



THE REPUBLIC OF KENYA

LAWS OF KENYA

THE LAW OF SUCCESSION ACT

CAP. 160

Revised and published by the National Council for Law Reporting
with the authority of the Attorney-General as gazetted by the Government Printer

www.kenyalaw.org

Kenya

Law of Succession Act

Cap. 160

Legislation as at 10 December 1976

Note: This is not the latest available version of this Act. [View it online.](#)

By [Kenya Law](#) and [Laws.Africa](#). Share widely and freely.

www.kenyalaw.org | info@kenyalaw.org

FRBR URI: /akn/ke/act/1972/14/eng@1976-12-10

There is no copyright on the legislative content of this document.

This PDF copy is licensed under a Creative Commons Attribution NonCommercial ShareAlike 4.0 License ([CC BY-NC-SA 4.0](#)). This license enables reusers to distribute, remix, adapt, and build upon the material in any medium or format for noncommercial purposes only, and only so long as attribution is given to the creator. If you remix, adapt, or build upon the material, you must license the modified material under identical terms. CC BY-NC-SA includes the following elements:

- BY: credit must be given to the creator.
- NC: Only noncommercial uses of the work are permitted.
- SA: Adaptations must be shared under the same terms.

Share widely and freely.

Law of Succession Act (Cap. 160)

Contents

1. Short title	1
2. Application of Act	1
3. Interpretation	1
4. Law applicable to succession	4
Part II – WILLS	4
5. Persons capable of making wills and freedom of testation	4
6. Appointment by will of executor	4
7. Wills caused by fraud, coercion, importunity or mistake	4
8. Forms of wills	4
9. Oral wills	4
10. Probate of oral wills	5
11. Written wills	5
12. Incorporation of papers by reference	5
13. Effect of gift to attesting witness	5
14. Witness not disqualified by being executor	5
15. Existing wills	6
16. Formal validity of other wills	6
17. Will may be revoked or altered	6
18. Revocation of will	6
19. Revocation of will by testator's marriage	6
20. Effect of obliteration, interlineation or alteration in will	6
21. Revival of will	7
22. Construction of wills	7
23. Failure of testamentary dispositions	7
24. Election	7
25. Rules against perpetuities, remoteness and accumulations	7
Part III – PROVISION FOR DEPENDANTS	7
26. Provision for dependants not adequately provided for by will or on intestacy	7
27. Discretion of court in making order	7
28. Circumstances to be taken into account by court in making order	8
29. Meaning of dependant	8
30. Limitation of time	8
Part IV – GIFTS IN CONTEMPLATION OF DEATH	8
31. Characteristics	8

Part V – INTESTACY	9
32. Excluded property	9
33. Law applicable to excluded property	9
34. Meaning of intestacy	9
35. Where intestate has left one surviving spouse and child or children	9
36. Where intestate has left one surviving spouse but no child or children	10
37. Powers of spouse during life interest	10
38. Where intestate has left a surviving child or children but no spouse	11
39. Where intestate has left no surviving spouse or children	11
40. Where intestate was polygamous	11
41. Property devolving upon child to be held in trust	11
42. Previous benefits to be brought into account	11
43. Presumption of survivorship	12
Part VII – ADMINISTRATION OF ESTATES	12
44. Application of Part	12
45. No intermeddling with property of deceased person	12
46. Duties of officers in relation to protection, etc., of deceased's property	12
47. Jurisdiction of High Court	13
48. Jurisdiction of Magistrates	13
49. Territorial jurisdiction of Magistrates	14
50. Dispute to include applications	14
51. Application for grant	14
52. Wilful and reckless statements in application for grant	15
53. Forms of grant	15
54. Limited grants	15
55. No distribution of capital before confirmation of grant	15
56. No grant to certain persons	15
57. Grant to corporate body	16
58. Number of administrators where there is continuing trust	16
59. Renunciation of executorship	16
60. Probate where there are several executors	16
61. Discovery of codicil after grant of probate	16
62. No grant of administration until citation issued to executor	16
63. Grant of administration to universal or residuary legatee	17
64. Right to administration of representative of deceased residuary legatee	17

65. Grant of administration where no executor nor residuary legatee nor representative of such legatee	17
66. Preference to be given to certain persons to administer where deceased died intestate	17
67. Notice of application for grant	17
68. Objections to application	18
69. Procedure after notice and objections	18
70. Power of courts	18
71. Confirmation of grants	18
72. Grants not to be confirmed in certain circumstances	19
73. Duty of court to give notice to holder of grant to apply for confirmation	19
74. Errors may be rectified by court	19
75. Procedure where codicil discovered after grant	19
76. Revocation or annulment of grant	19
77. Sealing of Commonwealth and Foreign grants	20
78. Duplicate or copy of foreign grant to have same effect as original	20
79. Property of deceased to vest in personal representative	20
80. When grant takes effect	20
81. Powers and duties of personal representatives to vest in survivor on death of one of them	21
82. Powers of personal representatives	21
83. Duties of personal representatives	21
84. Personal representatives to act as trustees in certain cases	22
85. Assent necessary to complete legatee's title	22
86. Debts to be paid before legacies	22
87. Personal representatives not bound to pay legacies without indemnity	22
88. Abatement and refunding of legacies	22
89. Insolvent estates	23
90. Investment of funds to provide for legacies and interest on legacies	23
91. Transfer of assets from Kenya to personal representatives in country of domicile for distribution	23
92. Protection of persons acting on representation	23
93. Validity of transfer not affected by revocation of representation	23
94. Neglect or misapplication of assets by personal representatives	24
95. Offences by personal representatives	24
Part VIII – MISCELLANEOUS	24
96. Sane murderer not to share in victim's estate	24
97. Rules	24
98. Transitional	25

99. Repeal	25
100. Amendments	25
101. Saving	25
FIRST SCHEDULE	25
SECOND SCHEDULE	35
THIRD SCHEDULE	38
FOURTH SCHEDULE	39
FIFTH SCHEDULE	44
SIXTH SCHEDULE	46
SEVENTH SCHEDULE	48
EIGHTH SCHEDULE	49
NINTH SCHEDULE	50

LAW OF SUCCESSION ACT

CAP. 160

Published in Kenya Gazette Vol. LXXIV—No. 55 on 17 November 1972

Assented to on 13 November 1972

Commenced on 1 July 1981 by [Law of succession Commencement](#)

[Amended by [Statute Law \(Miscellaneous Amendments\) Act, 1975 \(Act No. 7 of 1975\)](#) on 27 June 1975]

[Amended by [Law of Succession \(Amendment\) Act, 1976 \(Act No. 8 of 1976\)](#) on 10 September 1976]

[Amended by [Laws of Kenya \(Rectification\) \(No.5\) Order, 1976 \(Legal Notice 256 of 1976\)](#) on 10 December 1976]

An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto

1. Short title

This Act may be cited as the Law of Succession Act.

2. Application of Act

Except as otherwise expressly provided in this Act, or by any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to all cases of intestate or testamentary succession to the estates of persons dying after the commencement of this Act, and to the administration of estates of such persons.

3. Interpretation

(1) In this Act, except where the context otherwise requires-

"active service" means service with the armed forces or merchant marine on a field of military operations or at sea, or proceeding to or from such field or sea, or under orders to proceed to such field or sea, or in being in some place for the purpose of proceeding to such field or sea;

"administrator" means a person to whom a grant of letters of administration has been made under this Act;

"agricultural land" means any land used for agricultural purposes which is not within a municipality or a township or a market, but does not include any land registered under the provisions of any written law;

"authorized investment" with reference to the investment of any fund, means an investment of such type as is authorized for investment of that fund by any will applying thereto, or as is for the time being authorized by any written law for the investment of trust funds;

"charitable purpose" includes the relief of poverty, the advancement of education, the advancement of religion, and any other purpose of a public nature and capable of administration by a court of law which benefits the community at large or the inhabitants or any particular class of inhabitants of any particular locality;

"codicil" means a testamentary instrument made in relation to a will, explaining, altering or adding to its dispositions or appointments, and duly made and executed as required by this Act for the making and execution of a will;

"competent witness" means a person of sound mind and full age;

"court" means any court having jurisdiction under this Act in the matter in question;

"demonstrative legacy" means a testamentary gift which is in its nature, general but which manifests an intention that such gift shall be primarily satisfied out of a specified fund or a specified part of the property of the testator but shall, upon failure of such fund or property, be met from the general estate;

"estate" means the free property of a deceased person;

"executor" means a person to whom the execution of the last will of a deceased person, is, by the testator's appointment, confided;

"free property" in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death;

"full age" means having attained the age of eighteen years;

"general legacy" means a testamentary gift, whether specific or general, of property described in general terms to be provided out of the general estate of the testator, whether or not also charged on any specific part of his estate;

"general power of appointment", means an unfettered power of appointment to such object or objects as the appointor may think fit;

"general residuary bequest" means a testamentary gift of all the property of the testator not otherwise disposed of;

"house" in the case of a deceased person who has married under any system of law allowing polygamous marriages, means a family unit comprising a wife, whether alive or dead at the date of the death of the husband and the children of such wife;

"income" includes rents and profits;

"independent witness" means a witness who is not a beneficiary under a will or the spouse of any such beneficiary;

"limited residuary bequest" means a testamentary gift which, but for some specific limitation therein expressed or implied would constitute a general residuary bequest;

"minor" means any person who is not of full age;

"net estate" means the estate of a deceased person after payment of reasonable funeral expenses, debts and liabilities, expenses of obtaining probate or letters of administration, other reasonable expenses of administration and estate duty, if any;

"net intestate estate" means the estate of a deceased person in respect of which he has died intestate after payment of the expenses debts, liabilities and estate duty set out under the definition of **"net estate"** so far as such expenses debts, liabilities and estate duty are chargeable against that estate;

"particular residuary bequest" means a testamentary gift of all of a particular property not otherwise disposed of;

"pecuniary legacy" includes an annuity, a general legacy, a demonstrative legacy so far as it is not discharged out of the specified fund or property, and any other general direction by the testator for the payment of money, including all death duties free from which any gift is made to take effect;

"personal and household effects" means clothing and articles of personal use and adornment, furniture, appliances, pictures, ornaments, food, drink, utensils and all other articles of household use or decoration normally to be associated with a matrimonial home, but does not include any motor vehicle or any other thing connected with the business or profession of the deceased;

"personal representative" means the executor or administrator, as the case may be, of a deceased person;

"portion" means provision by a parent or person in *loco parentis* to establish a child in life;

"power of appointment" means power vested in some person to determine the disposition of property of which such person is not the owner;

"probate" means the certificate of a court of competent jurisdiction, that a will, of which a certified copy is attached in the case of a written will, has been proved a valid will with a grant of representation to the executor in respect of the estate;

"purchaser" means a purchaser for money or money's worth;

"representation" means the probate of a will or the grant of letters of administration;

"special legacy" means a testamentary gift of a particular part of the property of the testator, which identifies such part by a sufficient description, whether in specific or in general terms, and manifests an intention that such part shall be enjoyed or taken in the state and condition indicated by that description;

"special power of appointment" means power of appointment to such object or objects within a special description or class as the appointor may think fit;

"trust corporation" means any incorporated banking or insurance or guarantee or trust company having a subscribed capital of not less than five hundred thousand shillings or any body corporate which has a subscribed capital of not less than five hundred thousand shillings and which is for the time being empowered (by or under any written law, its charter, memorandum of association, deed of settlement or other instrument constituting it or defining its powers), to undertake trusts, but for so long a time only as such body corporate shall not, by any prospectus, circular, advertisement or other document issued by it or on its behalf, state or hold out that any liability attaches to the Public Trustee or to the Consolidated Fund in respect of any act or omission of such body corporate when acting as an executor or administrator:

Provided that a body corporate which would be a trust corporation but for the fact that its subscribed capital is less than five hundred thousand shillings may act as executor or administrator in any case with the leave of the court on giving such security as the court may determine, and thereupon for the purpose of so acting as executor or administrator such corporation shall have all the rights and privileges conferred on a trust corporation by this Act;

"wife" includes a wife who is separated from her husband and the terms **"husband"** and **"spouse"**, **"widow"** and **"widower"** shall have a corresponding meaning;

"will" means the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death, and duly made and executed according to the provisions of Part II of this Act, and includes a codicil.

