Description

The constitution impacts the Law of succession in the following areas: 1) Common and Customary Low of Intestate Succession; 2) Maintenance upon death and 3) Law of Testate succession.
This cheatsheet summaries the ways in which the SAn legislature and Courts have impacted the Law of Succession - specifically through it's definition of "spouse"/Survivor

Terminology

Dies Caedit	Personal right to claim - occurs upon someones death
Dies Vaedut	When they can enforce right to claim - once creditors; L7D account settles etc

The Common Law of Intestate Succession

Regulated by **Instestatate Succession Act 81 of 1987**. This says that the deceased surviving spouse is one of the deceased primary Intestate heirs.

The SAn legislature and courts expanded the traditional definition of spouse.

Customary Law of Intestate Succession

History

s23 of the Black Administration Act 38 (1927) and *S1(4)(b) of ISA* implied that black intestsate and non-black intetstate estates would be governed by different acts. CC found this to be unconstitutional (*SAHRC v President*)

CC ordered that ISA applied to all estates and Legislature repealed BAA.

Legislature then enacted Reform of Customary Law of Succession and Regulation of Related Matters Act 11 (2009)

Maintenance Upon Death

Surviving spouse can bring maintenance claim against deceased's estate for reasonable maintenance of they cannot meet their maintenance needs from their own means.

Statutary Claim in terms of **Maintenance of Surviving Spouses Act 27 (1990)**. This Act uses the traditional def of spouse - this def was expanded by courts and legislature.

The Legislature: Civil Union Act 17 of 2006; S13

S13 regulates legal consequences of a civil union.

13(1): Legal consequences of marriage in Marriage Act apply to civil unions

13(2): Spouse includes civil union partner

6) ComLaw - Courts: Bwanya v The Master (P)

Legal Question: Can surviving partner in opposite sex life partnership inherit under ISA/claim in terms of MA?

Answer:

- *Majority:* Exclusion in ISA/MA is unconstitutional. In MA it also conditions that the spouse did not receive equitable share in partners estate.

6) ComLaw - Courts: Bwanya v The Master (P) (cont)

- *Majority*: Rejected choice argument in Volks: Said many women do not have a real choice to enter into marriage by reason of their vulnerability (Men don't want to marry, financial reasons etc.)

- *Majority*: Real Q is whether these relationships were worthy of constitutional/legal protection. Yes in context of intestate inheritance.

- Minority: Difficult to establish what a permanent life partnership is; believes it's illusionary that women are helplessly trapped in cohabitation relationships; upheld *Volks* and dissented bc of precedent.

Court Order

MA/ISA S1(1) must be read as though the words "or permanent life partnership in which partners have undertaken reciprocal duties of support" must be read in after the word "spouse"

- Ruled that orders are suspended for 18mnths so that Parliament can take steps to cure constitutional defects identified in judgements.

MA read on after "survivor": & includes surviving partner of a perm life prtnrship termd by death of 1 partner in which the partners undertook recip duties of supp and in circum where surv partner has not received equit share of partners estate."

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Law of Testate Succession:

Constitution has impacted the law of succession in 2 ways:

1. Meaning of the word spouse (**Moosa v Minister of justice**)

Legal Question: Must a husvand/wife of a mono/poly muslim marriage be recognised as a "surviving spouse" for purposed of 2C (1) of the Wills Act.

Answer: Exclusion infringes on person rights to equality and human dignity.

Court Order: For purpose of 2C(1) of the Wills Act a surviving spouse includes every husband and wife of a mono/poly Muslim marriage solemnised under the religion of Islam.

2. Amendment of testamentary provisions which are contrary to public policy. (cases denoted with TS2.x)

- **BOE Trust LTD (2013**: The Constitutional Right to property and human dignity affirm the right to freedom of testation/*voluntas testatoris servanda est*.

- This right is not absolute - it may not contrary to public policy (*contra bono mores*)

1) ComLaw - Courts: Daniels v Campell 2004

Legal Quesion: Can a spouse to a mono Muslim marriage concluded only in accordance of Mulsim rights inherit in terms of ISA/ claim in terms of MA?

Answer:

- Spouse in ISA/MA must be given ordinary meaning.

- We think of a "spouse", the couples in above scenario fit neatly into our understanding of the words meaning.

Thus, the word "Spouse" in ISA/MA includes the surviving spouse to a monogamous Muslim marriage.

3) ComLaw - Courts: Laubsher v Duplan 2017

Background/Legal Question: Does the enactment of *Civil Union Act* render *Gory* irrelevant? *Volks v Robinson 2005* amplifies this question because the court denied a maintenance claim for an opposite sex life partner on the grounds that there was nothing that stopped them from getting legally married. *Laubscher* tells us that *Gory* is not rendered irrelevant.

Answer:

- Gory dealt with the inability of same sec partners to inherit in terms of ISA, not their inability to enter civil union. Thus, mischief Gory addressed did not dissappear with the Act.

