognised in Quebec, art 366 of the *CCQ* contains the requirements for a minister of religion to legally solemnize a marriage and art 118 of the *CCQ* stipulates that a person who solemnized a marriage must, without delay, forward the declaration of marriage to the registrar of civil status. A detailed discussion on the recognition of religious marriages in Quebec falls outside the scope of this study and will not be discussed further.
90 Smith "Intestate Succession in Quebec" 62.
91 Smith "Intestate Succession in Quebec" 62.
92 Smith "Intestate Succession in Quebec" 62.
93 Art 594 of the 1980 *CCQ*, now art 522 of the 1991 *CCQ*; Smith "Intestate Succession in Quebec" 58.
94 Art 585 of the *CCQ*; Smith "Intestate Succession in Quebec" 62.

CCQ provides a regime governing support claims against succession.[95] The court will take into account the needs of the claimant, the assets of the succession, including other benefits that the claimant has acquired.[96] The courts are allowed to reduce gifts made by the deceased, either during his lifetime or by legacy, if these gifts rendered the succession unable to pay the support obligation.[97]

The law of intestate succession under the *CCQ* does not greatly differ from the *CCLC*.[98] The *CCQ* also has rules regarding the calculation of degrees of relationship and about representation.[99] Representation of an unworthy heir is permitted,[100] but the representation of an heir who has renounced a succession is not permitted.[101] Representation of privileged collaterals is only allowed in the first class, the same as in the *CCLC*.[102] There is a slight difference, in that representation only operated when the collaterals competed.[103] For example, the deceased had two siblings who predeceased him, A and B, they left children A1 and A2 and B1. In terms of the *CCLC* A1, A2 and B1 would each get one-third of the succession. In terms of the *CCQ* representation operates and A1 and A2 would each share one-half of the succession and B1 would get the other half.

The first two classes are also governed the same as the *CCLC*, however the division among the members in the second class have slightly changed.[104] Where the deceased is survived by a spouse and either privileged ascendants or privileged collaterals, the surviving spouse will get two-thirds and the blood relatives will get the remaining third.[105] However, if the deceased is survived by a spouse and both privileged ascendants and privileged collaterals, the spouse gets two-thirds and the

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95 Smith "Intestate Succession in Quebec" 62.
96 Smith "Intestate Succession in Quebec" 62.
97 Smith "Intestate Succession in Quebec" 62.
98 Smith "Intestate Succession in Quebec" 63.
99 Arts 655-659 and 660-665 of the *CCQ*; Smith "Intestate Succession in Quebec" 63.
100 Art 660 of the *CCQ*.
101 Art 664 of the *CCQ*; Smith "Intestate Succession in Quebec" 63.
102 Art 663 *CCQ*; Smith "Intestate Succession in Quebec" 63.
103 Smith "Intestate Succession in Quebec" 63.
104 Arts 670-675 of the *CCQ*; Smith "Intestate Succession in Quebec" 63.
105 Smith "Intestate Succession in Quebec" 63.

privileged ascendants get the remaining third, and the collaterals are excluded.[106] The rest remains the same as per the *CCLC*.

Succession in the third and fourth class have been modified to form one class.[107] Ordinary collaterals who are descendants of privileged collaterals will receive one-half by way of representation and the distribution of the share is *per stirpes*.[108] The other half goes equally to the ascendants and other collaterals. If there is no one to succeed to either of these halves, the whole succession goes to the other group.[109] The principle of *la fente* is applied when the deceased is survived by ordinary ascendants and ordinary collaterals (who are not descendant from privileged collaterals) and the succession is split in two.[110] Those who succeed, on each side of the family, share *per capita* without representation.[111] Ascendants in the second degree (grandparents) on a side will take the entire share of that side with the exclusion of other ascendants or collaterals, if there are not ascendants in the second degree, and the share on that side will go to the closest ordinary collateral descended from them.[112] If there are no collaterals descended from the grandparents, the share will go to the ascendants in the third degree, if there are none, to the closest collaterals descended from them, and so on until no succession within the degrees of succession remain.[113] The degrees of succession were reduced from twelve to eight.[114] As in the *CCLC*, if there is no eligible heir on one side, the other side will take the whole succession.[115] The State takes the succession if there are no eligible relatives.[116] This is no longer known as an irregular succession, as the State now automatically receives the succession when all heirs have renounced their inheritance or no heir has appeared within six months after death, and legal