- (2) References in this Act to **"child"** or **"children"** shall include any child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to any female person, any child born to her out of wedlock, and, in relation to any male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.
- (3) A child born to a female person out of wedlock, and a child as defined by subsection (2) of this section as the child of a male person, shall have relationship to other persons through her or him, as the case may be, as though such child had been born to her or him in wedlock.
- (4) Where the date of birth of any person is unknown or cannot be ascertained, that person shall be treated as being of full age for the purposes of this Act if he has apparently attained the age of eighteen years, and shall not otherwise be so treated.

[Act [No. 8 of 1976](#), Sch.]

4. Law applicable to succession

- (1) Except as otherwise expressly provided in this Act or by any other written law-
 - (a) succession to immovable property in Kenya of a deceased person shall be regulated by the law of Kenya, whatever the domicile of such person at the time of his death;
 - (b) succession to the movable property of a deceased person shall be regulated by the law of the country of the domicile of such person at the time of his death.
- (2) A person who immediately before his death was ordinarily resident in Kenya shall, in the absence of proof of domicile elsewhere, be presumed to have been domiciled in Kenya at the date of death.

Part II – WILLS

Capacity

5. Persons capable of making wills and freedom of testation

- (1) Subject to the provisions of this Part and Part III of this Act, every person who is of sound mind and not a minor may dispose of all or any of his free property by will and may thereby make any such disposition by reference to any secular or religious law that he chooses.
- (2) For the avoidance of doubt, it is hereby declared that any female person, whether married or unmarried, has the same capacity to make a will as does a male person.
- (3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section, unless he is, at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing.
- (4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.

[Act [No. 8 of 1976](#), s. 3.]

6. Appointment by will of executor

A person may, by will, appoint an executor or executors.

7. Wills caused by fraud, coercion, importunity or mistake

A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, or has been induced by mistake, is void.

Formalities

8. Forms of wills

A will may be made either orally or in writing.

9. Oral wills

- (1) No oral will shall be valid unless-
 - (a) it is made before two or more competent witnesses; and

- (b) the testator dies within a period of three months from the date of making the will:

Provided that an oral will made by a member of the armed forces or merchant marine during a period of active service shall be valid if the testator dies during the same period of active service notwithstanding the fact that he died more than three months after the date of making the will.

- (2) No oral will shall be valid if, and so far as, it is contrary to any written will which the testator has made, whether before or after the date of such oral will, and which has not been revoked as provided by [sections 18 and 19](#) of this Act.

10. Probate of oral wills

If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, such oral will shall not be valid except so far as its contents are proved by a competent independent witness.

11. Written wills

No written will shall be valid unless-

- (a) the testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;
- (b) the signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;
- (c) the will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

12. Incorporation of papers by reference

If a testator, in a will or codicil, refers to another document then actually written, and expressing any part of his intentions, such document, provided it is clearly identified as the document to which the will refers, shall be considered as forming part of the will or codicil in which it is referred to.

13. Effect of gift to attesting witness

- (1) A will shall not be considered as insufficiently attested by reason of any benefit thereby given, either by way of bequest or by way of appointment to any person attesting it, or to his or her spouse.
- (2) A bequest to such attesting witness (including any direction as to payment of costs or charges) or a bequest to his or her spouse shall be void, unless the will is also attested by at least two additional competent and independent witnesses in which case the bequest shall be valid.

[Act [No. 8 of 1976](#), s. 4.]

14. Witness not disqualified by being executor

No person, by reason of his being an executor of a will, shall be disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

15. Existing wills

Notwithstanding the provisions of this Part, any written will executed before the commencement of this Act shall whether the testator dies before or after the commencement of this Act, be treated as properly executed if it was executed according to the requirements of the law in force at the date of such execution.

16. Formal validity of other wills

Notwithstanding the provisions of this Part, every will whether of movable or immovable property, and whether executed before or after the commencement of this Act, shall be treated as properly executed, if its execution conformed either at the time of execution or at the time of the testator's death, to the law in force-

- (a) in the state where it was executed; or
- (b) in the state where the property is situated; or
- (c) in the state where, at the time of its execution or the testator's death, he was domiciled; or
- (d) in a state of which the testator was a national either at the time of its execution or on his death.

Revocation, Alteration and Revival

17. Will may be revoked or altered

A will may be revoked or altered by the maker of it at any time when he is competent to dispose of his free property by will.

18. Revocation of will

- (1) Save as provided by [section 19](#) of this Act, no will or codicil, or any part thereof, shall be revoked otherwise than by another will or codicil declaring an intention to revoke the same, or by the burning, tearing or otherwise destroying of the will with the intention of revoking the same by the testator, or by some other person at his direction.
- (2) A written will shall not be revoked by an oral will.

19. Revocation of will by testator's marriage

A will shall be revoked by the marriage of the maker:

Provided that a will expressed to be made in contemplation of marriage with a specified person shall not be revoked by the marriage so contemplated.

20. Effect of obliteration, interlineation or alteration in will

- (1) No obliteration, interlineation or other alteration made in a written will after the execution thereof shall have any effect unless such alteration is signed and attested as a written will is required to be under [section 11](#) of this Act:

Provided that a will as so altered shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses is made in the margin or on some other part of the will opposite or near to such alteration or is referred to in a memorandum written at the end or some other part of the will and so signed and attested.

- (2) Where a typewritten or printed will purports to have been executed by the filling in of any blank spaces, there shall be a presumption that such will has been duly executed.

21. Revival of will

- (1) No will which has been in any manner wholly revoked, shall be revived otherwise than by the re-execution thereof.
- (2) Where only part of a will has been revoked, that part shall not be revived otherwise than by the re-execution thereof or by a subsequent will or codicil showing an intention to revive the same.

Construction**22. Construction of wills**

Wills shall be construed in accordance with the provisions of the First Schedule to this Act.

Failure of Dispositions**23. Failure of testamentary dispositions**

Testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner and to the extent provided by the Second Schedule to this Act.

Election**24. Election**

Beneficiaries under testamentary gifts or dispositions shall be put to election in the circumstances and manner and to the extent provided by the Third Schedule to this Act.

Perpetuities, Remoteness and Accumulations**25. Rules against perpetuities, remoteness and accumulations**

Testamentary gifts or dispositions shall be void if and so far as they offend the rules against perpetuities, remoteness, or accumulations set out in the Fourth Schedule to this Act and with effect as provided therein.

Part III – PROVISION FOR DEPENDANTS**26. Provision for dependants not adequately provided for by will or on intestacy**

Where a person dies after the commencement of this Act, and so far as succession to his property is governed by the provisions of this Act, then on the application by or on behalf of a dependant, the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of such will, gift and Law, is not such as to make reasonable provision for such dependant, order that such reasonable provision as the court thinks fit shall be made for such dependant out of the deceased's net estate.

[Act [No. 8 of 1976](#), s. 5.]

27. Discretion of court in making order

In making provision for a dependant the court shall have complete discretion to order a specific share of the estate to be given to the dependant, or to make such other provision for him by way of periodical payments or a lump sum, and to impose such conditions, as it thinks fit.

28. Circumstances to be taken into account by court in making order

In considering whether any order should be made under this Part, and if so, what order, the court shall have regard to-

- (a) the nature and amount of the deceased's property;
- (b) any past, present or future capital or income from any source of the dependant;
- (c) the existing and future means and needs of the dependant;
- (d) whether the deceased had made any advancement or other gift to the dependant during his lifetime;
- (e) the conduct of the dependant in relation to the deceased;
- (f) the situation and circumstances of the deceased's other dependants and the beneficiaries under any will;
- (g) the general circumstances of the case, including, so far as can be ascertained the testator's reasons for not making provision for the dependants.

[L.N. [No. 256 of 1976](#), Sch.]

29. Meaning of dependant

For the purpose of this Part of this Act, "**dependant**" means-

- (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
- (b) such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death;
- (c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.

30. Limitation of time

No application under this Part shall be brought after a grant of representation in respect of the estate to which such application refers has been confirmed as provided by [section 71](#) of this Act.

Part IV – GIFTS IN CONTEMPLATION OF DEATH

31. Characteristics

A gift made in contemplation of death shall be valid, notwithstanding that there has been no complete transfer of legal title, if-

- (a) the person making the gift is, at the time contemplating the possibility of death, whether or not expecting death, as the result of a present illness or present or imminent danger; and
- (b) a person gives movable property (which includes any debt secured upon movable or immovable property) which he could otherwise dispose of by will; and
- (c) there is delivery to the intended beneficiary of possession or the means of possession of such property or of the documents or other evidence of title thereto; and
- (d) a person makes a gift in such circumstances as to show that he intended it to revert to him should he survive the same illness or danger; and

- (e) the person making such gift dies from any cause without having survived the same illness or danger; and
- (f) the intended beneficiary survives the person who made the gift to him:

Provided that-

- (i) no gift made in contemplation of death shall be valid if the death is caused by suicide;
- (ii) the person making the gift may, at any time before his death lawfully request its return.

Part V – INTESTACY

32. Excluded property

The provisions of this Part shall not apply to-

- (a) agricultural land and crops thereon; or
- (b) livestock,

situated in such areas as the Attorney-General may, by notice in the *Gazette*, specify.

33. Law applicable to excluded property

The law applicable to the distribution on intestacy of the categories of property specified in [section 32](#) of this Act shall be the law or custom applicable to the deceased's community or tribe as the case may be.

[Act [No. 8 of 1976](#), s. 6.]

34. Meaning of intestacy

A person is deemed to die intestate in respect of all his free property of which he has not made a will which is capable of taking effect.

35. Where intestate has left one surviving spouse and child or children

- (1) Subject to the provisions of [section 40](#) of this Act, where an intestate has left one surviving spouse and a child or children, the surviving spouse shall be entitled to-
 - (a) the personal and household effects of the deceased absolutely; and
 - (b) a life interest in the whole residue of the net intestate estate:

Provided that if the surviving spouse is a widow, such interest shall determine upon her re-marriage to any person.

