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The New Lesotho Administration of Estates and Inheritance Act of 2024 and its Repercussions for the Child's Share: Lessons for South Africa

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Abstract

Lesotho's legal framework for the administration of deceased estates and inheritance has undergone a transformative overhaul with the enactment of the Administration of Estates and Inheritance Act, 2024 ('the Act'). Operationalised on 2 April 2024, the Act introduces significant reforms to the management and distribution of deceased estates by addressing the limitations and prejudices previously imposed by customary law, thereby ensuring a more inclusive approach to inheritance rights. It reforms outdated and fragmented laws governing inheritance, succession, administration and the distribution of deceased estates under civil and customary rules. Section 71(1) provides that if a surviving spouse with minor children remarries, the property of the previous marriage shall not form part of the community of property in the subsequent marriage. Furthermore, a widow or widower must declare their marital inheritance to the Master of the High Court before remarrying. This article explores whether widows and widowers may enter into a subsequent marriage with the child's share of the inheritance. The article argues that a parent who enters into a subsequent marriage with the child's share of the inheritance commits financial violence against that child. Drawing on Lesotho's jurisprudence and the new legislative framework, the article argues that South Africa can rely on the supremacy clause in its succession law and related legislation when considering the child's best interests.

Keywords

Administration of Estates and Inheritance Act, child's share of inheritance, financial violence, Lesotho, South Africa.

1. Introduction

Lesotho, like many African states, bears the enduring imprint of colonial rule on its legal and social institutions.[1] Colonialism fundamentally altered Basotho norms, belief

1 Mpapa, P *'Widows and Daughters without Hope': Interrogating the Concept of 'Customary Heirship' in Lesotho* (Master's dissertation, University of Zimbabwe 2014) 2.

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systems, and cultural practices, premised on the colonial assumption that African societies were backward and needed civilisation.[2] One of the most profound consequences was the transformation of Sesotho customary law.[3] The Laws of Lerotholi reduced what had previously been a flexible, living, orally transmitted system regulating Basotho social life to writing in 1903.[4] These codified rules have survived Lesotho's transition to independence and continue to shape the post-colonial customary law framework.[5]

A notable difficulty with the Laws of Lerotholi is their uneasy relationship with Lesotho's 1993 Constitution.[6] Despite constitutional supremacy, these laws still carry considerable authority and often operate in ways that undermine constitutional values.[7] This tension arises largely because the Laws of Lerotholi reflect a colonial interpretation of Basotho culture, capturing more of what colonisers understood or misunderstood about customary practices than the lived realities of the Basotho people themselves.[8] As a result, post-colonial customary rules governing institutions such as marriage, succession and chieftaincy remain deeply westernised.[9] The Laws of Lerotholi have therefore been widely criticised for their rigidity, resistance to social change and discriminatory impact, particularly on women in traditional communities.

Mpapa observes that the original aim of codifying the Laws of Lerotholi was to clarify and provide certainty about Basotho customary law.[10] Initially, people assumed these written rules faithfully represented living customs.[11] However, research has demonstrated a significant disconnect between the codified rules and actual social practice. Unsurprisingly, the earliest version of the Laws of Lerotholi prominently addressed succession, reflecting the centrality of inheritance to family structure and social continuity.[12] Over time, the Laws expanded to regulate a wide range of matters, including chieftaincy, land tenure, inheritance, marriage and civil liability.[13] Despite their questionable legal status and lack of legislative force, the Laws of Lerotholi remain the primary written reference point for Sesotho customary law, particularly in matters of succession and inheritance.[14]

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2 Seema, J 'The Restoration of Cultural Identity in Maboea's Poetry Volume *Tlhaka ya Basotho*' (2016) 36 *South African Journal of African Languages* 201.

3 Ibid.

4 Juma, L 'The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho' (2011) 23 *Pace International Law Review* 95; *Laws of Lerotholi* 1909.

5 Juma ibid.

6 Mpapa (note 1) 2.

7 Ibid.

8 Juma (note 4) 95; *Laws of Lerotholi* 1909.

9 Ibid.

10 Mpapa (note 1)2.

11 Ibid.

12 'Nyane, H 'The Constitutional Rules of Succession to the Institution of Monarch in Lesotho' (2019) *Potchefstroom Electronic Law Journal* 9. See section 2 of the Laws of Lerotholi, which provides that 'the succession to the chieftainship shall be by right of birth; that is [,] the firstborn male child of the first wife married: if the first wife has no male issue then the firstborn male child of the next wife married in succession shall be the chief; provided that if a chief dies leaving no male issue the chieftainship shall devolve upon the male following according to the succession of houses'.

13 Juma (note 4); *Laws of Lerotholi* 1909.

14 Ibid.

Under Sesotho customary law, as in other African customary law systems, succession traditionally focuses on preserving the family lineage, maintaining household unity, and ensuring the deceased's property is managed for the benefit of the broader family.[15] Succession entails not merely transferring property but also assuming the deceased's social status and responsibilities.[16] Central to this system is male primogeniture, the principle that the eldest surviving male child inherits intestate from his father.[17] Historically, this principle has been justified on the basis that it prevents the fragmentation of family property and ensures the continued support of widows, younger children, and unmarried daughters in the household.[18]

While male primogeniture was historically justified as a way to preserve family property and continuity, its rigid application gradually became a major obstacle to substantive equality. In practice, the rule systematically excluded women and girl children from inheriting their husbands' or fathers' estates, regardless of their dependence on, or contribution to, the family estate. In Lesotho, this principle never meaningfully evolved in response to changing social realities, despite customary law's inherently adaptive nature. As a result, the customary law of succession became increasingly restrictive, entrenching gender-based exclusion and limiting the protection afforded to vulnerable family members, particularly women and children.