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[106] Smith "Intestate Succession in Quebec" 63.
[107] Smith "Intestate Succession in Quebec" 63.
[108] Arts 678, 663 and 665 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.
[109] Art 678 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.
[110] Art 679 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.
[111] Arts 679, 663 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.
[112] Art 680 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.
[113] Art 680 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.
[114] Art 683 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.
[115] Art 682 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.
[116] Art 696 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.

proceedings are no longer necessary.[117] The anomalous succession in terms of the *CCLC* was abolished.[118]

4.5 Comparative analyses between the historic development of intestate succession in South Africa and Quebec

Quebec was first established as a French Colony, which naturally lead to French customary law being the law applied,[119] whereas South Africa, or more specifically the Cape, became a Dutch colony, which lead to the inception of Dutch law and customs as the applicable law.[120] The historical development of intestate succession in Quebec has many similarities to both the *Aasdomsrecht* and *Schependomsrecht*, from which South Africa's intestate succession originated from. In terms of the *Custom of Paris* as well as the *CCLC*, prior to 1915, the surviving spouse could only inherit if no other blood relatives survived the deceased,[121] which is similar to the *Aasdomsrecht* as well as the Dutch Law principle of *naaste bloed erft goed*.[122] The French Custom differed from the *Aasdomsrecht* in that representation was allowed,[123] which can be compared to the *Schependomsrecht*. However, the *Schependomsrecht* applied representation *ad infinitum*,[124] whereas the French Custom only applied representation *ad infinitum* to descendants but limited representation to the twelfth degree in ascendants and collaterals.[125] Though, the *Ordinance* limited representation in collaterals and ascendants up to and including four degrees from the deceased, the fifth degree would inherit *per capita*.[126] This in turn can be compared to the *CCLC* where representation was only limited to the children of privileged collaterals.[127]

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[117] Art 697 of the *CCQ*; Smith "Intestate Succession in Quebec" 64.
[118] Smith "Intestate Succession in Quebec" 64.
[119] See para 4.1 above.
[120] See para 2.1 above.
[121] See para 4.3 above.
[122] See para 2.1 above.
[123] See para 4.3 above.
[124] See para 2.1 above.
[125] See para 4.3 above.
[126] See para 2.1 above.
[127] See para 4.3 above.

The French law principle of *la fente* can to a certain degree be compared to the Dutch law principle of *het goed moet gaan aan de zynde daar van het ghekomen is*, which is the idea that half of your estate came from your mother and the other half from you father.[128] *La fente* was applied when the deceased left ordinary ascendants or when the deceased left half-siblings, the succession would be split equally on the deceased's mother and father's side.[129]

In terms of the *Custom of Paris* as well as the *CCLC* privileged ascendants and privileged collaterals could inherit equally,[130] while the *Aasdomsrecht* favoured ascendants over collaterals, and the *Schependomsrecht* favoured collaterals, if the deceased was only survived by one parent, based on the principle *geen goed komt van een die left*, this principle would no-longer be applied in terms of the *Octrooi*, which declared the surviving parent a competent heir.[131] Where both parents were predeceased the collaterals would inherit, based on the principle *goed klimt niet garen*.[132] However, if the deceased was, for example, survived by a grandparent on his mother's side and a half-brother on his father's side, the estate would be split between the mother and father.[133] This means that the grandparent would receive the mother's 50% share and the half-brother would receive the father's 50% share. This, in turn, again resembles the principle of *la fente* as discussed above.

The differences and similarities are easier seen and explained when applying the different principles to the same example. Using the example given in paragraph 2.1 above: A is the deceased and he is survived by his wife B, child C, grandchild D1 (descendant from predeceased child D) and greatgrandchild EE1 and EE2 (descendants from predeceased child E and grandchild E1). In terms of the *Aasdomsrecht*, C would be the sole heir, as representation was not applied. However, in terms of the *Schependomsrecht* C receives one third of the estate, D1 represents D and receives one-third of the estate, EE1 and EE2 represent E and E1

[128] See para 2.1 above.
[129] See para 4.3 above.
[130] See paras 4.2 and 4.3 above.
[131] See para 2.1 above.
[132] See para 2.1 above.
[133] See para 2.1 above.

and both receive one-sixth of the estate. The same division of the succession would take place in terms of the *CCLC*, prior to the 1915 amendment. The division of the succession in terms of the *CCLC*, after 1915, differs from the *Schependomsrecht*, in that the surviving spouse would be entitled to one-third of the estate, the descendants would share in the remaining two-thirds, in the same manner as before. C receives one-third of the remainder of the succession, D1 represents D and receives one-third of the remainder of the succession, EE1 and EE2 represent E and E1 and both receive one-sixth of the remainder of the succession.