- (2) A surviving spouse shall, during the continuation of the life interest provided by subsection (1) of this section, have a power of appointment of all or any part of the capital of the net intestate estate by way of gift taking immediate effect among the surviving child or children, but such power shall not be exercised by will nor in such manner as to take effect at any future date.
- (3) Where any child considers that the power of appointment under subsection (2) of this section has been improperly exercised or withheld, he or, if a minor, his representative, may apply to the court for the appointment of his share, with or without variation of any appointment already made.
- (4) Where an application is made under subsection (3) of this section, the court shall have power to award the applicant a share of the capital of the net intestate estate with or without variation of any

appointment already made, and in determining whether such order shall be made and if so, what order shall have regard to -

- (a) the nature and amount of the deceased's property;
 - (b) any past, present or future capital or income from any source of the applicant and of the surviving spouse;
 - (c) the existing and future means and needs of the applicant and the surviving spouse;
 - (d) whether the deceased had made any advancement or other gift to the applicant during his lifetime or by will;
 - (e) the conduct of the applicant in relation to the deceased and to the surviving spouse;
 - (f) the situation and circumstances of any other person who has any vested or contingent interest in the net intestate estate of the deceased or as a beneficiary under his will (if any); and
 - (g) the general circumstances of the case including the surviving spouse's reasons for withholding or exercising the power in the manner in which he or she did, and any other application made under this section.
- (5) Subject to the provisions of [sections 41 and 42](#) of this Act and subject to any appointment or award made under this section, the whole residue of the net intestate estate shall on the death, or in the case of a widow, re-marriage, of the surviving spouse, devolve upon the surviving child, if there be only one or shall be equally divided among the surviving children.

[Act [No. 8 of 1976](#), s. 7.]

36. Where intestate has left one surviving spouse but no child or children

- (1) Where the intestate has left one surviving spouse but no child or children, the surviving spouse shall be entitled out of the net intestate estate to-
- (a) the personal and household effects of the deceased absolutely; and
 - (b) the first ten thousand shillings out of the residue of the net intestate estate, or twenty per centum thereof, whichever is the greater; and
 - (c) a life interest in the whole of the remainder:

Provided that if the surviving spouse is a widow, such life interest shall be determined upon her re-marriage to any person.

- (2) The Minister may, by order in the *Gazette*, vary the amount specified in paragraph (b) of subsection (1) of this section.
- (3) Upon the determination of a life interest created by subsection (1) of this section, the property subject to such interest shall devolve in the order of priority set forth in [section 39](#) of this Act.

[Act [No. 8 of 1976](#), s. 8.]

37. Powers of spouse during life interest

A surviving spouse entitled to a life interest under the provisions of [section 35 or 36](#) of this Act, with the consent of all co-trustees and all children of full age, or with the consent of a court shall, during the period of such life interest, have the power to sell any of the property subject to such interest if such is necessary for his own maintenance:

Provided that in the case of immovable property, the exercise of such a power shall always be subject to the consent of a court.

[Act [No. 8 of 1976](#), s. 9.]

38. Where intestate has left a surviving child or children but no spouse

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of [sections 41 and 42](#) of this Act, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children.

39. Where intestate has left no surviving spouse or children

- (1) Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority-
 - (a) father; or if dead
 - (b) mother; or if dead
 - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none
 - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
 - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
- (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1) of this section, the net intestate estate shall devolve upon the State, and be paid into the Consolidated Fund.

40. Where intestate was polygamous

- (1) Where an intestate has married more than once under any system of law permitting polygamy, his personal and household effects and the residue of the net intestate estate shall, in the first instance, be divided among the houses according to the number of children in each house, but also adding any wife surviving him as an additional unit to the number of children.
- (2) The distribution of the personal and household effects and the residue of the net intestate estate within each house shall then be in accordance with the rules set out in [sections 35 to 38](#) of this Act, as the case may be.

41. Property devolving upon child to be held in trust

Where reference is made in this Act to the "**net intestate estate**", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain such age or so marry in which case such issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.

42. Previous benefits to be brought into account

Where-

- (a) an intestate has during his lifetime or by will, paid, given or settled any property to or for the benefit of a child, grandchild or house; or
- (b) property has been appointed or awarded to any child or grandchild under the provisions of [section 26 or section 35](#) of this Act,

such property shall be taken into account in determining the share of the net intestate estate finally accruing to such child, grandchild or house.

43. Presumption of survivorship

Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall, for all purposes of this Act be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder:

Provided that in the case of spouses who died in such circumstances, the spouses shall be presumed to have died simultaneously.

Part VII – ADMINISTRATION OF ESTATES

44. Application of Part

- (1) The provisions of this Part shall not, in cases of intestacy, apply to those types of property mentioned in [section 32](#) of this Act.
- (2) The Minister may, after consultaion with the Chief Justice, by order published in the *Gazette*, suspend in any area referred to in order all or any of the following provisions of this Act, namely, [section 45, 46, 48 or 49](#).
- (3) Where the operation of [sections 48 and 49](#) of this Act is suspended in any area, the High Court may make a grant of representation in respect of the estate of a deceased person whose last known place of residence was in tha area, whether the value of the estate exceeds or does not exceed one hundred thousand shillings.
- (4) In this section "area" means a province, district or otheer part of Kenya.

[Act [No. 7 of 1975](#), Sch.];

Protection

45. No intermeddling with property of deceased person

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall-
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

46. Duties of officers in relation to protection, etc., of deceased's property

- (1) Whenever it becomes known to any police officer or administrative officer that any person has died, he shall, unless aware that a report has already been made, forthwith report the fact of such death to the sub-chief of the sub-location or to the chief or administrative officer of the area (as the case may be) where the deceased had his last known place of residence.
- (2) Any person to whom a report is made under subsection (1) of this section shall -
 - (a) at the request of any person who appears to have a legitimate interest in the estate of the deceased; or

- (b) if no application for representation in respect of the estate has been made within one month after the date of the death of the deceased,

forthwith proceed to the last known place of residence of the deceased, and take all necessary steps for the protection of his free property found there, for ascertainment of his other free properties (if any), for ascertainment of all persons appearing to have any legitimate interest in succession to or administration of his estate, and for the guidance of prospective executors or administrators as to formalities and duties:

Provided that if such last known place of residence of the deceased is situated in a municipality, or when the deceased dies outside Kenya wheresoever his property is situated, the person to whom a report is made under subsection (1) of this section shall not take the action which he is required to take under this subsection unless and until he has first reported the death to the Public Trustee, who may if he so wishes himself take such action instead of such person; and

- (3) If any person to whom a report is made under subsection (1) of this section finds that there is any free property of the deceased, or that the person appearing to have the greatest legitimate interest in succession to or administration of his estate are resident in any other sub-location or area he shall forthwith report those facts to the sub-chief, chief or administrative officer of such other sub-location or area, who shall thereupon take in respect of such property or persons, all such steps are prescribed by subsection (2) of this section.
- (4) Any sub-chief, chief or administrative officer becoming aware that there is in his sub-location or area any free property of a deceased person, or that there are resident in his sub-location or area any persons appearing to have the greatest legitimate interest in succession to or administration of the estate of a deceased person, but that no grant of representation in respect of that estate has yet been made, shall, at the request of any person who appears to have any legitimate interest in that estate, and without waiting for a report under this section, forthwith take, in respect of such property or persons, all such steps as are prescribed by subsection (2) of this section.
- (5) Any person who is required to take the steps referred to in subsection (2) of this section -
 - (a) shall forthwith report to the Public Trustee the death of the person concerned; and
 - (b) notify the Public Trustee of the steps taken by him pursuant to that subsection.

[Act [No. 8 of 1976](#), s. 10.]

Jurisdiction

47. Jurisdiction of High Court

The High Court shall have jurisdiction to make any grant of representation or to determine any dispute under this Act:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

[Act [No. 8 of 1976](#), s. 10A.]

48. Jurisdiction of Magistrates

Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of [section 49](#) of this Act, a Resident Magistrate shall have jurisdiction to grant representation in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section of this Act, in any place where both the High Court and the Resident Magistrate's Court are available the High Court shall have exclusive jurisdiction to make grants of representation and to determine disputes under this Act.

[Act [No. 8 of 1976](#), s. 10B.]

49. Territorial jurisdiction of Magistrates

The Resident Magistrate within whose area a deceased person had his last known place of residence shall, if the gross value of the estate of such deceased does not exceed one hundred thousand shillings, have in respect of that estate the jurisdiction conferred by [section 48](#) of this Act.

Provided that -

- (i) any such magistrate may, with the consent or by the direction of the High Court, transfer the administration of an estate to any other such magistrate where it appears that the greater part of such estate is situate within the area of that other magistrate or that there is other good reason for such transfer;
- (ii) if the deceased had his last known place of residence outside Kenya, the High Court shall determine which magistrate shall have jurisdiction under this section:
- (iii) every Resident Magistrate shall have jurisdiction, in cases of apparent urgency, to make a temporary grant of representation, limited to collection of assets situate within his area and payments of debts, regardless of the last known place of residence of the deceased.

[Act [No. 8 of 1976](#), s. 10C.]

50. Dispute to include applications

An appeal shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate the gross value of which does not exceed one hundred thousand shillings and the decision of the High Court on such appeal shall be final.

[Act [No. 8 of 1976](#), s. 10D.]

Application for Grant

51. Application for grant

- (1) Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner.
- (2) Every such application shall include information as to -
 - (a) the full names of the deceased;
 - (b) the date and place of his death;
 - (c) his last known place of residence;
 - (d) the relationship (if any) of the applicant to the deceased;
 - (e) whether or not the deceased left a valid will;
 - (f) the present addresses of any executors appointed by any such valid will;
 - (g) in cases of total or partial intestacy, the names and addresses of all surviving spouses, children, parents, brothers and sisters of the deceased, and of the children of any child of his or hers then deceased; and
 - (h) a full inventory of all the assets and liabilities of the deceased;
 - (i) such other matters as may be prescribed.

- (3) Where it is alleged by any such application that the deceased left a valid will -
- (a) if it was written, the original will shall be annexed to the application, or if it is alleged to have been lost, or destroyed otherwise than by way of revocation, or if for any other reason the original cannot be produced, then either -
 - (i) an authenticated copy thereof shall be so annexed; or
 - (ii) the names and addresses of all persons alleged to be able to prove its contents shall be stated in the application;
 - (b) if it was oral, the names and addresses of all alleged witnesses shall be stated in the application.
- (4) No omission of any information from an application shall affect the power of the court to entertain the application.

52. Wilful and reckless statements in application for grant

Any person who, in any application for representation, wilfully or recklessly makes any statement which is false in any material particular shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

Forms of Grants

53. Forms of grant

A court may -

- (a) where a deceased person is proved (whether by production of a will or an authenticated copy thereof or by oral evidence of its contents) to have left a valid will, grant, in respect of all property to which such will applies, either -
 - (i) probate of the will to one or more of the executors named therein; or
 - (ii) if there is no proving executor, letters of administration with the will annexed; and
- (b) if and so far as there may be intestacy, letters of administration in respect of the intestate estate.

54. Limited grants

Any court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.

55. No distribution of capital before confirmation of grant

No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets constituting a net estate, or to make any division of property, unless and until such grant has been confirmed as provided by [section 71](#) of this Act.

[Act [No. 8 of 1976](#), s. 11.]

Persons Entitled to a Grant

56. No grant to certain persons

- (1) No grant of representation shall be made -
- (a) to any person who is a minor, or of unsound mind, or bankrupt; or
 - (b) to more than four persons in respect of the same property.

- (2) No grant of letters of administration, with or without will annexed, shall be made to any body corporate other than the Public Trustee or a trust corporation.