In response to enduring injustices in its succession regime, Lesotho enacted the Administration of Estates and Inheritance Act of 2024 to address inheritance practices that historically excluded women and left children inadequately protected. This article places the child at the centre of its analysis by examining how the Act affects a child's inheritance share, especially when a surviving spouse remarries and tries to use property set aside for the child. The article questions whether such use is permissible under the Act and argues that appropriating a child's inheritance in these circumstances constitutes financial abuse and undermines the child's constitutional and proprietary interests. The article further contends that succession law must prioritise the child's best interests while remaining sensitive to the surviving spouse's position. Lastly, drawing on Lesotho's evolving legal framework, the article offers comparative lessons for South Africa on applying the principle of constitutional supremacy in succession law to strengthen the protection of children's inheritance rights.

2. Succession and inheritance through the principle of primogeniture

In Lesotho, customary law of succession is based on the principle of primogeniture.[19] Mahao describes this principle as follows:

15 Himonga, C et al *Post-Apartheid and Living Law Perspectives* (Oxford University Press 2015) 159.
16 Wall, R & Hareven, T *Family History Revisited: Comparative Perspectives* (University of Delaware Press Newark 2001) 343–344.
17 Ibid.
18 'Nyane (note 12) 9.
19 Ibid at 3.

> This rule is both prescriptive and male-based. But a more discerning analysis would reveal that the rule of primogeniture was merely one of the rules – a point of departure – but most certainly not final. The correct interpretation of the rule is that it serves the limited function of providing the order of nomination for high office and nothing more. Accession was always subject to a second rule – the rule of ratification. This rule provided for participative processes through the family council, or the *kgotla*, and, finally through a public assembly.[20]

The role of the family head through the principle of primogeniture transcends the spheres of the law of persons, whereby the family head personifies the home and its collective; the law of property, by which he is the nominal owner of family resources; the law of succession, whereby he exercises the responsibilities of his deceased parents; and the law of obligations, under which he pays the debts and prosecutes the claims of the household and its collective.[21] In *Bhe*, Ngcobo further describes this principle:

> The primary purpose of the rule is to preserve the family unit and ensure that, upon the death of the family head, someone assumes the family head's responsibilities. These responsibilities include looking after the deceased's dependants and administering the family property on behalf of, and for the benefit of, the entire family.[22]

Contrary to the general belief that primogeniture is a means for selecting despotic rulers, it was, in truth, meant to select a responsible servant for a particular constituency.[23] Male primogeniture was not rigidly applied to prevent women from accessing property.[24] This principle began to exclude women only in the colonial and post-colonial eras, when state regulation distorted it to focus on property inheritance rather than succession to status.[25] In pre-colonial Lesotho, male leaders exercised the principle to administer indigenous property on behalf of all family members.[26] Describing this principle as it relates to chieftaincy in Lesotho, 'Nyane further contends that, ordinarily, succession to the office of the chief and the office of the king would be hereditary, based on the principle of male primogeniture.[27] The origins of the customary law of succession are traceable to the 19th century, when Moshoeshoe organised the various Sotho-speaking communities scattered by the devastating *Lifaqane* wars[28] that swept across almost all of Southern Africa.[29]

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20 Mahao, NL 'O se re ho morwa "morwa towe!": African jurisprudence exhumed' (2010) 43(3) *Comparative and International Law Journal of Southern Africa* 317 at 321.
21 Bekker, JC (ed) *Seymour's Customary Law in Southern Africa* (5th ed, Juta, 1989) 81.
22 *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole* 2005 (1) SA 580 (CC) para 180.
23 Bekker (note 21) 70.
24 Osman, F 'The Consequences of the Statutory Regulation of Customary Law: An Examination of the South African Customary Law of Succession and Marriage' (2019) 22 *Potchefstroom Electronic Law Journal* 4.
25 Ibid at 1.
26 Mahao (note 20) 321.
27 'Nyane (note 12) 5.
28 Thompson, LM *Survival in Two Worlds: Moshoeshoe of Lesotho, 1786-1870* (Clarendon Press 1975) 94.
29 'Nyane (note 12) 4.

Moreover, both oral and written evidence show that succession took a dramatic turn after the demise of Letsie I, the son of Moshoeshoe I.[30] During this period, deviations from and exceptions to the principle of male primogeniture emerged because, while Letsie I succeeded Moshoeshoe under this principle, his successor deviated from it.[31] Letsie I had no firstborn son from his first house; instead, he had a daughter, Senate, whom Moshoeshoe later proposed as her father's successor.[32] Moshoeshoe understood the flexibility of Sesotho customary law, as Basotho customs and traditions are not static but dynamic, adapting to social change.[33]

In pre-colonial times, primogeniture shaped Africans' drive to establish an education system that equipped men to assume and advance their fathers' responsibilities in line with indigenous metaphysics.[34] This understanding of their role as temporary caretakers of their responsibilities is vital to understanding why men were always preferred over their sisters when appointing successors to family headship.[35] The principle of male primogeniture bore an inherent protectiveness towards women, children and all vulnerable members of the community. It was not meant to belittle or undermine anyone; therefore, other elders in indigenous communities held traditional leaders to the highest standards of accountability and responsibility. Pre-colonial communities in Lesotho were designed around the philosophy of *ubuntu/botho*. An individual operated in the community for the benefit of all. The colonialists were not genuinely concerned with the rights of the Basotho people; instead, they focused on instilling individualism and materialism for their own benefit, which contrasts with the Basotho people's communal worldview.[36] The colonialists did not consider *ubuntu/botho*. As a result, they forced customary law to develop through a Western lens.