If the deceased is survived by his wife, both his parents, P1 and P2, and two siblings S1 and S2. In terms of both the *Schependomsrecht* and *Aasdomsrecht* the parents of the deceased would inherit in equal shares and the siblings would not inherit anything. In terms of the *CCLC*, prior to 1915, the ascendants (parents) and collaterals (siblings) would inherit in equal shares, as each category was treated equally. After 1915, the surviving spouse would receive one-third and the remaining succession would be divided equally between the parents and siblings. However, because each category was treated equally, if the deceased was survived by his wife and parents, his wife would receive half of the succession and the remaining succession would be divided equally between his parents, and the same principle would apply if the deceased was survived by his wife and siblings.

The *CCLC*, after 1915, had some similarities to the *Natal Act*, in that the surviving spouse would be entitled to receive either half of the succession if no descendants survived the deceased,[134] similar to the second class discussed in paragraph 4.3 above, and one-third of the succession if the deceased was also survived by descendants,[135] similar to the first class, as discussed above. The difference is that the *Natal Act* only applied to spouses who were married out of community of property. Surviving spouses were only acknowledged as competent heirs in 1915, after amendments were made to the *CCLC*,[136] whereas spouses were only deemed

[134] See para 2.1 above.
[135] See para 2.1 above.
[136] See para 4.3 above.

competent heirs in South Africa, during 1934 with the enactment of the *Succession Act*.[137]

The *CCLC*, after 1915, also had certain similarities to the *Succession Act*, in that the *CCLC* differentiated between four classes[138] and the *Succession Act* differentiated between four scenarios.[139] The first class in terms of the *CCLC* differs from the first and second scenario given by the *Succession Act*, in the first class the spouse would receive one-third of the succession and the descendants the remaining two-thirds, while in the first and second scenario the surviving spouse would either receive R50 000,00 or a child's share of the estate, whichever is greater in value, and the descendant's would receive the remainder of the estate.[140] The third scenario has some similarities with the second class. The third scenario was applied when the deceased was survived by his spouse as well as a parent or sibling. In this scenario the spouse would receive half of the estate and the remainder would go to the surviving parent or sibling, or split equally between both if both survived the deceased.[141] The second class consisted of three categories, namely: the surviving spouse; privileged ascendants; and privileged collaterals, and each category would be treated equally. The following example would have the same outcome, in both legal systems: A is survived by his wife B and his father C, the estate would be divided equally between B and C in terms of both the *Succession Act* and the *CCLC*. In terms of the *Succession Act*'s fourth scenario, the surviving spouse would be the sole heir if the deceased did not leave any descendants, parents or siblings, and the surviving spouse would only be the sole heir in terms of the *CCLC* if the deceased did not leave any privileged ascendants or privileged collaterals, in terms of the second class.

The *CCLC's* third class consisted of the ordinary ascendants and the fourth class consisted of the ordinary collaterals,[142] and if the deceased, in South Africa, was

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[137] See para 2.1 above.
[138] See para 4.3 above.
[139] See para 2.1 above.
[140] See para 2.1 above.
[141] See para 2.1 above.
[142] See para 4.3 above.

survived by ascendants, other than his parents, and collaterals, other than his siblings, the estate would be divided in terms of the *New Schependomsrecht,* as per the *Octrooi*.[143] It is, again, easier to observe the similarities and differences when applying them to the same example: A is survived by his grandfather on his mother's side, GM and his uncle on his father's side, UF. In terms of the *CCLC* the succession would be split, *la fente*, between his mother and his father's side, his grandfather, GM, would receive 50% and his uncle, UF, would receive 50%. However, in terms of the *New Schependomsrecht* the surviving grandparent, GM, would receive the entire estate, this would only be the case in terms of the *CCLC* if the deceased did not leave any ancestors or collaterals on his father's side.