57. Grant to corporate body

No grant of representation shall be made to any syndicate or nominee on behalf of a body corporate:

Provided that, where a body corporate applies for a grant of probate or (in the case of a trust corporation) letters of administration, the application may be signed and any necessary affidavits may be sworn by an officer authorized in that behalf by such body corporate or the directors or governing body thereof.

58. Number of administrators where there is continuing trust

Where a continuing trust arises, no grant of letters of administration may be made to one person alone except -

- (a) where that person is a trust corporation or is the Public Trustee; or
- (b) where the application is for the grant of letters of administration with the will annexed, and in that will the testator has appointed one or more trustees for the continuing trust who are willing and able to act.

[Act [No. 8 of 1976](#), s. 12.]

59. Renunciation of executorship

Any person who has been appointed by a will as an executor thereof may, either by oral declaration before the court or by writing under his hand, renounce executorship, and shall thereafter be finally precluded from applying for any grant of probate of that will.

60. Probate where there are several executors

When several executors are appointed, probate may be granted to them all simultaneously, or at different times.

61. Discovery of codicil after grant of probate

- (1) If a codicil is discovered after the grant of probate, a separate probate of that codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the will.
- (2) If different executors are appointed by the codicil, the probate of the will shall be revoked, and a new probate granted of the will and the codicil together.

62. No grant of administration until citation issued to executor

When a person who has been appointed by a will as an executor thereof has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon such executor to renounce his executorship or to apply for a grant of probate of such will:

Provided that -

- (i) when one or more of several executors have proved a will, the court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved; and
- (ii) there may be such limited grants of letters of administration in accordance with the provisions of [section 54](#) of this Act as may, in the opinion of the court, be necessitated by any special circumstances.

63. Grant of administration to universal or residuary legatee

When a deceased has made a will, but-

- (a) he has not appointed an executor; or
- (b) the only executors appointed are legally incapable of acting, or have renounced their executorship, or have died before the testator or before receiving a grant of probate of such will, or have failed within the time limited by a citation to apply for probate thereof; or
- (c) all proving executors have died before completing administration of all the property to which such will applies,

a universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

64. Right to administration of representative of deceased residuary legatee

When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative shall have the same right to administration with the will annexed as such residuary legatee.

65. Grant of administration where no executor nor residuary legatee nor representative of such legatee

When there is no executor, and no residuary legatee or representative of residuary legatee, or if every such person declines or is incapable of acting, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or the Public Trustee or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly.

[Act [No. 8 of 1976](#), s. 13.]

66. Preference to be given to certain persons to administer where deceased died intestate

When a deceased has died intestate, the court shall, save as otherwise expressly provided have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to such discretion, accept as a general guide the following order of preference -

- (a) surviving spouse or spouses, with or without association of other beneficiaries;
- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V of this Act;
- (c) the Public Trustee; and
- (d) creditors:

Provided that, where there is partial intestacy, letters of administration in respect of the intestate estate shall be granted to any executor or executors who prove the will.

[Act [No. 8 of 1976](#), s. 14.]

Procedure on Grants**67. Notice of application for grant**

- (1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting

objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.

- (2) Every such notice shall be exhibited conspicuously in the court-house, and also published in such other manner as the court directs.

68. Objections to application

- (1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.
- (2) When notice of objection has been lodged under sub-section (1) of this section, the court shall give notice to the objector to file an answer to the application and a cross-application within a specified period.

69. Procedure after notice and objections

- (1) When a notice of objection has been duly lodged under subsection (1) of [section 68](#), or no answer but no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.
- (2) When an answer and a cross application have been duly filed under subsection (2) of [section 68](#) of this Act, the court shall recognize that there is a dispute as to the grant, and shall (if necessary) refer the same to the High Court or to a Resident Magistrate as provided by [sections 47 and 48](#) of this Act.

[L.N. [No.256 of 1976](#), Sch.]

70. Power of courts

Whether or not there is a dispute as to the grant, every court shall have power, before making a grant of representation-

- (a) to examine any application on oath or affirmation; or
- (b) to call for further evidence as to the due execution or contents of the will or some other will, the making of an oral will, the rights of dependants and of persons claiming interests on intestacy, or any other matter which appears to require further investigation before a grant is made; or
- (c) to issue special citations to any persons appearing to have reason to object to the application.

Confirmation of Grants

71. Confirmation of grants

- (1) After the expiration of a period of six months, or such shorter period as the court (under subsection (3) of this section) may direct, from the date of any grant of representation, the holder thereof shall apply to the court for confirmation of such grant, in order to empower the distribution of any capital assets.
- (2) The court to which application is made, or to which any dispute in respect thereof is referred, may-
 - (a) if it is satisfied that the grant was rightly made to the applicant and that he is administering, and will administer, the estate according to law, confirm the grant; or
 - (b) if it is not so satisfied, issue to some other person or persons, in accordance with the provisions of [sections 56 to 66](#) (inclusive) of this Act, a confirmed grant of letters of administration in respect of the estate, or so much thereof as may be unadministered; or

- (c) order the applicant to deliver or transfer to the holder of a confirmed grant from any other court all assets of the estate then in his hands or under his control; or
- (d) postpone confirmation of the grant for such period or periods, pending issue of further citations or otherwise, as may seem necessary in all the circumstances of the case:

Provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled: and when confirmed, such grant shall specify all such persons and their respective shares.

- (3) The court may, on the application of the holder of a grant of representation, direct that such grant be confirmed before the expiration of six months from the date of the grant if it is satisfied-
 - (a) that there is no dependant, as defined by [section 29](#) of this Act of the deceased; and
 - (b) that it would be expedient in all the circumstances of the case so to direct.

72. Grants not to be confirmed in certain circumstances

No grant of representation shall be confirmed until the court-

- (a) is satisfied that no application under Part III of this act is pending; and
- (b) has received a certificate from the Estate Duty Commissioner that he is satisfied that all estate duty payable in respect of the estate concerned has been or will be paid, or that no estate duty is payable in respect thereof; or
- (c) is itself satisfied that no estate duty is payable in respect of the estate concerned.

73. Duty of court to give notice to holder of grant to apply for confirmation

It shall be the duty of the court, within one year from the date of any grant of representation to give notice to the holder of such grant to apply for confirmation thereof.

Alteration and Revocation of Grants

74. Errors may be rectified by court

Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.

75. Procedure where codicil discovered after grant

If, after the grant of letters of administration with the will annexed or after confirmation thereof, a codicil be discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

76. Revocation or annulment of grant

A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion-

- (a) that the proceedings to obtain the grant were defective in substance;
- (b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;
- (c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that such allegation was made in ignorance or inadvertently;

- (d) that the person to whom the grant was made has failed, after due notice and without reasonable cause either-
 - (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or
 - (ii) to proceed diligently with the administration of the estate; or
 - (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of [section 83](#) of this Act or has produced any such inventory or account which is false in any material particular; or
- (e) that the grant has become useless and inoperative through subsequent circumstances.

Sealing of Commonwealth and Foreign Grants

77. Sealing of Commonwealth and Foreign grants

- (1) Where a court or other authority, having jurisdiction in matters of probate or administration in any Commonwealth country or in any other foreign country designated by the Attorney-General by notice in the *Gazette*, has, either before or after the commencement of this Act, granted probate or letters of administration, or an equivalent thereof in respect of the estate of a deceased person, such grant may, on being produced to and a copy thereof deposited with the High Court, be sealed with the seal of that court, and thereupon shall be of like force and effect, and have the same operation in Kenya, as if granted and confirmed by that court.
- (2) Before sealing a grant under subsection (1) of this section, the High Court-
 - (a) shall satisfy itself as to the payment of estate duty as provided by [section 72](#) of this Act;
 - (b) may require such evidence (if any) as it thinks fit concerning the domicile of the deceased person;
 - (c) may, on the application of any creditor of the estate, require that adequate security be given for the payment of debts due from the estate to creditors residing in Kenya.

78. Duplicate or copy of foreign grant to have same effect as original

For the purposes of this Act, a duplicate of any grant sealed with the seal of a court or other authority in a Commonwealth or foreign country, or a copy thereof certified as correct by, or duly on behalf of such court or authority, shall have the same effect as the original.

Powers and Duties of Personal Representatives

79. Property of deceased to vest in personal representative

The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as such personal representative.

[Act [No. 8 of 1976](#), s. 15.]

80. When grant takes effect

- (1) A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom such grant is made consistent with his or their duties as such.

- (2) A grant of letters of administration, with or without will annexed, shall take effect only as from the date of such grant.

81. Powers and duties of personal representatives to vest in survivor on death of one of them

Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of such executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.

82. Powers of personal representatives

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that-

- (i) any purchase by them of any such assets shall be avoidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;
- (c) to assent, at any time after confirmation of the grant to the vesting of a specific legacy in the legatee thereof;
- (d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that except so far as otherwise expressly provided by any will-

- (i) no appropriation shall be made so as to affect adversely any specific legacy;
- (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

83. Duties of personal representatives

Personal representatives shall have the following duties, namely-

- (a) to provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;

- (b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- (c) to pay out of the estate of the deceased all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);
- (d) to ascertain and pay, out of the estate of the deceased, all his debts;
- (e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of such account;
- (f) subject to [section 55](#) of this Act, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- (g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of such completed administration.

84. Personal representatives to act as trustees in certain cases

Where the administration of the estate of a deceased person involves any continuing trusts, whether by way of life interest or for minor beneficiaries or otherwise, the personal representatives shall, unless other trustees have been appointed by a will for the purpose of such trust, be the trustees thereof:

Provided that, where valid polygamous marriages of such deceased person has resulted in the creation of more than one house, the court may at the time of confirmation of the grant, appoint separate trustees of the property passing to each or any of such houses as provided by [section 40](#) of this Act.

85. Assent necessary to complete legatee's title

- (1) The assent of the executor shall be necessary to complete the title of the legatee to a specific legacy.
- (2) Such assent may be verbal, and either express or implied from the conduct of the executor, and shall be sufficient to divest his interest as executor therein, and (subject to any registration required by any other written law) to transfer the subject of the bequest to the legatee.
- (3) When the executor is a legatee, his assent to his own specific legacy shall be necessary to complete his title thereto as legatee.
- (4) The assent of the executor to a specific legacy shall give effect thereto from the death of the testator.

86. Debts to be paid before legacies

Debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy.

87. Personal representatives not bound to pay legacies without indemnity

If an estate is subject to any contingent liabilities, a personal representative shall not be bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

88. Abatement and refunding of legacies

Legacies shall abate and be refunded according to the provisions of the Sixth Schedule to this Act.

89. Insolvent estates

- (1) Where any application for a grant of probate or letters of administration shows by the inventory therein that the estate the subject thereof will, after payment of funeral and other expenses, be insolvent, the court shall of its own motion order the administration of such estate in bankruptcy as provided by [section 121](#) of the Bankruptcy Act, [Cap. 53](#).
- (2) If and so soon as any personal representative knows or has reason to believe that the estate in respect of which probate or letters of administration have been granted to him will prove to be insolvent, he shall forthwith petition for administration thereof in bankruptcy as aforesaid.
- (3) This section shall have effect notwithstanding anything contained in the Bankruptcy Act, [Cap. 53](#).

90. Investment of funds to provide for legacies and interest on legacies

Personal representatives shall invest funds to provide for legacies in the manner and according to the provisions set out in the Seventh Schedule to this Act; and legacies shall carry interest in accordance with those provisions.