Furthermore, as common law found its ground in Lesotho and after King Moshoeshoe's efforts to make Senate an heir, irrespective of her gender (as discussed above), upon the death of Letsie (Moshoeshoe's son, who succeeded him), the council of 'Sons of Moshoeshoe' aborted the plan and appointed Lerotholi as *Morena e Moholo*.[37] The earliest version of the Laws was drawn up during Lerotholi's reign.[38] 'Nyane contends that Lerotholi obviously used this opportunity to regularise the rules of succession, which were hugely shaken by the Senate saga, to legitimise himself as having properly succeeded his father, Letsie I.[39]

30 Ibid at 6.
31 Ibid.
32 Ibid. Moshoeshoe performed a rather strange ritual of converting Senate to make her a male. The ritual was performed by mounting Senate on a horse, giving her a rhinoceros horn – a sign of power – and declaring her the successor.
33 Phafoli, LS & Zulu, NS 'The Complexity of the Cultural Identity of Basotho in Lesotho' (2012) 9 *LWATI: A Journal of Contemporary Research* 238 at 245.
34 Ndima, DD 'The African Law of the 21st Century in South Africa' (2003) 36 *Comparative and International Law Journal of Southern Africa* at 325.
35 Ibid at 325.
36 Nunn, B 'Law as a Eurocentric Enterprise' (1997) 15 *Law and Inequality* 347.
37 'Nyane (note 12) 8.
38 Ibid at 9. At that time, no written blueprint of customary law existed. The only available document was the 1872 Cape Colony Report of the Commission on Laws and Customs of the Basotho.
39 Ibid.

On 4 October 1966, after almost a century of colonial rule, Lesotho regained its independence as a constitutional monarchy.[40] However, on 30 January 1970, the (then) Prime Minister suspended the Independence Constitution, which contained an elaborate Bill of Rights.[41] The monarchy survived, albeit under much stress.[42] On 20 January 1986, the army seized power, and the monarch was given a more active political role pending the outcome of a newly launched constitutional reform programme. Accordingly, an elected government was yet to materialise.[43]

Only after independence were some issues with the Laws of Lerotholi re-codified into different statutes.[44] The Chieftainship Act 22 of 1968 codified matters relating to chieftainship and succession thereto. Lesotho currently operates under a dualist legal system comprising Sesotho customary law, as set out in the Laws of Lerotholi, and Roman-Dutch law (common law).[45] The 1993 Constitution of Lesotho protects both legal systems and, despite originating in the era of modern African constitutions, largely follows British conventions.[46] The 1993 Constitution establishes a human rights regime grounded in the principle of non-absolutism.[47] The Constitution establishes 15 internationally recognised human rights.[48] Section 4(1) further provides that human rights limitations in Lesotho shall be predominantly specific because they are contained in individual rights provided for under the Bill of Rights.[49]

Under customary law, children's inheritance rights are traditionally limited and often favour male heirs. Section 11(1) of the Laws of Lerotholi provides that the heir is the first male child of the first wife. If she has no sons, the role passes to the first male child of the

40 Maqutu, WCM & Sanders, AJGM 'The Internal Conflict of Laws in Lesotho' (1987) 20 *Comparative and International Law Journal of Southern Africa* 377, 378.

41 Ibid at 378.

42 Maqutu & Sanders (note 40) at 378. Despite the introduction of the Human Rights Act of 1983, parliamentary democracy has not yet returned.

43 Ibid.

44 Shale, I 'Succession to Chieftainship for Women under Lesotho's 1993 Constitution: Assessing the Insurmountable Challenge Placed by Section 18(4)(c) of the Constitution on Customary Law and Gender Equality' (2014) *Lesotho Law Journal* 92 at 93.

45 Letsika, Q 'The Place of Sesotho Customary Law Marriage within the Modern Lesotho Legal System' (2005) 2 *University of Botswana Law Journal* 74.

46 'Nyane, H 'Development of Constitutional Democracy: 20 Years of the Constitution of Lesotho' (2014) *Lesotho Law Journal* 59 at 63.

47 'Nyane, H 'Limitation of Human Rights under the Constitution of Lesotho and the Jurisprudence of Superior Courts' (2015) 23 *Lesotho Law Journal* 5.

48 These rights are established under Chapter II of the Constitution: (a) the right to life; (b) the right to personal liberty; (c) freedom of movement and residence; (d) freedom from inhuman treatment; (e) freedom from slavery and forced labour; (f) freedom from arbitrary search or entry; (g) the right to respect for private and family life; (h) the right to a fair trial of criminal charges against him and a fair determination of his civil rights and obligations; (i) freedom of conscience; freedom of expression; (j) freedom of peaceful assembly; (k) freedom of association; (l) freedom from discrimination; (m) the right to equality before the law and the equal protection of the law; and (n) the right to participate in government.

49 Section 4(1) of the 1993 Constitution: 'the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest'.

next wife, in the order that the wives were married. However, the Constitution of Lesotho and the 2024 Act both guarantee equality before the law, overriding the customary law position that allows only male children to inherit by recognising that all children, regardless of gender, have the right to inherit from their parents.