The law governing intestate succession in both South Africa and Quebec initially did not recognise adopted children as competent heirs.[144] Adopted children, in South Africa, were only fully recognised as descendants of their adoptive parents in 1983,[145] whereas they received full recognition as descendants in 1980 in Quebec.[146] The law of intestate succession in South Africa also distinguished between extra-marital children, as the child born out of wedlock could only inherit from the mother and not the father. This exclusion was abolished with the enactment of the *ISA* in 1988,[147] while extra-marital children were recognised as legitimate heirs by 1980 in Quebec.[148]

Dependants, whether they are descendants or surviving spouses, may lodge a claim against the estate for maintenance in both Quebec and South Africa.[149] In South Africa maintenance claims of descendant's are governed by both the common law and the *AEA*[150] and the maintenance claims of surviving spouses are governed by the *MSSA*,[151] while in Quebec maintenance claims are governed by the *CCQ*.[152] The

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[143] See para 2.1 above.
[144] See paras 2.1 and 4.4 above.
[145] See para 2.1 above.
[146] See para 4.4 above.
[147] See para 2.1 above.
[148] See para 4.4 above.
[149] See paras 2.5, 3 and 4.4 above.
[150] See para 3 above.
[151] See para 2.5 above.
[152] See para 4.4 above.

law of intestate succession in both Quebec and South Africa initially excluded same-sex partners as surviving spouses. In Quebec, this position changed when civil unions obtained legal recognition in terms of the *CCQ* in 2002, together with the enactment of the *Civil Marriages Act* in 2005.[153] This position also changed in South Africa with the enactment of the *Civil Union Act* in 2006. Notably, neither South Africa, nor Quebec, acknowledge *de facto* spouses for the purposes of intestate succession.[154] However, it appears that the legal recognition of opposite-sex life partners in intestate matters is changing in South Africa, based on the decision of *Bwanya*, as discussed in chapter 2.5 above.[155]

South Africa's default marital regime is in community of property,[156] while Quebec's changed from in community of property to the partnership of acquests in 1970, and the family patrimony was created in 1989.[157] These concepts of family patrimony and partnership of acquests are foreign to South African law. Despite this, they can to some extent be compared to accrual claims, in respect of marriages that were concluded out of community with the accrual system. As an accrual claim, similar to the partnership of acquests, also places an obligation on either the estate or the surviving spouse.[158]

While many similarities can be found in the historic development of intestate succession in both Quebec and South Africa it appears that the concept of customary dower, which provided security for both the surviving spouse and the children of the deceased,[159] has no equal concept or legal principle in South Africa. However, as South Africa consists of a mixed legal system and is multi-cultural and multi-religious,[160] a different form of dower is applied in Muslim marriages.[161] Marriage is

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[153] See para 4.4 above.
[154] See paras 2.5 and 4.4 above.
[155] See para 2.5 above.
[156] See para 2.1 above.
[157] See para 4.4 above.
[158] Sections 3 and 4 of the *MPA.*
[159] See paras 4.3 and 4.4 above.
[160] See paras 2.4 and 2.5 above.
[161] The Holy Qur'an ch 4 v 4; Rautenbach *Introduction to Legal Pluralism in South Africa 91,* 288; This study will only discuss the dower in terms of Muslim rites, known as *mahr*. *Mahr* and the customary dower differs from *lobolo (*also known as *lumalo, bogadi, xuma, thaka, magadi, ikhazi and emabheka*)*,* which is found in African customary law. *Lobolo* traditionally consisted of cattle,

a civil contract between a man and a woman, in terms of Islamic law.[162] Dower (*mahr*) is considered an essential component of the marriage contract.[163] It was established in the matter of *Ryland v Edros*[164] that proven terms and customs arising from the marriage contract can be enforceable.[165] The draft *Muslim Marriages Bill*,[166] defines *mahr* as either a sum of money, property, or anything of value which becomes payable by a husband to his wife as result of the marriage.[167] The purpose of *mahr* is to lay the foundations for affection and companionship and to establish the family.[168] *Mahr*, or a portion thereof, may become payable on an agreed future date, but will become due and payable upon the dissolution of the marriage either by divorce or death.[169] *Mahr* differs from the customary dower in that it forms part of the marriage contract and is payable on the date of marriage or may be differed, whereas the customary dower is a right given to the surviving spouse in terms of French customary law or it can be contained in a marriage contract, referred to as the predetermined dower, and the surviving spouse can only claim this right after their spouse passed away.[170] *Mahr* also differs from Quebec's customary dower in that *mahr* is applied informally because Muslim marriages are not yet recognised in South African law,[171] it is also not regulated or governed by any legislation, whereas