91. Transfer of assets from Kenya to personal representatives in country of domicile for distribution

Where a person not having his domicile in Kenya has died leaving assets both in Kenya and in the country in which he had his domicile at the time of his death, and there has been a grant of representation in Kenya with respect to the assets there, and a grant of representation in the country of domicile with respect to the assets in that country, the personal representatives in Kenya, after having given such notices as are required by paragraph 5 of the Sixth Schedule to this Act and after having discharged, at the expiration of the time therein named, such lawful claims as have come to their notice, may, instead of themselves distributing any surplus or residue of the deceased's property to persons residing out of Kenya who are entitled thereto, transfer with the consent of the personal representatives in the country of domicile, the surplus or residue to those personal representatives for distribution to those persons.

92. Protection of persons acting on representation

- (1) Every person making or permitting to be made any payment or disposition in good faith under a grant of representation shall be indemnified and protected in so doing notwithstanding any defect or circumstances whatsoever affecting the validity of the grant.
- (2) Where a grant of representation is revoked or varied, payments and dispositions made in good faith to a personal representative under that grant before the revocation or variation thereof shall be a valid discharge to the person making the same and a personal representative who has acted under the revoked or varied grant may retain and reimburse himself in respect of any other person to whom representation is afterwards granted might have properly made:

Provided that any personal representative who so acted shall account for all payments, dispositions, retentions or reimbursements made by him to the person or person to whom representation is afterwards granted.

93. Validity of transfer not affected by revocation of representation

- (1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act, by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.
- (2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral

and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.

94. Neglect or misapplication of assets by personal representatives

When a personal representative neglects to get in any a asset forming part of the estate in respect of which re-representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.

95. Offences by personal representatives

Any personal representative who, as regards the estate in respect of which representation has been granted to him-

- (a) wilfully or recklessly neglects to get in any asset forming part of such estate, misapplies any such asset, or subjects any such asset to loss or damage; or
- (b) wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of [section 83](#) of this Act; or
- (c) wilfully or recklessly produces any such inventory or account which is false in any material particular; or
- (d) knowing or having reason to believe that such estate will prove to be insolvent, continues to administer the same without petitioning for administration thereof in bankruptcy,

shall be guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding one year, or to both such fine and imprisonment.

Part VIII – MISCELLANEOUS

96. Sane murderer not to share in victim's estate

- (1) Notwithstanding any other provision of this Act, a person who, while sane, murders another person shall not be entitled directly or indirectly to any share in the estate of the murdered person, and the persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as though such murderer had died immediately before the murdered person.
- (2) For the purpose of this section the conviction of a person in criminal proceedings of the crime of murder shall be sufficient evidence of the fact that the person so convicted committed the murder.

[L.N. [No. 25 of 1976](#), Sch.]

97. Rules

The Rules Committee may make rules of procedure generally for the carrying out of the purposes and provisions of this Act, and without prejudice to the foregoing generality, any such rules of procedure may prescribe-

- (a) the procedure to be followed by any court in determining applications under [section 26](#) or subsection (3) of [section 35](#) of this Act;
- (b) the procedure to be followed by any court in granting probate or letters of administration;
- (c) the procedure to be followed in the case of any dispute as to a grant;
- (d) the form and manner in which applications under [section 26](#) and subsection (3) of [section 35](#) of this Act, and applications for grants are to be made, grants are to be issued, grants are to be limited, notices are to be given, or inventories or accounts are to be produced;

- (e) the fees to be paid on any application or grant, or on any other procedure related thereto.

98. Transitional

All proceedings commenced under any written law or part thereof repealed by this Act shall, so far as practicable, be continued under this Act.

99. Repeal

The laws set out in the Eighth Schedule to this Act are hereby repealed.

100. Amendments

The Acts set out in the first column of the Ninth Schedule to this Act are hereby amended, in relation to the provisions thereof specified in the second column of that Schedule, in the manner specified in relation thereto in the third column of that Schedule.

101. Saving

Except as otherwise expressly provided in this Act, nothing in this Act shall affect the provisions of-

- (a) the Trustee Act ([Cap. 167](#));
- (b) the Public Trustee Act ([Cap. 168](#));
- (c) the Trusts of Land Act ([Cap. 290](#));
- (d) the provisions concerning estates of deceased soldiers contained in [sections 218 to 222](#) of the Armed Forces (Act [No. 60 of 1968](#)).

FIRST SCHEDULE

[[section 22](#), Act [No. 8 of 1976](#), s. 16.]

CONSTRUCTION OF WILLS

General Rules

1. Wording of will

It is not necessary, in order to give effect to any disposition, that any technical words be used in a will, but only that the wording be such that the intention of the testator can be known therefrom.

2. Meaning of clause to be collected

The meaning of any clause in a will is to be ascertained from the entire instrument, and all the provisions of such will are to be construed with reference to each other; but where two clauses or provisions are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

3. Will speaks from death as to property comprised in it

Every will shall be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will:

Provided that, in respect of the subject of a specific legacy, there shall be a presumption that the will speaks as at the date of its actual execution.

4. Negative words insufficient to exclude person entitled on intestacy

Merely negative words in a will shall not be sufficient to exclude a person entitled on intestacy and in order to effect such an exclusion there must be an actual gift to some other definite object.

5. Express gift cannot be controlled by reason assigned, etc.

Subject to the provisions of paragraph 2, an express and positive gift cannot be controlled by reason assigned, or by subsequent ambiguous words, or by inference and argument from other parts of the will, and is not affected by a subsequent inaccurate recital of, or reference to, its contents:

Provided that, in cases of ambiguity or doubt, recourse may be had to such reference in order to assist the construction.

6. Implication admissible only in absence of express disposition

Implication shall be admissible only in the absence of an express disposition, and shall not be admissible to control an express disposition.

7. Words may be supplied, rejected, etc.

Words and limitations contained in a will may be transposed, supplied or rejected, where such a course is warranted by the immediate context or the general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention, and obvious clerical errors may be corrected.

8. Technical words

Technical words shall be presumed to be employed in their technical sense, unless the context clearly indicates the contrary.

9. Words in general

Words in general shall be construed in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected from the will and that other sense can be ascertained.

10. Words occurring more than once

Words occurring more than once in a will shall be presumed to be used always in the same sense unless the context clearly indicates the contrary or unless the words are applied to different subjects.

11. Additional words

Where a testator uses an additional word or phrase, an additional meaning shall be presumed unless the context clearly indicates the contrary.

12. Words construed so as to make them operative

When a clause or disposition is capable of two meanings, according to one of which it has some effect, and according to the other of which it can have no effect, the former shall be preferred.

13. Intention to be given effect to

Where for any reason effect cannot be given completely to the testator's apparent intention, effect shall nevertheless be given thereto so far as is possible.

14. Rules of construction not to be strained to validate gift

The rules of construction shall not be strained in order to bring a gift within the rules of law, but, where the will admits of two constructions, the construction which will render the gift valid shall be preferred:

Provided that where a gift, valid in the first instance, is modified by some subsequent clause in the same will or in a codicil thereto in such manner as to render such preceding gift void for remoteness, such modifying clause, if separable from the original gift, shall be rejected as if such will or codicil had never contained the same.

15. Inconvenience or absurdity of gift

The inconvenience or absurdity of a gift, or the fact that the testator did not foresee all the consequences of his disposition, shall not be a ground for varying the construction of the will where the terms are unambiguous; but, where the terms of any gift or disposition are ambiguous, the more rational of two constructions shall be preferred.

16. Construction not to be varied by subsequent events

The construction of a will shall not be varied by events subsequent to its execution, but in determining the meaning of particular expressions regard may be had to circumstances which, at the date of execution, were capable of arising subsequent to that date.

17. Presumption against intestacy

A testator shall be presumed to calculate against intestacy and, subject to the provisions of paragraph 14 a construction avoiding intestacy shall be preferred.

18. Presumption as regards gift over

A testator shall be presumed to calculate on the dispositions in his will taking effect; and a gift over shall not, in the absence of clear intention be construed as providing exclusively for lapse or other initial failure of the original gift.

19. Independent gifts

Unless a design to connect them appears from the will, independent gifts shall be construed separately and without relation to one another, notwithstanding that it may be conjectured from the circumstances that the testator had the same intention with regard to all such gifts.

20. References to child, etc., to include illegitimate child

Unless a contrary intention appears from the will, the term "**child**", "**son**", "**daughter**", "**grandchild**", and "**issue**" and similar words shall be construed in accordance with the definition of "child" in subsection (2) and with the provisions of subsection (3) of [section 3](#) of this Act.

21. References to application of Islamic law to mean law of sect or school of testator

Unless a contrary intention appears from the will, where a testator declares that this property shall devolve according to Islamic law, the Islamic law applicable shall be the law of the sect or school of Islamic law to which the deceased belonged.

22. Particular rules of construction

The several particular rules of construction provided by the following paragraphs shall apply if, and so far only, as a contrary intention is not expressed or implied in the will and shall have effect subject to the terms of the will.

Descriptions

23. Misomer or misdescription of object

- (1) Where the words used in a will to designate or describe a legatee, or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect, and it shall be sufficient for this purpose if the legatee, or class of legatees, is so designated as to be distinguished from every other person or class.
- (2) A mistake in the name of a legatee may be corrected by a description of such legatee and a mistake in the description of a legatee may be corrected by the name of such legatee.
- (3) Where the words used in a will to designate or describe a legatee are applicable to two or more reasons or classes of persons, or partly to one and partly to another person or class the legatee or class of legatees may be ascertained from the general context and the surrounding circumstances.

24. Rejection of erroneous particulars in description of subjects

If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous and the gift shall take effect:

Provided that, if a will mentions several circumstances as descriptive of the thing which the testator intends to bequeath and there was any property in respect of which all those circumstances existed at the date of execution of the will the gift shall be considered as limited to such property and no part of the description shall be rejected as erroneous because the testator had at the date of his death other property to which such part of the description does not apply.

25. Rejection of erroneous particulars in description of subjects

A gift or disposition not expressive of any definite intention, shall be void for uncertainty:

Provided that-

- (i) no gift for charitable purposes shall be void for uncertainty of the object; or
- (ii) no gift whereby the legatee is expressly or impliedly given a right of selection, purchase or disposition shall be void merely by reason of the uncertainty arising from such right.

26. Gift presumed to comprise whole interest of testator

Where property is bequeathed to any person, the gift shall be presumed to comprise the whole interest of the testator in such property, unless it appears from the will that only a restricted interest was intended for him.

27. Construction of bequest which refers to person as existing

The object of a gift which refers to a person or persons as existing shall be construed as at the date of the will, unless a contrary intention clearly appears therein.

Residuary Bequests

28. Effect of general residuary bequest

A general residuary bequest shall comprise all free property of the testator as at the date of his death, whether or not acquired after the date of the will, of which he has not otherwise disposed, and shall include all free property of which he may have attempted but failed to dispose, even though expressly excepted from the gift.

29. Effect of limited residuary bequest

A limited residuary bequest shall have the same effect as a general residuary bequest, subject only to the specific limitation therein expressed or implied.

30. Effect to particular residuary bequest

A particular residuary bequest shall comprise all free property of the testator falling under the particular description as at the date of his death, of which he has not otherwise disposed, and shall include all such property of which he may have attempted but failed to dispose.