3. Lesotho's estate laws: From outdated frameworks to recent reforms

Lesotho's estate laws entered a new era with the introduction of the Administration of Estates and Inheritance Act of 2024.[50] The Act came into operation on 2 April 2024 and marks a major shift in how deceased estates are managed and distributed, replacing outdated, fragmented laws with a more modern, inclusive, and unified legal framework.[51] It addresses longstanding issues tied to both civil and customary practices, particularly the historical exclusion of women and children, by promoting fairness and consistency in inheritance rights.[52]

The new law replaces several outdated, hard-to-apply statutes, including the Wills Ordinance of 1843 and the Intestate Succession Act of 1953.[53] By consolidating these into a single, coherent system, the Act aims to improve enforcement, close legal gaps, and ensure that estate administration better reflects the realities and needs of present-day Lesotho.[54] Furthermore, the Act marks a bold step toward equality and fairness in Lesotho's succession laws. It guarantees that all children, regardless of gender, birth status or whether their parents were married under civil or customary law, have equal inheritance rights.[55] This reform directly challenges historical injustices that excluded certain children from their rightful share of family estates.[56]

Understanding today's complex family dynamics, especially in cases of remarriage and blended families, the Act introduces a property regime based on the accrual system.[57] This ensures that assets from a previous marriage remain protected for the children's benefit, even if a surviving parent remarries. Under section 71(1), if a parent with minor children remarries in community of property, the estate from the earlier marriage is safeguarded, preventing it from becoming part of the new marital estate. This eliminates confusion and conflict in polygamous households and reinforces the cultural principle of '*malapa h'a jane*', meaning that each household's inheritance remains separate.[58] This is a significant step toward protecting children's rights and clarifying inheritance matters. While section 71(1) of the Act states that property from a previous marriage should not become part

50 Moerane, M & Rafoneke, R 'The New Administration of Estates and Inheritance Act No. 2 of 2024: Key Changes and Implications' (4 September 2024) at 3 <https://webbernew.com/a79/general-articles/the-new-administration-of-estates-and-inheritance-act-no.2-of-2024:-key-changes-and-implications.html> accessed 24 April 2025.

51 Ibid.

52 Ibid.

53 Section 116(2) of the Act stipulates: 'The following laws are repealed: (a) the Wills Ordinance 1843; (b) the Law of Inheritance Act, 1873; (c) the Administration of Estate Act, 1935; (d) the Remuneration of Executors, 1946; and (e) the Intestate Succession Act, 1953.'

54 Moerane & Rafoneke (note 50).

55 Section 69(2) of the Act.

56 Moerane & Rafoneke (note 50).

57 Section 66(1)*(a)*(ii) and (iii) of the Act.

58 Moerane & Rafoneke (note 50).

of the joint estate in a subsequent marriage with minor children, the provision remains vague, especially regarding the child's inheritance share, particularly if that inheritance involves immovable property. This lack of clarity raises serious concerns.

The article's central argument is that unless the law explicitly defines and safeguards the child's inheritance, the new marital estate could absorb it. This opens the door to potential financial harm to the child, which directly undermines the very rights that the Act claims to protect. Assuming protection is not enough; the law must be precise. Without clear legal boundaries, the child's inheritance is vulnerable, and this foreseeable threat must be treated with the same urgency and seriousness as any other rights violation.

4. Harmonisation of the Rights of Customary Widows with the Legal Capacity of Married Persons Act 15 of 2022: The rights of customary widows

The preamble to the Harmonisation of the Rights of Customary Widows with the Legal Capacity of Married Persons Act 15 of 2022 ('Harmonisation Act') provides for the enhancement of the economic status of customary widows to enable them to exercise their economic and property rights in line with the provisions of the Legal Capacity of Married Persons Act 9 of 2006 and incidental matters. Section 3(2) of the Harmonisation Act provides that, upon her husband's death, a customary widow shall own and control the joint estate property. Section 3(3) provides that a customary widow may administer the joint estate, dispose of its assets, enter into contracts, and act as guardian of minor children. Moreover, section 6 of the Harmonisation Act provides that where a surviving spouse has minor children and remarries, the property of the joint estate from the previous marriage shall not form part of the community of property of the subsequent marriage.

Customary law has historically prejudiced customary widows by failing to recognise a woman's share in the joint estate. In other words, in a customary law marriage, the spouses do not have a community of property; the estate belongs to the husband, and the wife is a perpetual minor. In *Khathala v Khathala*,[59] the first male child was held to be entitled to inherit the whole estate of his deceased father. The deceased first married the plaintiff's mother and, after her death, married the defendant.[60] He married the defendant first by customary rites and then by civil rites (*ho tiisa lenyalo*) before a minister of religion. Because she had also married by civil rites, the defendant argued that, under the received law (common law), she was entitled to a half-share of her deceased husband's estate.[61] The matter concerned the right to a Post Office Savings Account book with £300 credited to the deceased. Schreiner JA held:

> It is enough to say, as here, that Basuto living 'according to Basuto custom' marry according to Basuto rites as well as according [to] Christian rites, their proprietary relations during their joint lives and their intestate succession rights after the death of one of them are governed by Basuto law.[62]

59 LAC (1955–1969) 73.
60 Letsika, Q 'The Place of Sesotho Customary Law Marriage Within the Modern Lesotho Legal System' (2005) *Botswana Law Journal* 79.
61 Ibid.
62 LAC (1955-1969) 73.

The court held that the eldest son of the previous marriage was the rightful successor under customary law.[63] He was the lawful successor to all his deceased father's property, including the savings book and the credit reflected therein, as against the widow, who was entitled only to maintenance under customary law.[64] Under customary law, the surviving widow's half-share in the erstwhile joint estate was not recognised at all.[65] *A fortiori*, where a wife married in community of property dies, customary law does not recognise her half-share in the joint estate as a separate estate that could devolve upon her son.[66] The court further held that the civil marriage could not supersede the customary marriage and therefore that where, under customary law, there is an heir who has reached the age of majority, the widow cannot have any better rights than the heir, in accordance with sections 11(1) and 14 of the Laws of Lerotholi. This rule applies generally, and there is no reason it cannot apply to a customary marriage. Indeed, section 3(2) of the Harmonisation Act provides that, upon her husband's death, the customary widow shall have ownership and control of the joint estate property.