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which would on occasion be supplemented by other livestock or money, modern day *lobolo* consists of money or property or both, but is still referred to as "cattle". *Lobolo* cannot be compared to the customary dower because it is a bride price paid to the head of the bride's household, whereas the customary dower is payable to the deceased's surviving spouse, *lobolo* is therefore not discussed in this study; *Mahr* and the customary dower also differs from *Arsha*, which is a form of marriage under Hindu rites where the father of the bride gives away the bride after receiving a cow and a bull or two such pairs of animals from the groom, it therefore also cannot be reasonably compared to the customary dower and is not discussed in this study; *Asura* is another type of marriage in terms of Hindu rites where the father of the bride receives compensation for the bride, which is known as *sulk* or "bride price", however Hindu texts are opposed to this type of marriage and deems it as immoral because it is regarded as a sale of the father's daughter. *Asura* marriages also differ from the customary dower to such an extent that it cannot be reasonably compared and will therefore not be discussed in this study.

[162] Rautenbach *Introduction to Legal Pluralism in South Africa* 351.
[163] Rautenbach *Introduction to Legal Pluralism in South Africa* 353.
[164] *Ryland v Edros* 1997 2 SA 690 (C) (hereinafter referred to as *Ryland*).
[165] *Ryland* paras 710D-E.
[166] GN 37 in GG 33946 of 21 January 2011.
[167] Section 1 of the draft *Muslim Marriage Bill*.
[168] Section 1 of the draft *Muslim Marriage Bill*.
[169] Section 1 of the draft *Muslim Marriage Bill*.
[170] See para 4.1 above.
[171] Rautenbach *Introduction to Legal Pluralism in South Africa* 63.

Quebec's customary dower is recognised in Quebec's legal system and governed by the *CCQ*.

4.6 Suggested alternatives to Section 1(1)(c)(i) of the ISA

Chapter 3 of this study looked at available statistics which indicated that the majority of South Africans die intestate, which means that the *ISA* is used to administer the majority of deceased estates. The available statistics also indicated that more than half of the population's estate is worth less than R250 000.00, which is the prescribed minimum fixed amount awarded to surviving spouses. This supports the argument that section 1(1)(c)(i) of the *ISA* inadvertently excludes children as well as adult descendants of a large population group, by allocating a fixed minimum amount to the surviving spouse or spouses. Another example given in chapter 3 also showed that this exclusion is not only limited to impoverished families.

The late Chief Justice Q.B., Sir James Stuart Bart, intentionally died intestate and remarked that he preferred his assets to be distributed accordingly as the law regulating intestate succession in the Province of Quebec is "just, clearly defined and especially equitable in regard to the rights of women and children". As previously stated, the *Constitution* provides the courts with the discretion to take into consideration foreign law when interpreting any legislation and developing the common law as well as customary law.[172] This study therefore looked at the intestate succession in Quebec in order to formulate a possible solution for the problems highlighted in chapter 3 above. The law of intestate succession in Quebec is comprised of a mixed legal system, consisting of French customary law and common law.[173] Similarly, South African intestate succession law is comprised of a mixed legal system, consisting of Roman-Dutch law, English common law and indigenous laws referred to as customary law.[174] Quebec was used in this research, not only because it also consists of a mixed legal system, but because both jurisdictions share many similarities in the developmental history of intestate

[172] See paras 1 and 3 above.
[173] Smith "Intestate Succession in Quebec" 52.
[174] Rautenbach 2008 *JCL* 119; see para 2 above.

succession.[175] Statistics moreover show that a large portion of Quebec's population die intestate.[176] Likewise, the majority of South Africans die intestate,[177] and the majority of deceased estates are therefore administered in terms of the laws of intestate succession in both South Africa and the Canadian province of Quebec.