31. Effect of failure of share of residue

The failure of any gift of a share in a residuary bequest, whether general limited or particular shall not result in such share accruing to the other shares therein, but subject only to any subsequent residuary bequest, shall create an intestacy in respect of such.

General Legacy of Property not Possessed

32. General legacy of property

Notwithstanding the provisions of paragraphs 8 to 14 of the Second Schedule to this Act, where a general legacy is in the form of a gift of a specified type of property which is not at the time of the testator's

death included in his estate, the value of such gift shall if it can be ascertained, be met from the testator's general estate, but if the value thereof cannot be ascertained the gift shall fail.

Annuities

33. Annuity created by will payable for life only, unless contrary intention appears by will

Where an annuity is created by will, the legatee shall be entitled to receive it for his life only, unless a contrary intention appears by the will, notwithstanding that the annuity is directed to be paid out of the income of a specified fund or specified property.

34. Annuities for maintenance and education

Where there is a gift of an annuity for the maintenance and education of the beneficiary, such annuity shall be deemed to be given for the life of the beneficiary.

35. Where will directs that annuity be provided out of property or where money bequeathed to be invested in purchase of annuity

Where will directs that annuity be provided out of property or where money bequeathed to be invested in purchase of annuity for any person, the legatee may either have an annuity purchased for him or receive forthwith the money appropriated for that purpose by the will.

36. Relation of annuity to residuary estate

- (1) Where there is a direct gift of an annuity, or where a will manifests an intention that an annuity shall be charged on the capital of the testator's residuary estate, the annuity shall constitute a charge upon such capital.
- (2) In all other cases, in default of specific provision, the annuity shall be payable only out of the income of the residuary estate.
- (3) In default of provision to the contrary, an annuity payable only out of the income of the residuary estate, or of a specified fund or of specified property, shall constitute together with all arrears thereof, a continuing charge on the whole of such income.

37. Commencement of annuity and time for payment when no time fixed will

When an annuity is given by will, and no time is fixed for its commencement, it shall commence from the testator's death, and the first payment shall be made at the expiration of one year after that event:

Provided that, where there is a direction that the annuity shall be paid quarterly or monthly, the first payment shall be due at the end of the quarter or month, as the case may be, immediately after the testator's death; and shall, if the personal representatives think fit, be paid when due but the personal representatives shall not be bound to pay it until the expiry of twelve months after the testator's death.

38. Dates of successive payments directed to be made within given time or on day certain

Where there is a direction that the first payment of an annuity shall be made within any specified period of time after the death of the testator, or on a day certain, the next payment to be made and subsequent payments shall be made accordingly.

39. Apportionment

If an annuitant dies in the interval between the times for payment of his annuity, an apportioned share of the annuity shall be paid to his personal representatives.

Gifts of Income

40. Gift of income for indefinite period

Where the income of any fund, property or residuary estate is bequeathed to any person, and the will affords no indication of an intention that the enjoyment of the gift should be of limited duration, the principal, as well as the income, shall belong to the legatee.

Gifts for Special Purposes

41. Effect of gift for special purpose

Where a gift is bequeathed solely for the benefit of the legatee, then, notwithstanding that words are added to the gift expressing a purpose for which the gift is made, the legatee shall be entitled to claim the gift without applying it to that purpose, whether or not the purpose be expressed in obligatory terms:

Provided that-

- (i) where the gift is made subject to a gift over of any surplus remaining after the purpose has been fulfilled, the provisions of this paragraph shall apply only to so much of the gift as is necessary for such purpose;
- (ii) the provisions of this paragraph shall not apply where the purpose specified is so expressed as to create a condition or a discretionary trust with gift over, nor where the legatee is a minor.

42. Effect of discretion as to time

Where a gift of a sum of money is directed to be applied solely for the benefit of a person in a certain way, but the time within which the gift is to be expended is left in the discretion of the personal representatives or of trustees, the beneficiary shall not so long as the personal representatives or the trustees properly exercise their discretion, demand payment of the money, but if he dies before the money is so applied, his personal representatives shall be immediately entitled to the money.

Conditional Gifts

43. Express words unnecessary

No precise form of words shall be necessary to create a condition in a will, and any expression disclosing such an intention of the testator shall have that effect.

44. Void

Any condition shall be void which-

- (a) requires the performance of an illegal act, or is not legally enforceable; or
- (b) is contrary to law, morality or public policy; or
- (c) is uncertain, or is too vague to be enforced; or
- (d) offends against any law as to accumulations, remoteness or perpetuities; or
- (e) is impossible *ab initio*, or becomes impossible by the act or default of the testator, or by an act of any court; or
- (f) is repugnant to the gift to which it is annexed; or
- (g) is in total restraint of the marriage of any person other than a widow; or
- (h) is attached to a gift of capital to a widow, in total restraint, of her marriage, without providing for any gift over on default; or
- (i) forbids dispute of the will, without providing for any gift over on default; or
- (j) restrains alienation, voluntary or involuntary, of the subject of the gift;

Provided that nothing in this subparagraph shall affect or render void any discretionary trust with gift over, or any life estate made determinable on bankruptcy.

45. Condition either precedent or subsequent

- (1) A condition shall be either precedent, in that the performance thereof is made to precede the vesting of a gift in interest, or subsequent, in that the non-performance thereof is made to determine a gift antecedently vested in interest.
- (2) In case of doubt, construction of a condition as a condition subsequent shall be preferred to construction as a condition precedent.

46. Effect of void condition

- (1) Where a gift is made upon a condition subsequent which is void, the gift shall be absolute.
- (2) Where a gift is made upon a condition precedent which is void, the gift shall be void if -
 - (a) the void condition is the sole motive of the bequest; or
 - (b) the impossible nature of the condition was unknown to the testator; or
 - (c) the condition is illegal as involving the performance of an unlawful act,but in all other cases such gift shall be absolute.

47. Effect of impossibility supervening

- (1) Where a gift is made upon a condition subsequent which was valid *ab initio*, but which has, for any reason, become impossible before being performed, the gift shall be absolute.
- (2) Where a gift is made upon a condition precedent which was *ab initio*, but which has, for any reason other than the act or default of the testator or an act of any court, become impossible before being performed, the gift shall be void.

48. Legatee bound by legal conditions

Where a legatee has taken a gift subject to a valid condition, he shall be estopped by his act of taking the gift from subsequently insisting on rights which, by the terms of the conditions, he is bound to release, or from declining a duty which he is required by the condition to perform.

49. One or two separate and independent bequests to same person may be accepted and the other refused

Where a will contains two separate and independent gifts to the same person, the legatee may take one of them, and may refuse the other, although either or both of such gifts was made upon condition.

50. Time in which conditions must be performed

Where a gift is made upon a condition, and no time is specified for its performance, the legatee shall perform the condition within a reasonable time:

Provided that -

- (i) where the condition is for the benefit of another person, then, in the absence of any specified time in which the condition is to be performed, the legatee shall perform the condition upon demand being made by such other person;
- (ii) where the condition is the happening of a specified uncertain event beyond the control of the legatee, the gift shall take effect if that event happens before the gift is payable or distributable, but not thereafter.

51. Performance generally

The performance of a condition shall be such as to constitute a substantial compliance with the terms of the condition:

Provided that, in respect of time, there shall be strict compliance where there is any express gift over.

52. Ignorance of condition

Where a gift is made upon a valid condition, ignorance of that condition shall not protect the legatee from the consequence of his default, unless such ignorance is attributable to the act or default of some person who benefits by breach of that condition.

53. Legatee named as executor cannot take unless he shows intention to act as executor

If a gift is bequeathed to a person who is named an executor of the will for his own benefit, and is not given independently of the office of executor, there shall be a presumption that he is not intended to take the gift unless he proves the will or otherwise unequivocally manifest an intention to act as executor.

Vesting and Divesting of Gifts

54. Meaning and effect of vesting

- (1) A gift shall vest in the legatee in interest when his entitlement to such gift, whether in possession or reversion, or to be enjoyed in possession at some future time, becomes certain.
- (2) Where the legatee dies before receiving possession of a gift already vested in him in interest, such gift unless divested by his death, shall pass to his personal representative.
- (3) Where the legatee dies before a gift vests in him in interest, such gift shall have no effect:

Provided that a gift over which is contingent only upon a collateral event, irrespective of the legatee attaining a specified age or surviving a specified period, shall vest in the personal representatives of the legatee if that event happens after his death.

55. Direction for vesting

A direction that a gift shall vest at any given time shall, unless it appears from the will to refer to vesting in possession, be construed as referring to vesting in interest.

56. Time of vesting of general terms

If a gift be made in general terms, without specifying any particular time for the vesting thereof, the legatee shall have a vested interest therein from the day of the death of the testator, or so soon thereafter as he comes into existence or the terms of the gift may otherwise permit.

57. Vesting of contingent gifts

If a gift be made in terms which clearly indicate that the interest of the legatee shall be contingent upon the happening of some uncertain event (other than the performance of a void condition not itself avoiding the gift), such interest shall not vest in the legatee until such event has happened.

58. Gift may vest subject to subsequent divesting

A gift may be made to vest immediately on the testator's death or on the happening of a specified event, notwithstanding that by the terms of the will, it is subject to subsequent divesting on the happening or not happening of some uncertain event.

59. Absolute gift with enjoyment postponed

Where a substantive gift is made subject only to a direction that it shall not be paid or delivered to the legatee until the happening of some future event, the legatee shall acquire an immediate vested interest, although vesting in possession shall be postponed in accordance with the direction:

Provided that a mere direction that the legatee attains an age exceeding full age shall be inoperative after he attains full age.

60. Direction for payment without substantive gift

Where the gift consists solely in a direction to pay or distribute at a future age, or upon the happening of some future event (other than performance of a void condition not itself avoiding the gift) without any substantive gift, the gift shall not vest in interest until such future age is attained or such future event occurs:

Provided that when the payment or distribution appears to be postponed merely for the convenience of the fund or the property, as the case may be, the vesting shall not be deferred as provided in this paragraph.

61. Gift subject to attaining certain age or marrying

Where a gift is made to a legatee and the attainment of a certain age or marriage is introduced into and made a constituent part of the description or character of the legatee, the vesting of the gift in interest shall be postponed until the attainment of that age or marriage as the case may be.

62. Effect of interim direction for maintenance

Where, under the terms of any gift the vesting thereof purports to be postponed to a given age and the gift is accompanied by a direction that the intermediate income shall be applied for the maintenance of the legatee, the gift shall vest in interest immediately, whether or not he attains that age:

Provided that this rule shall not apply to the gift of an entire fund to be distributed among a class of persons equally on attaining a given age.

63. Ambiguity of vesting contingency or divesting

Where the terms of a will are ambiguous in respect of the vesting, contingency or divesting of a gift, it shall, subject to all other rules of construction, be so construed as to give the legatee a vested rather than a contingent interest.

Satisfaction

64. Presumed satisfaction of debt

Where a debtor bequeaths a gift to his creditor, and the gift is equal to or greater than the debt, there shall be a presumption that the gift is intended to satisfy the debt, and not to be taken in addition to payment of the debt:

Provided that this presumption shall arise only in respect of a debt contracted before the date of execution of the will.

65. Presumed satisfaction of portion

Where a person who is under an obligation by contract to provide a portion for his child, or for some other person to whom he stands in *loco parentis*, fails to do so, but makes a gift to such child or other person by will, there shall be a presumption that such gift is intended to satisfy such portion, so far as such gift extends.