In *Lepule v Lepule*[67] the Court of Appeal of Lesotho had to determine whether the marriage in community of property of the applicant's parents had any effect on the manner in which the joint estate should be dealt with after the death of the applicant's mother ('Mateboho). Under customary law and on 'Mateboho's death, her half-share did not pass to the applicant but remained part of the estate of her surviving spouse.[68] The deceased had married 'Mateboho in 1974.[69] The applicant, Teboho Lepule, was born in 1975 and was the first-born male child of this marriage. 'Mateboho died in 1987.[70] After her death, on 9 December 1987, the deceased married 'Mateboho's younger sister, 'Manthabiseng Lepule (the first respondent), by civil rites: in community of property.[71] The court referred to Justice Winston Churchill Maqutu in his book *Contemporary Family Law*:

> The idea of a woman having an estate of her own is foreign to indigenous law. How this affects succession has never been cleared. In practice at the death of a Mosotho the joint estate is often never divided. As a general rule [the] heir inherits the whole estate of the deceased, the widow becoming his dependant towards whom he has duties in accordance with indigenous law. The fact that the widow might have half the joint [estate] is in general disregarded despite the fact that Roman Dutch Law is the common law of Lesotho.[72]

This is what appears to have happened in this case, as there was no evidence that the death of 'Mateboho was reported to the Master, or that the joint estate was divided, or that any steps

63 Ibid LAC (1955-1969) 73. para 20.
64 Ibid.
65 Ibid.
66 Ibid.
67 *Lepule v Lepule* (C of A (CIV) 5 of 2013) [2016] LSCA 3 (29 April 2016).
68 Ibid para 23.
69 Ibid para 3.
70 Ibid.
71 Ibid.
72 Ibid para 24.

were taken to administer her part of the estate.[73] Soon after her death, the applicant's father married the first respondent, and they continued to increase the estate, treating it as a single estate until the father's death in 2006.[74] After the father's death, the family council confirmed the first respondent as the heir to the estate's immovable property.[75] The court held that the applicant's contention that, as her oldest son, he inherited 'Mateboho's half-share in the joint estate under customary law could not be sustained. The subsequent discovery of the marriage certificate the applicant relied on would not have altered the result. Therefore, it could not provide a valid ground to rescind the judgment and order entered by the court on appeal.[76]

The Harmonisation Act significantly improved the position of customary law widows. The Act's core purpose is to ensure equality between customary widows and widowers and, in the process, to harmonise the legal position of customary widows with that of their common-law counterparts by abolishing marital power and extending that abolition to inheritance matters. The Harmonisation Act allows the customary widow, upon her husband's death, full ownership and control of the joint estate. Upon her death, the Administration of Estates and Inheritance Act applies, allowing all the deceased's children (married by either customary or civil rites), regardless of age or gender, to inherit equal shares from the estate. The Act therefore upholds the rights of customary widows and ensures equal protection for both women and men in customary marriages.

5. The South African legal framework and the African Children's Charter on the best interests of a child

5.1 Constitution of the Republic of South Africa

Section 28(2) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that the child's best interests are of paramount importance in every matter concerning the child. This provision is central to children's rights in South Africa and guides all decisions affecting children. The meaning and scope of the phrase 'best interests of the child' is intentionally broad, allowing for its flexible application to various circumstances involving children. It implies that in every action or decision made by legal, administrative and judicial entities, the child's welfare should be the primary consideration. While the child's best interests are paramount, they are not the sole consideration.

Section 28 of the Constitution aims to protect minors when they are vulnerable. 'Parental care' indicates a shift away from the common-law principle of parental authority.[77] The term 'parental care' must be read in the context of a parent–child relationship and includes a parent's responsibility to help a minor overcome their defencelessness and immaturity in judgment and experience.[78] Therefore, section 28 of the Constitution ensures the safeguarding of minors against the inherent imbalance between minors and adults.

73 Ibid para 25.
74 Ibid.
75 Ibid.
76 Ibid para 26.
77 Sithole, NT *A Minor's Capacity to Make an Informed Decision to Terminate Pregnancy: A Needs Analysis for Mandatory Counselling* (LLM thesis, University of Zululand 2020).
78 Ibid.

Section 28(2) does not grant minors autonomy, but requires an equilibrium among the interests of minors, their parents, and the state; this must be understood in light of the minor's age and developing capacity for autonomy and personal self-fulfilment.[79] Courts must also consider parental rights and responsibilities when applying the best interests principle.[80] Courts should not ignore other constitutional rights when applying the best interests principle.[81] In interpreting section 28 of the Constitution, courts must balance a minor's need for autonomy with the protection their parents must provide.[82]

AD v DW[83] and *S v M*[84] emphasised the central role of the best interests principle in matters concerning children. The Constitutional Court's interpretation highlights the need for a flexible, individualised approach that prioritises protecting and advancing children's rights and interests. Applying the best interests principle requires careful consideration of each child's specific circumstances and a commitment to upholding children's rights in all judicial proceedings affecting them.