The *CCQ* provides a viable solution to the problems discussed in chapter 3 above, as it awards one-third of the estate or succession to the surviving spouse and the remaining two-thirds are allocated to the descendants, which will ensure that both the surviving spouse as well as the descendants are always included in the inheritance.[178] On the other hand, a prescribed minimum fixed amount which is allocated to the surviving spouse or spouses may lead to the exclusion of the descendants, as is the case in the majority of intestate estates in South Africa, where the deceased was survived by a spouse or spouses as well as descendants.[179]

Another alternative could be to apply Quebec's customary dower,[180] as the customary dower provides security for spouses in the form of a *usufruct* over immovable property and will ensure that the property of the deceased is passed to his descendants. This offers a possible solution that provides security and certainty to the surviving spouse or spouses and ensures that the descendants receive the inheritance. However, there exists no legal principle in South Africa that can successfully be compared to Quebec's customary dower and it would therefore not be easily transplanted in the South African legal system. This leads to the conclusion that the customary dower may not necessarily be a viable solution.

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[175] See para 4.5 above.
[176] Smith "Intestate Succession in Quebec" 52.
[177] Office of the High Court of South Africa *A Guide 2016* 29; See para 3 above.
[178] See para 4.4 above.
[179] See para 3 above.
[180] See para 4.4 above.

Chapter 5: Conclusion and recommendations

This study focused on the administration of deceased estates where the deceased was survived by descendants as well as a spouse or spouses. Intestate succession in its original form and early development had various inequities, which included the discriminatory treatment of surviving spouses, adopted children, extra-marital children on the side of the father, and widowers who were married out of community of property.[1] It also had various complexities as the law was established in terms of common law principles and statutory sources.[2] The complexities and inequities lead to the enactment of the *ISA*, as the *ISA* embodied the legislature's attempt to simplify intestate succession in South Africa, by codifying the various common law principles and statutory sources.[3] Intestate succession underwent further development through various Constitutional Court judgments, as the *ISA* in its initial form also had various inequities because it discriminated against black South Africans, especially black women, and spouses married in terms of customary law, Muslim and Hindu rites, as well as same-sex partners.[4]

The *ISA* completely changed the treatment of surviving spouses by the common law, from not being a competent heir to now being the primary heir.[5] Section 1(1)(1)(c)(i) of the *ISA* stipulates that if a deceased is survived by a spouse as well as descendants, the surviving spouse will inherit the greater of either a child's share or a fixed amount as determined by the Minister of Justice, which amount is currently set at R250 000.00.[6] Descendants are the only heirs who can compete with the surviving spouse or spouses.[7] However, the descendants can only compete with the surviving spouse where the nett value of the estate is more than

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1 See para 2.1 above.
2 See para 2.1 above.
3 See para 2.2 above.
4 See para 2.3 above.
5 See para 2.1 above.
6 See para 3 above.
7 See paras 2.4 and 2.5 above; Note that the only polygynous marriages recognised for purposes of the *ISA* are marriages concluded in terms of either African customary law or Muslim rites.

R250 000.00.[8] The purpose of this study was to determine whether the legislature inadvertently placed the surviving spouse in a more favourable position than the descendants, by allocating a minimum fixed amount which the spouse should receive.

This appears to be the case, when taking into consideration the available statistics indicating that more than half of the South African population lives under the upper bound poverty line,[9] and that the estate value of the majority of South Africans is worth less than R250 000.00.[10] This leads to the conclusion that the majority of intestate estates will exclude the descendants of the deceased, based on the prescribed fixed amount which the spouse or spouses should receive. The legal remedies available to the descendants who are excluded from inheriting due to the surviving spouse or spouses entitlement to the minimum fixed amount of R250 000.00, are limited to either a maintenance claim or a claim in terms of the *conditio indebiti* that are expensive and timeous processes.[11] These legal remedies are only available to descendants who were dependant on the deceased,[12] which means that there is no legal recourse for descendants who were not dependant on the deceased.

Furthermore, the available statistics indicate that the majority of South Africans die intestate, which means that the majority of estates are administered in terms of the *ISA*.[13] This leads to the conclusion that, in the majority of cases, the surviving spouse will inherit the entire estate of the deceased, to the exclusion and detriment of the descendants. It therefore appears that section 1(1)(c)(i) does infringe on the rights of children, as well as adult descendants, who hail from impoverished families.