3) ComLaw - Courts: Laubsher v Duplan 2017 (cont)

- Legislature did not deal with the issue of *Gory*/same sex life partners when enacting CivUnion Act - thus they did not intend to amend the reading in order prescribed in *Gory*

- *Volks* clearly different to *Laubscher* : 1) Volks dealt with maintenance, Laubcher deals with intestate succession. 2) Deceased left a will in Volks 3) Issue in Volks was an equality challenge of Maintenance of Surviving Spoused Act, but in Laubscher its re: the interpretation of *Gory's* court order in light of CivUnion Act.

Courts Ruling:

- Enactment of CivUnion Act did not specifically amend the ISA as requires by *Gory*.

-CivUnion Created a new category of beneficiary in ISA that is distinguishable from same-sex life partnerships.

Therefore, same sex life partnership will still enjoy intestate rights as per *Gory* until Legislature appeals/amends it.

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7) ComLaw - Courts: Wilsnach v TM (2021) (P!)

Legal Question: Can a grandparent who assumed parental control in respect of a child inherit as a "parent" from that child's intestate estate in terms of ISA?

Answer

- The grandmother was the primary caregiver and dominant parental figure of child and acquired parental rights & responsibilities over child. Logical that she should be regarded as a parent.

- When a person has filled the role of a parent, their right to dignity demands that they be regarded as such.

Court Order

The deceased grandma was parent & was entitled to inherit in terms of ISA

TS2.1 Minister of Education v Syfrets Ltd (2006)

Legal Issue: Applicants want the removal of discriminatory limitations on testamentary bursary at UCT. Stipulated: Only Europeans, no women/Jewish people.

Reasoning: Only European limitation = indirect discrimination. No women/jewish people=direct discrimination. Therefore: contrary to public policy.

Court Order: Will was amended through deletion of offending references to race, gender and religion.

TS2.3) King v De Jager (2021) (P!)

Legal Issues: After kids property could only be devolved to male descendants. Does the exclusion if female descendants constitute unfair discrimination that enables court to strike down fideicommissum bequest?

Answer: WC HC said no; CC said it was unnconstitutional and thus unenforceable.

Court Order

Minority: Unfair on grounds of gender. Common Law must be developed to restrict discriminatory freedom of testation.

Majority: No need to develop Common Law - this was already not allowed for in the law.

Substantive equality & Ubuntu demanded a decontextualisation of Freedom of testation in SA to address consequences in an unequal society

2) ComLaw - Courts: Gory v Klover 2007

Legal Question: Can a partner to a same-sex permanent life partnership inherit under the ISA?

Answer:

- At this time, same sec partners were legally incapable of concluding a civil marriage.

2) ComLaw - Courts: Gory v Klover 2007 (cont)

- The exclusion of permanent homosexual partners from intestate inheritance in ISA = unfair discrimination on grounds of sexual orientation AND marriage = unconstituti-onal.

Courts Order:

s1(1) of ISA must be read as though the words "or partner in a permanent same-sex life partnership *in which the partners have undertaken reciprocal duties of support*" appear after the word "spouse"

4) ComLaw - Courts: Govender v Ragavayah (2009)

Legal Question: Can a spouse to a monogomous Hindu marriage inherit in terms of ISA

Answer:

- Same Reasoning as *Daniels v Campell*

Courts Order: The applicant was declared a spouse of the deceased for purposed of s1(1) of ISA.

5) ComLaw - Courts: Hassam v Jacobs 2009

Legal Question: Can each of the surviving spouses in a Poly Muslim marriage inherit in terms of ISA/MA?

Answer

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5) ComLaw - Courts: Hassam v Jacobs 2009 (cont)

- ISA does not provide for the scenario in which deceased is survived by multiple spouses = unfair discrimination on the grounds of marriage type = unconstitutional.

- MA: S(6) of Interpretation Act 33 of 1997: unless states otherwise, words which appear in singular also apply in plurarl. Thus the word "survivor" in MA included those in poly marriages.

Courts Order

The ISA must be read as though words "or spouses" appear after the word spouse.

Note: Bc the court did not say it was unconstitutional that poly marriages could not claim in terms of MA, this did not beed to be confirmed in front of CC. The ISA one did bc they deemed the act unconstituti-onal.

ConLaw - courts: Volks v Robinson (2005)

Legal Question: Can surviving partner in perm hetro life partnership institute a maintenance claim in terms of MA?

Answer 1: High Court

Yes. Exclusion of surviving partner = unfair discrimination on grounds of marital status = unconstitutional.

ConLaw - courts: Volks v Robinson (2005) (cont)

Court Order 1: Read in "and includes surviving partner of a life partnership" into definition.

Answer 2: CC

Majority refused to confirm high courts order. Reasoned:

- It would strain MA

- Survivng Life Partner does not fit neatly into ordinary meaning of the word "spo-use".

- Hetro couples enjoy Freedom of Choice to get married.

Implication: Surviving Spouse cannot institute maintenance claim.

TS2.2) In re BOE Trust (2013) (P!!)

Legal Issue: Applicants sought to remove discriminatory limitation from testamentary bursary to 4 SAn universities. Limitation: white students only.

Outcome: WC High Court dis not grant application- they appealed supreme court. 4 unis rejected bursary - making it impossible to implement busrary request.

Testator forsaw that this might happen - listed charities for this scenario.

The alternative devolution in terms of charities had to occur in accordance with testators directions.

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