5.2 African Children's Charter

The best interests principle performs multiple functions. The first function is that in all matters not regulated by positive rights in the African Children's Charter, the best interests standard 'will be the basis for evaluating the laws and practices of states parties'.[85] Ultimately, the principle enables courts or other bodies to assess the appropriateness, reasonableness, and lawfulness of a state's omission to codify the omitted rights in its positive law.[86] Second, the principle may justify, support, or clarify an approach to matters arising under other provisions of the African Children's Charter.[87] This is the 'interpretative function' of the best interests principle.[88] This means that the principle is a standard against which the appropriateness and legitimacy of laws, policies, and programmes affecting children are measured.[89] In this way, the best interests of the child should be seen not as an attempt to create specific obligations, but as a general principle that should inform decision-making in connection with all actions concerning children.[90] Third, as a procedural rule, the best interests of the child principle requires decision-makers to consider how their actions may negatively impact children.[91] Ensuring the best interests

79 Cummings, CL & Mercurio, MR 'Ethics for the Paediatrician: Autonomy, Beneficence, and Rights' (2010) 31(6) *Pediatric Review* 252 at 255.
80 SkillsYouNeed.com 'What is Counselling?' (2011–2017) <https://www.skillsyouneed.com/learn/counselling.html> accessed 9 May 2025.
81 Ibid.
82 Moyo, A 'Article 4, Best Interests of the Child' in *The African Charter on the Rights and Welfare of the Child: A Commentary* (PULP 2024) 61.
83 2008 (3) SA 183 (CC).
84 2007 (2) SACR 539 (CC).
85 Moyo (note 82) at 61.
86 Ibid.
87 Ibid.
88 Ibid.
89 Ibid.
90 Ibid.
91 Ibid.

of the child requires establishing procedural safeguards, including prioritising children's issues and making court decisions affecting children as quickly as possible.[92] Fourth, as a mediatory concept, the best interests principle 'assist[s] in resolving conflicts where these arise within the overall framework of … the [Charter]'.[93] This mediatory function also applies when a child's rights conflict, most commonly between autonomy-related rights and protection rights.[94]

Reference to 'all actions concerning the child' shows that the best interests standard applies without restriction when children are concerned.[95] To this end, the African Children's Committee states that 'there are no conditions attached to this principle which could dilute its scope, reach or standard of application'.[96] The principle's all-encompassing nature is designed to reverse the 'historical disregard of children's interests by decision makers at all levels of society' in the private and public spheres of activity.[97] It has been observed that 'the word "action" does not only include decisions, but also includes all acts, conduct, proposals, services and procedures and other measures'.[98] The phrase 'in all actions concerning children' is broad enough to include omissions or the failure or refusal to act in circumstances where duty-bearers are reasonably expected to act in a particular manner.[99]

5.3 Children's Act 38 of 2005

Section 9 of the Children's Act states that a child's best interests are paramount in all matters concerning the child's care, protection, and well-being. Section 7(1) of the Children's Act provides guidelines for determining a child's best interests.[100] Although the list of factors to consider in determining a child's best interests is not exhaustive, the Children's Act provides some assistance in making this determination.[101] However, when determining the child's best interests, the court must consider all applicable factors and the circumstances of each unique case.[102] Accordingly, courts should consider all points of view (subjective and objective) against what is in the child's best interests.[103] When there is a conflict about the child's best interests, the state will always promote the paternalistic nature of the

92 Ibid.
93 Ibid.
94 Ibid at 63.
95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
99 Ibid.
100 See Boyd, MT *The Determination of the Child's Best Interests in Relocation Disputes* (LLM thesis, University of Western Cape, 2015) 21–22.
101 Ferreira, S 'The Best Interests of the Child: From Complete Indeterminacy to Guidance by the Children's Act' (2010) 13(2) *Potchefstroom Electronic Law Journal* 212.
102 Heaton, J 'Some General Remarks on the Concept "Best Interest of the Child"' (1990) 53 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 93. See, also, Securities and Futures Commission 'Guidelines for the Exemption of Listed Corporations from Part XV' <https://www.sfc.hk/web/EN/rules-and-standards/sfo-part-xv-disclosure-of-interests/guidelines-for-the-exemption-of-listed-corporations-from-part-xv.html> accessed 1 January 2025.
103 Ibid.

best interests principle.[104] According to Cronje and Heaton,[105] the minor's best interests include their 'physical, emotional, economic, intellectual, cultural, spiritual, social, moral and religious well-being'.[106] In addition to the 'best interests of the child' principle being entrenched in section 28(2) of the Constitution, the Children's Act provides guidelines for determining what constitutes the best interests of a minor.[107]

6. Key South African legislation on the administration of estates

6.1 Administration of Estates Act 66 of 1965

Section 38 of the Administration of Estates Act stipulates that a spouse may take over the inheritance of their minor children if circumstances permit. This typically occurs when the surviving spouse and their minor children share the inheritance. In some situations, this can undermine the surviving spouse's authority as a parent. However, section 38 of the Act is designed to help the spouse maintain a stable home environment for the minor children by placing the surviving spouse in a better position to do so. A section 38 take-over may be desirable for two reasons. Conditions may require dividing the estate among various beneficiaries. The estate as a whole may have greater economic value than the sum of its components. Section 38 of the Act may allow the spouse to keep the estate as an economic unit and retain its greater value.

When the surviving spouse remains responsible for a minor child's physical and emotional well-being, the division of the estate may leave her unable to do so. For example, selling a family home to pay debts may seriously affect the survivor's ability to maintain a stable social environment for the child. Section 38 of the Act allows the spouse to maintain the estate and to keep 'house and hearth' together. The primary goal of section 38 is social, not financial. That is why the surviving spouse may choose to provide security and give the children their shares when they reach 18. By allowing the surviving spouse to take over their minor children's inheritance under certain conditions, section 38 of the Act aims to provide stability and continuity for the family unit.