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8 Unless the deceased was survived by more than one spouse, which means that each of the spouses should receive either a child's share or R250 000.00, whichever is the greater amount; See paras 2.4 and 2.5 above.
9 See para 3 above.
10 See para 3 above.
11 See para 3 above.
12 See para 3 above.
13 See para 3 above.

However, as seen from the practical example given in chapter 3 above, this is not only limited to impoverished families.[14]

In an attempt to find a possible solution for the discriminatory treatment of children as well as adult descendants by the *ISA*, this study discussed and compared the historical development of intestate succession in both South Africa and Quebec. The purpose of this comparison was to determine whether the legal system of Quebec was suitable to compare to South Africa and if the laws could easily be transplanted. During this comparison it was found that both Quebec and South Africa had various similarities in not only the historical development of the law of intestate succession, but also in the application of certain legal principles in the division of the estate (or succession) to competent heirs.[15] The main focus was that both legal systems initially excluded spouses as competent heirs, the difference being that the *Schependomsrecht*, which was the foundation of intestate succession in South Africa,[16] completely excluded the surviving spouse, whereas the surviving spouse could inherit in terms of the *Custom of Paris* as well as the *CCLC*, prior to 1915, if the deceased did not leave any other blood relative.[17] The other difference was that the *Custom of Paris* as well as the *CCLC* provided the surviving spouse with a right to customary dower, which gave security to the surviving spouse in the form of a life interest or *usufruct* over a portion of the succession and still kept the inheritance in the bloodline of the deceased as his descendants would inherit the succession.[18] The *CCLC* was amended in 1915 as to recognise the surviving spouse as a competent heir in both the first and second class,[19] this however meant that the spouse would have to abandon his/her right to dower in order to inherit.[20] The surviving spouse therefore has to choose between his/her right to customary dower and the right to inherit.

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[14] See para 3 above.
[15] See para 4.5 above.
[16] See para 2.1 above.
[17] See paras 4.1, 4.2 and 4.3 above.
[18] See paras 4.1, 4.2 and 4.3 above.
[19] See para 4.3 above.
[20] See para 4.3 above.

Although the right to customary dower appears to serve as some solution to the problems highlighted in chapter 3 above, it does not seem to have an equal concept or legal principle in South Africa.[21] *Mahr* in terms of Islamic law is the only form of dower in South Africa that can, to a certain extent, be compared to the customary dower.[22] Unfortunately, the problem is that *mahr* is only applied informally in South Africa, to marriages concluded in terms of Muslim rites, as Muslim marriages are not yet recognised by the South Africana legal system and there is currently no legislation which encompasses, regulates, or enforces this right to dower.[23] This means that the idea of customary dower cannot be easily transplanted in the South African legal system and is therefore not a viable solution.[24]

The modern law of intestate succession is governed in Quebec by the *CCQ*[25] and in South Africa by the *ISA*.[26] These two legal systems differ in their treatment of the surviving spouse and descendants in intestate succession. The *ISA* regards the surviving spouse as the primary heir, although this preferential treatment only falls away in estates that are large enough to divide equally between the surviving spouse and descendants, whereas the *CCQ* places the surviving spouse in the same category as descendants, privileged ascendants, and privileged collaterals. The *CCQ* appears to be closer to the common law principles that the *ISA* developed from, in that it ensures that blood relatives are never excluded from inheriting, while the *ISA*, in the majority of matters, excludes blood relatives in favour of the surviving spouse, which is the complete opposite from the legal principles that the *ISA* developed from. The Report, which had a large influence on the development of the *ISA*, stated that the rules of intestate succession should operate fairly,[27] it does not seem fair that the majority of intestate estates will exclude the descendants of the deceased in favour of the surviving spouse.

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[21] See para 4.5 above.
[22] See para 4.5 above.
[23] See para 4.5 above.
[24] See para 4.6 above.
[25] See para 4.4 above.
[26] See para 2.3 above.
[27] See para 2.1 above.

Taking the abovementioned into consideration, it is recommended that the fixed amount allocated to the surviving spouse, in terms of the *ISA*, should rather be replaced by a portion or percentage of the value of the estate in order to ensure that the descendants cannot be excluded from the estate. This approach makes provision for the surviving spouse and keeps the inheritance within the deceased's bloodline and is, therefore, closer to the common law principles from which the *ISA* developed.

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