66. No presumed satisfaction of gift made previously in contemplation of death

A gift made by will shall not of itself raise any presumption that such gift is intended to satisfy or to take the place of a gift, whether or not of equal amount, previously made to the same person by the testator in contemplation of death.

Additional and Substituted Gifts

67. Two gifts to same person

Where a testator has purported to make two gifts to the same person, and a question arises whether he intended to make the second gift instead of or in addition to the first, and if there is nothing in the will or wills to show what he intended, the following rules shall have effect in determining the construction to be put upon the will or wills-

- (a) if the same specific thing is bequeathed twice to the same legatee by the same will, or by separate wills, he shall be entitled to receive that specific thing only;
- (b) where one and the same will purports to make, in two places, a gift to the same person of the same quantity or amount of anything, he shall be entitled to one such gift only;

- (c) where two gift of unequal amount are given to the same person by the same will, the legatee shall be entitled to both gifts;
- (d) where two gifts, whether equal or unequal in amount, are given to the same legatee by separate wills, the legatee shall be entitled to both gifts.

Liabilities Incidental to Gifts

68. Liability for charges

- (1) Where the free property of any deceased person includes any interest in property which at the time of his death is charged with charges, the payment of money, whether by way of mortgage, charge, lien (including a lien for unpaid purchase money), pledge or otherwise, and the deceased has not by will, deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for such payment and every part of the said interest, according to its value, shall bear a proportionate part of such payment.
- (2) Any contrary or other intention shall not be deemed to be signified by a general direction for payment of debts out of any residuary estate, or by a charge of debts upon any residuary estate, unless such intention is further signified by words expressly or by necessary implication referring to the payment so charged.
- (3) A periodical payment in the nature of land revenue or in the nature of rent in respect of any period prior to the death of the testator, shall not be such a payment as is contemplated by this rule.

69. Completion of testator's title to things bequeathed to be at cost of his estate

Where anything is to be done to complete the testator's title to the thing bequeathed, other than a payment with which that thing is charged at the date of his death, it shall be done at the cost of his estate.

70. Exoneration of legatee's immovable property for which land revenue or rent payable periodically

Where there is a gift of any interest in immovable property in respect of which payment in the nature of land revenue or in the nature of rent has to be made periodically, the estate of the testator shall (as between such estate and the legatee) make good such payments or a proportion of them as the case may be, up to the day of his death.

71. Exoneration of specific legatee's securities

In the absence of any direction in the will, any call or other payment due from the testator at the time of his death in respect of any securities, of which there is a specific legacy, if the same is not when charged upon those securities by way of lien or otherwise, shall, as between the testator's estate and the legatee, be borne by such estate, but if any call or other payment becomes due in respect of such securities after the testator's death, the same shall, as between the testator's estate and the legatee, be borne by the legatee, if he accepts the gift.

72. Order of payment when legacy directed to be paid out of the fund the subject of specific legacy

Where a portion of a fund is specifically bequeathed and a legacy is directed to be paid out of the same fund, the portion specifically bequeathed shall first be paid to the legatee thereof, and the demonstrative legacy shall be paid out of the residue of the fund, and, so far as the residue shall be deficient, out of the general assets of the testator, in exoneration of the specific legacy.

73. Expenses to be borne by legatee

The costs of the preservation, transfer or delivery of the subject of a specific legacy shall be borne by the legatee.

Gifts to Survivors

74. Gifts to such of certain persons as shall be surviving at some period not specified

- (1) Where a gift is in effect made to such of certain persons as shall be surviving at some period, but the exact period is not specified, it shall go to such of them as shall be alive at the time of payment or distribution and capable of taking.
- (2) The provisions of this paragraph shall apply whether the gift is to vest in possession immediately on the death of the testator, or at some time subsequent thereto upon the termination of a prior interest:

Provided that, where the time of payment or distribution depends upon the happening of two events one of which is personal, and the other of which is not personal, to the legatee, the gift shall subject to all other rules of construction, be construed as referring to the happening of the former event exclusively.

Exercise of Powers

75. Execution of power of appointment by general legacy or residuary bequest

Unless a contrary intention is clearly expressed or implied in the will -

- (a) a general legacy or limited residuary bequest shall be construed to include any property falling within the general description of such legacy or bequest over which the testator may have a general power of appointment by will and shall operate as an execution of such power as regards such property; and
- (b) a general residuary bequest shall be construed to include any property over which the testator may have a general power of appointment by will and shall operate as an execution of such power:

Provided that, unless an intention in that behalf is clearly expressed or implied in the will, no such gift shall in either event be construed as an exercise of any power of revocation and new appointment.

76. Execution of special powers

No general legacy or general residuary bequest shall be construed as an execution of any special power of appointment, unless an intention in that behalf is clearly expressed or implied in the will.

77. Particular residuary bequests

No particular residuary bequest shall be construed as an execution of any general or special power of appointment unless an intention in that behalf is clearly expressed or implied in the will.

78. Implied gifts to objects of special power in default of appointment

Where by a will any special power of appointment is given over property, but no provision is made in the event of default of such appointment, such property shall, in default of any such appointment or so far as the same may not extend, belong to all the objects of such power in equal shares, subject to all appointments made thereunder being brought into account.

SECOND SCHEDULE

[[section 23](#)]

FAILURE OF TESTAMENTARY DISPOSITIONS

By Lapse

1. Principle of lapse
 - (1) Save as is provided in this Schedule no gift or disposition shall confer any benefit on any person who predeceases the testator, and where a gift or disposition fails on this account it is said to "**lapse**".
 - (2) Subject to the provisions of [section 43](#) of this Act, the burden of proving that a legatee or appointee under a will has survived the testator shall lie upon the person alleging such survivorship.

- (3) A statement in a will that there shall be no lapse shall have no effect, except and so far as a further legatee or appointee, capable of taking, is designated.

2. Exceptions

- (1) Unless a contrary intention appears in the will, there shall be no lapse in either of the following cases-

- (a) where the gift or disposition is made in discharge of a moral obligation recognized by the testator; or
- (b) where the gift or disposition is in favour of any child or other issue of the testator for any estate or interest not determinable at or before the death of such child or other issue and such child or other issue, as the case may be, leaves issue surviving the testator,

but in either such case the gift or disposition shall take effect as if the deceased legatee had died immediately after the testator.

- (2) Where a gift or disposition is in favour of a described class of persons, notwithstanding that one or more of the class is named, and any member of that class survives to take a vested interest, there shall be no lapse but the survivor or survivors shall take the whole:

Provided that, if property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but the vesting of their interest is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them capable of taking as are then alive and to the personal representatives of any of them otherwise capable of taking who have died since the death of the testator.

3. Gift to several named persons

Where there is a gift or disposition to several named persons, who do not constitute a class for the purpose of the will, and one or more of such persons predecease the testator, then-

- (a) if an intention appears from the will that such persons should take as joint tenants, or that only the survivors of them should take, there shall be no lapse, if any of them survives the testator and is capable of taking the whole; but
- (b) if an intention appears from the will that such persons should take as tenants in common, and no intention appears therefrom that only the survivors of them should take, there shall be a lapse in respect of the share or shares of any of such persons predeceasing the testator, subject only to the provisions of paragraph 2.

4. Charges of gifts on gifts

Where one gift is charged on the subject of another gift-

- (a) if the encumbered gift lapses, the charge shall continue to have effect notwithstanding such lapse;
- (b) if the encumbering gift lapses, the legatee of the encumbered gift shall take the whole subject thereof free of the charge,

unless a contrary intention is expressed or implied in the will.

5. Lapse of limited interests

The lapse of a limited interest shall accelerate the interests in remainder expectant on the determination of such limited interest.

6. Effect on gifts over

Where a gift or disposition is made to one person with a gift over to another person in such circumstances that the gift over would fail if the original legatee survived the testator, the lapse of the original gift or disposition shall result in the gift over taking effect.

7. General effect of lapse

Subject only to the foregoing provisions of this Schedule, if a gift or disposition lapses, the property or interest in the subject thereof shall pass under any residuary bequest which, but for such gift or disposition, would have applied to such property or interest:

Provided that, if there is no such residuary bequest, or if the lapsed gift or disposition is itself a share of such residuary bequest and there is no ulterior residuary bequest under which it can pass, then there shall be intestacy in respect of such property or interest.

By Ademption

8. Principle of ademption

- (1) If property which has been specifically bequeathed does not belong to the testator at the time of his death, or has been converted into property of a different kind, the gift cannot take effect, by reason of the subject thereof having been withdrawn from the operation of the will; and where a gift fails on this account, it is said to be "**adeemed**".
- (2) There must be a substantial change in the subject of a specific legacy to cause ademption and a merely nominal change shall not have that effect.

9. Change of subject without testator's consent

Where property specifically bequeathed undergoes a change between the date of the will and the testator's death, and the change is caused by a wrongful conversion, the gift shall not be adeemed, but where the change is caused by the authority of any written law, whether or not approved by the testator, there shall be ademption unless the written law effecting such conversion provides otherwise.

10. Gift of interest in fund

The gift of an interest in a fund shall not be adeemed by any sale or change of investment of such fund by the persons having control thereof, nor shall it be adeemed by the testator receiving the same before his death, whether or not thereafter sold or re-invested by him, if it can at his death be followed and distinguished.

11. Non-ademption of demonstrative legacy

A demonstrative legacy shall not be adeemed by reason that the property on which it is charged by the will does not exist at the time of the death of the testator, or has been converted into property of a different kind, but it shall, in such case, be paid out of the general estate of the testator.

12. Revival of will does not revive adeemed legacy

The revival of a will shall not revive an adeemed gift, so as to give the legatee any interest in any property then representing the original subject of the adeemed gift.

13. No presumption of intention

Apart from any intention which may be expressed or implied in the terms of the will itself, there shall be no presumption of intention that ademption shall or shall not in any particular circumstances result:

Provided that the intention of the testator, to be ascertained according to the ordinary rules of construction, shall always be relevant to determine the precise subject of the gift.

14. Ademption by subsequent provision

Where a testator makes a gift by will to any person for a specific purpose, or to any child or other person to whom he stands in *loco parentis* by way of portion, and after the date of execution of that will provides by deed of settlement or otherwise for the same purpose or by way of portion for the same child or other person, there shall be a presumption that such gift is adeemed by the subsequent provision, so far as such subsequent provision extends.

THIRD SCHEDULE

[[section 24](#)]

ELECTION

1. Principle of election

- (1) Where a person by a will validly made in accordance with Part II of this Act, purports to dispose of any property which is not his own, and bequeaths a gift to the person to whom that property belongs, the legatee accepting the gift so bequeathed to him may elect to give effect to the testator's, attempted disposition or to enforce his proprietary rights against that disposition.
- (2) If a legatee elects under this paragraph to enforce propriety right, he shall make compensation out of the gift bequeathed to him to the person whom he has thereby disappointed, and the amount of such compensation shall be assessed on the value of the attempted disposition as at the date of the testator's death, but shall not exceed the value of the gift bequeathed to the person electing to enforce his proprietary rights.

2. Where property belongs to more than one person

Where a testator purports to dispose of property which belongs to more than one person, every such person, if also a beneficiary under the will of that testator, shall have the right of election provided by paragraph 1, to the extent of his interest in such property.