Section 80(1) of the Act provides, inter alia, that no natural guardian shall alienate or mortgage any immovable property belonging to their minor child unless the court or the Master authorises it.[108] Thus, section 80 of the Act, read with the two definitions, makes clear that no land or real rights in land may be alienated without authorisation from either the High Court or the Master.[109] Questions that arise are whether section 80 applies where a guardian waives the preference of the ranking of a bond in favour of a further bond; and whether section 80 applies where a minor waives the preference of a usufruct in favour of a bond.[110] Where a guardian waives a personal right belonging to the minor, such as a right

104 Ibid.
105 Cronje, DSP & Heaton, J *South African Family Law* (2004) 158.
106 Ibid.
107 Section 7 of the Children's Act.
108 'Section 80(10) Administration of Estates Act 66 of 1965' (22 January 2007).
109 <https://www.phfirms.co.za/kc/Data/Section_80(1)_Administration_of_Estates_Act_66_of_1854.asp> accessed 29 May 2025.
110 Ibid.

of pre-emption, the court in *Ex parte Oberholzer and Others*[111] held that a registrar must seek the court's authorisation, as the upper guardian of minors.[112] It therefore appears that the court's authorisation is necessary for such a waiver.[113] Furthermore, in terms of *Smit NO v Die Meester*,[114] the court must apply section 80 of the Act to register any servitude over a minor's immovable property.[115]

A final question is whether a waiver of a fideicommissum belonging to a minor falls within the ambit of section 80. In the latest cases decided in this regard, there is still no consensus. In *Eksteen and Another v Pienaar and Another*[116] a fideicommissum was regarded as a real right.[117] However, in *Van der Merwe v Registrateur van Aktes*[118] a fideicommissary right was held to be a *jus in personam* (a personal right) and not a *jus in rem* (real right).[119] In light of these two conflicting decisions, it is unclear whether a fideicommissum falls within the ambit of section 80. However, whether the right is real or personal, the *Oberholzer* case above should be followed, and the High Court should authorise and lodge the authorisation.

6.2 Intestate Succession Act 81 of 1987

Children are often the most vulnerable family members and are afforded specific rights and protections under intestate laws. In South Africa, if an individual dies without a valid will (or if their will is found invalid), the distribution of their assets is governed by the Intestate Succession Act. This Act provides a legal roadmap for dividing the deceased's assets among their surviving relatives. The hierarchy generally prioritises surviving spouses, children and extended family members (like parents and siblings) if there is no spouse or child.

Various legal frameworks govern intestate succession in South Africa. Children's inheritance rights are protected by a network of legal instruments and regulations in South Africa. Key statutes include the Intestate Succession Act, the Children's Act, the Maintenance Act of 1998, the Administration of Estates Act,[120] and the South African Constitution. While the Constitution may not directly dictate inheritance laws, it shapes how courts interpret legislation on children's welfare, including inheritance and maintenance rights.[121] The Maintenance Act ensures that a child's right to financial support (maintenance) is upheld, even after a parent's death.

111 1951 (1) SA 554 (A).
112 Section 80(10) Administration of Estates Act 66 of 1965.
113 Ibid.
114 1959 (4) SA 13 (T).
115 Section 80(10) Administration of Estates Act 66 of 1965.
116 1969 (1) SA 17 (O).
117 Section 80(10) Administration of Estates Act 66 of 1965.
118 1975 (4) SA 636 (T).
119 Section 80(10) Administration of Estates Act 66 of 1965.
120 Intestate Succession Act 81 of 1987; Children's Act 38 of 2005; Maintenance Act 99 of 1998; Administration of Estates Act 66 of 1965.
121 Will and Testament (12 June 2024) <https://www.willandtestament.co.za/rights-of-children-in-intestate-estates/> accessed 29 May 2025.

7. Overview of children's rights to financial security in international law and South African law

7.1 Children's financial security

The right to financial security focuses on the child as the right-holder, not on the identities or capacities of the duty-bearers. The relevant life is that of the child, not the parent's; thus, the child's financial security must be secured before, after and despite a parent's death.[122] This matters because children's rights treaties do not appear to extend the duty of maintenance beyond a payer's life.[123] Under international law, children appear to have a right to maintenance only from living relatives. Parents have no duty to provide financial support for children after their death, and states have no duty to implement systems for claiming maintenance from deceased estates. International law's agnostic position on the duty of maintenance upon death contrasts with the domestic laws of many jurisdictions, including South Africa, which require decedents to provide for their dependants.[124]

South Africa is also a state party to the African Charter on the Rights and Welfare of the Child (ACRWC),[125] the world's only regional children's rights treaty. The ACRWC was developed to complement the Convention on the Rights of the Child (CRC) while accounting for 'regional specificities', including 'the heightened importance of family to the African child, the distinct role of children within African families and communities, and the importance of the extended family in child-rearing'. Lefebvre et al argue that household financial hardship is associated with an increased likelihood of child neglect, highlighting the relationship between socioeconomic disadvantage and children's vulnerability to maltreatment.[126] For those families facing financial hardship who are identified to child welfare, the child welfare system can be viewed as part of the environmental context that influences children, their caregivers, the child–caregiver relationship, and, ultimately, children's developmental resilience. Most scholars emphasise that families identified to child welfare who run out of money for basic necessities have multiple complex needs.

7.2 Children's rights in the South African Constitution

The best interests of the child principle existed in South African law before the CRC and the Constitution. Section 28(2) has extended its scope beyond family law to encompass all matters concerning children. Children enjoy all rights contained in the Bill of Rights except the rights to vote and to stand for public office. Section 28 enshrines additional child-specific rights. The inclusion of section 28 marked 'the first time that children's rights were robustly and comprehensively recognised in the express language of a nation's

122 Cheng, G 'When parents die: Locating children's right to economic security in South Africa's law of succession and guardianship' (LLM thesis, University of Cape Town 2021) 16.
123 Ibid.
124 Ibid.
125 (1990) OAU Doc CAB/LEG/24.9/49 (ACRWC).
126 Lefebvre, R, Fallon B, Van Wert M and Filippelli J, 'Examining the Relationship between Economic Hardship and Child Maltreatment Using Data from the Ontario Incidence Study of Reported Child Abuse and Neglect-2013 (OIS-2013)' (2017) 7(1) *Behavioral Sciences* 6.

Constitution'.[127] Of relevance to the right to financial security, section 28 enshrines children's right to parental or family care and to 'basic nutrition, shelter, basic health care services and social services'. The interplay between children's rights to parental care and to shelter, and the allocation of duties between parents and the state, was addressed in the ground-breaking Constitutional Court decision in *Government of the Republic of South Africa v Grootboom*.[128]

In *Grootboom*, the Constitutional Court affirmed that parents bear primary responsibility for their children's financial needs, with the state's obligation secondary and supplementary. The judgment dispelled prior hopes that section 28 put children in South Africa in a stronger position than adults to claim socioeconomic entitlements from the state. The *Grootboom* decision has been criticised for rendering the inclusion of section 28(1)*(c)* 'almost entirely without purpose'.[129] Because both international treaties and domestic constitutional law place responsibility for children's financial needs first and foremost on parents, maintenance is vital to children's financial security.

7.3 How legal systems balance the child's share of inheritance and remarrying difficulties

A parent's duty to support a child does not end at death; it passes to the deceased estate. In the South African legal system, a *lacuna* requires Parliament's attention when it reviews the country's laws, particularly the Intestate Succession Act, the Children's Act, the Maintenance Act, the Administration of Estates Act, and the Constitution. For example, where a child's inheritance from a deceased estate consists of a share in immovable property, such share may not be disposed of unless adequate security is provided to safeguard the child's best interests. A widow or widower must not subsequently marry someone who is an heir or beneficiary of an estate left by their previous spouse.

This amounts to financial harm to a minor child who is an heir and/or beneficiary of the deceased parent's estate. In Lesotho, section 71(1) of the Administration of Estates and Inheritance Act does not provide a balanced approach that protects children's rights while ensuring the surviving spouse is not unfairly burdened. The provision is unduly restrictive in its application to widows and widowers who had no descendants during the subsistence of their previous marriage and who subsequently choose to remarry. This is particularly concerning where property was acquired during the previous marriage, but no children were born of or outside that marriage. The resulting imbalance in the recognition and protection of the parties' rights ought to be addressed, as the provision fails to adequately reflect the principle of reciprocity and the equitable treatment of similarly situated persons.

8. Conclusion and recommendations

This article investigates whether widows and widowers may enter a subsequent marriage with the child's share of the inheritance, and whether a widow or widower must declare

127 Binford, W 'The Constitutionalisation of Children's Rights in South Africa' (2015-2016) 60 *New York Law School of Law* Review 334; Kilkelly, U & Liefaard, T 'Legal Implementation of the UNCRC: Lessons to be Learned from the Constitutional Experience of South Africa' (2019) 52 *De Jure Law Journal* 521.

128 2001 (1) SA 46 (CC).

129 Cheng (note 122) 16.

their marital inheritance to the Master of the High Court before remarrying. The principal question is the extent of section 71(1) of Lesotho's Administration of Estates and Inheritance Act, which provides that property from a previous marriage should not become part of the joint estate in a subsequent marriage where there are minor children. The two countries take different approaches to estate administration. Section 71(1) of the Administration of Estates and Inheritance Act does not, however, clarify what constitutes a child's share of property inherited from a previous marriage or how such property should be treated in a subsequent marriage where there are minor children. In essence, the provision lacks an authoritative interpretation. This lack of clarity raises questions about how to protect and administer property inherited for the benefit of children from a previous marriage and calls for further consideration of the appropriate legal and procedural framework.

By contrast, the South African approach clearly departs from section 80(1) of the Administration of Estates Act, which provides that no natural guardian may alienate or mortgage any immovable property belonging to their minor child unless authorised by the court or the Master. *Ex parte Oberholzer and Others* held that where the Guardian waives a personal right belonging to the minor, such as a right of pre-emption, which courts can easily intervene in, a registrar must seek the Court's authorisation as the superior guardian. The notion of balancing the exercise in these sections is not yet established, as it both opens the door to potential economic harm against the child — a form of economic violence that directly undermines the rights of a minor child and the child's share of inheritance.

This article argues that legislation must strictly regulate a child's inheritance share. To truly protect children, the law must include clear and specific provisions that leave no room for doubt. As it stands, section 71(1) of the Act cannot fully safeguard a child's inheritance, particularly in complex family situations. We propose amending this section to explicitly protect the child's share, ensuring it remains separate and secure regardless of whether the surviving parent enters into a subsequent marriage.

We recommend that South Africa adopt a paradigmatic shift similar to Lesotho's Administration of Estates and Inheritance Act. The first step would be to apply the supremacy clause in succession laws and related legislation to better protect the child's best interests. This entails including a clause on the administration of estates to align with section 71(1) of the Administration of Estates and Inheritance Act to mandate that the widow or widower does not go into a subsequent marriage with the child's share of inheritance and to declare their marital inheritance at the Office of the Master of the High Court before they remarry. Consequently, the succession laws of both countries should be recast in light of the modern concept of constitutionalism, so that the child's share of inheritance goes to the minor children, not the surviving spouse, and the surviving spouse receives the residue (if any).

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