3. Testator's ignorance immaterial

It shall be immaterial to any case of election whether the testator, in purporting to dispose of property which is not his own, was aware of his lack of title, or proceeded on the erroneous supposition that he was exercising a power of disposition which belonged to him.

4. Legatee's ignorance material

A person shall not be bound to elect until all circumstances which may influence his election are known to him, and, if a person elects in ignorance of any material facts he shall not be bound by such election.

5. Implied election

Where there is no express election, it may be implied or inferred from acts, or from failure to dissent, but such an inference shall not arise unless the legatee actually knows of his right to elect.

6. Postponement in case of disability

In case of any disability of a legatee entitled to elect the election shall be postponed until the disability ceases, or until the election shall be made by some competent authority or representative.

7. Extrinsic evidence inadmissible to provide intention

In order to raise a case of election the intention of the testator to dispose of the property not belonging to him must be apparent on the face of the will, and extrinsic evidence shall not be admissible.

8. Case to which doctrine does not apply

The principle of election set out in this Schedule shall not apply-

- (a) to creditors; or
- (b) to legatees who hold the property of which the testator has attempted to dispose in some capacity other than that in which the gift is made to them; or
- (c) where the property of which the testator has attempted to dispose does not belong either to the testator or to the legatee, nor to any case where the legatee cannot by his own lawful act give effect to that disposition; or

- (d) where the legatee, although subsequently becoming the owner of the property of which the testator has attempted to dispose, is not the owner of such property at the date of the testator's death; or
- (e) to persons who, although taking no direct gift under the will derive an indirect benefit therefrom.

9. Application to appointments under powers

The principles of election set out in this schedule shall apply to cases of invalid appointments under powers, but not where-

- (a) the testator clearly shows he is aware that the appointment is of doubtful validity;
- (b) the appointment is made to objects of the power absolutely, with merely a condition or proviso in favour of strangers to the power; or
- (c) the appointment is void for remoteness.

FOURTH SCHEDULE

[[section 25](#), Act [No. 8 of 1976](#), s. 18.]

PERPETUITIES, REMOTENESS AND ACCUMULATIONS

1. Interpretation

(1) In this Schedule-

"disposition" includes the conferring of a power of appointment and any other disposition of an interest in or right over property, and references to the interest disposed of shall be construed accordingly;

"in being" means living or *en ventre sa mere*;

"power of appointment" includes any discretionary power to transfer a beneficial interest in property without the furnishing of valuable consideration.

(2) For the purposes of this Schedule a disposition contained in a will is deemed to be made at the death of the testator.

(3) Property or any interest in property vests-

- (a) when the person to whom it is given is ascertained and in existence; and
- (b) when the property or the amount of the interest is ascertained; and
- (c) when all other events have happened to enable the interest to come into possession at once subject to the determination at any time of any prior interest.

2. Condition restraining alienation

(1) Where a disposition is subject to a condition or limitation absolutely restraining the beneficiary or any person claiming under him from charging or disposing of his interest in the property the condition or limitation is void.

(2) This rule does not apply to a disposition for charitable purposes.

3. Restriction repugnant to interest

Where a disposition creates an interest absolutely in favour of any person but the terms of the disposition direct that such interest shall be applied or enjoyed by him in a particular manner he is entitled to receive and dispose of such interest as if there were no such direction.

4. Duration of perpetuity period

The perpetuity period is-

- (a) where the instrument by which the disposition is made so provides, such number of years not exceeding eighty as is specified in that behalf in the instrument; which failing
- (b) a specified life or specified lives in being and eighteen years thereafter; which failing
- (c) eighteen years.

5. Remoteness of vesting

Subject to the provisions of this Schedule, no disposition is valid which must postpone the vesting of the interest disposed of beyond the perpetuity period.

6. Uncertainty as to remoteness

- (1) Where, apart from the provisions of this paragraph and paragraphs 8 and 9, a disposition might not vest the interest disposed of within the perpetuity period, the disposition shall be treated, until such time (if any) as it becomes established that the vesting must occur, if at all, beyond the perpetuity period, as if the disposition were not subject to this Schedule, and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application for interim income or otherwise.
- (2) Where a disposition consists of the conferring of a general power of appointment which might not become exercisable within the perpetuity period, the disposition shall be treated, until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period, as if the disposition were not subject to this Schedule.
- (3) Where a disposition consisting of the conferring of any power, option or other right might be exercised beyond the perpetuity period, the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to this Schedule, and shall be void only if, and so far as, the right is not fully exercised within the perpetuity period.

7. Ascertainment of lives in being

- (1) Where paragraph 6 applies and the duration of the perpetuity period is not determined by paragraph (a) or (c) of paragraph 4, it shall be determined as follows: -

Where any person falling within subparagraph (2) of this paragraph are individuals in being and ascertainable at the commencement of the perpetuity period the duration of the period shall be determined by reference to their lives and no others, but so that the lives of any description of persons falling within paragraph (b) or (c) of that subparagraph shall be disregarded if the number of persons of that description is such as to render it impracticable to ascertain the date of death of the survivor.

- (2) The said persons are as follows-

- (a) a person expressly selected by the instrument creating the disposition to be a life in being;
- (b) a person to whom or in whose favour the disposition was made, that is to say-
 - (i) in the case of a disposition to a class of persons, any member or potential member of that class;
 - (ii) in the case of an individual disposition to a person taking only on certain conditions being satisfied, any person as to whom some of the conditions are satisfied and the remainder may in time be satisfied;
 - (iii) in the case of the exercise of any power, option or other right, the person on whom the right is conferred;

- (c) a person having a child or grandchild within subparagraphs (i) or (ii) of paragraph (b) or any of whose children or grandchildren, if subsequently born, would by virtue of his or her descent fall within either of those subparagraphs;
- (d) any person on the failure or determination of whose prior interest the disposition is limited to take effect;
- (e) any person on whose death any disposition is limited to take effect;
- (f) any person who is a life in being for the purpose of any other disposition created by the same instrument.

8. Reduction of age and exclusion of class members to avoid perpetuity

- (1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding eighteen years, and it is apparent at the time the disposition is made or becomes apparent at the time the disposition is made or becomes apparent at a subsequent time-
 - (a) that the disposition would, apart from this paragraph, be void for remoteness, but
 - (b) that it would not have been void if the specified age had been eighteen year, the disposition shall be treated for all purposes as if, instead of being limited by reference to the age in fact specified, it had been limited by reference to the age nearest to that age which would, if specified instead, have prevented the disposition from being so void.
- (2) Where in the case of any disposition, different ages exceeding eighteen years are specified in relation to different persons-
 - (a) the reference in subparagraph (a) of subparagraph (1) of this paragraph to the specified age shall be construed as a reference to all the specified ages, and
 - (b) the said subparagraph (1) shall operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness.
- (3) Where the inclusion of any person, being potential members of a class or unborn persons who at birth would become members or potential members of the class, prevents the foregoing provisions of this paragraph from operating to save a disposition from being void for remoteness, those persons shall thenceforth be deemed for all purposes of the disposition to be excluded from the class, and the said provisions shall thereupon cease to have effect accordingly.
- (4) Where, in the case of a disposition to which subparagraph (3) of this paragraph does not apply, it is apparent at the time the disposition is made or become apparent at a subsequent time that, apart from this subparagraph, the inclusion of my persons, being potential members of a class or unborn persons who at birth would become members or potential members of the class, would cause the disposition to be treated as void for remoteness, those persons shall, unless their exclusion would exhaust he classs thenceforth be excluded from the class for all the purposes of the disposition.
- (5) Where this paragraph has effect in relation to a disposition to which paragraph 6 applies, the operation of this paragraph shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

9. Condition relating to death of surviving spouse

Where a disposition is limited by refercnce to the time of death of the survivor of a person in being at the time of the commencement of the perpetuity period and any spouse of that person, and that time has not arrived at the end of the perpetuity period, the disposition shall be treated for all purposes, where to do so would save it from being void for remoteness, as if it had instead been limited by reference to the time immediately before the end of that period.

10. Saving and acceleration of expectant interest

A disposition shall not be treated as void for remoteness by reason only that the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an

interest shall not be prevented from being, accelerated on the failure of a prior interest by reason only that the failure arises because of remoteness.

11. Powers of appointment

For the purpose of this Schedule a power of appointment shall be treated as a special power unless-

- (a) in the instrument creating the power it is expressed to be exercisable by one person only, and
- (b) it could, at all times during its currency when that person is of full age and capacity be exercised by him so as immediately to transfer to himself the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power:

Provided that for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is void for remoteness, the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.

12. Validity of powers of appointment

- (1) In the case of a general power of appointment the perpetuity period commences at the time of the exercise of the power.
- (2) In the case of a special power of appointment the perpetuity period commences at the date the disposition creating the special power takes effect.

13. Administrative powers of trustees

This Schedule shall not operate to invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property for full consideration, or to do any other act in the administration (as opposed to the distribution) of any property, and does not prevent the payment to trustees or other persons of reasonable remuneration for their services.

14. Presumptions and evidence as to future parenthood

- (1) Where there arises on this Schedule a question which turns on the ability of a person to have a child at some future time, then-
 - (a) subject to paragraph (b), it is presumed that a male can have a child at the age of fourteen years or over, but not under that age, and that a female can have a child at the age of twelve years or over, but not under that age or over the age of fifty-five years; but
 - (b) in the case of a living person evidence may be given to show that he or she will or will not be able to have a child at the time in question.
- (2) Where any question is decided by treating a person as unable to have a child at a particular time, and he or she does so, the High Court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition, so far as may be just, in the position they would have held if the question had not been so decided.
- (3) Subject to subparagraph (2) of this paragraph, where any such question is decided in relation to a disposition by treating a person as able or unable to have a child at a particular time, then he or she shall be so treated for the purpose of any question which may arise in this Schedule in relation to the same disposition in any subsequent proceedings.
- (4) In the foregoing provisions of this paragraph references to have a child are references to begetting or giving birth to a child, but those provisions (except subparagraph (1) (b)) shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to his or her ability at that time to beget or give birth to a child.

15. General restriction on accumulation of income

- (1) No person may, by will settle or dispose of any property in such manner that the income thereof shall, save as hereinafter mentioned, be wholly or partially accumulated for any longer period than one of the following, namely-
 - (a) the term of eighteen years from the date of the making of the disposition; or
 - (b) the duration of the minority or respective minorities of any lives in being at the death of the testator; or
 - (c) the duration of the minority or respective minorities only of any person or persons who, under the limitations of the will directing the accumulations, would for the time being, if of age, be entitled to the income directly to be accumulated; or
 - (d) the duration of the minority or respective minorities of any persons in being at the date of the making of the disposition.
- (2) In every case where any accumulation is directed otherwise than in accordance with the provisions of subparagraph (1) of this paragraph, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to the said provisions, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.
- (3) This paragraph does not apply to any provision-
 - (a) for payment of the debts of the testator or of any other person; or
 - (b) for raising portions for-
 - (i) any child, children or remoter issue of the testator; or
 - (ii) any child, children or remoter issue of a person taking any interest under the will directing the accumulations or to whom any interest is thereby limited.

16. Accumulations during minority

When accumulations of surplus income are lawfully made during a minority, the period for which such accumulations are made shall not (whether the trust was created or the accumulations were made before or after the commencement of this Act) be taken into account in determining the periods for which accumulations are permitted to be made by paragraph 15 and accordingly an express trust for accumulation for any other permitted period shall not be deemed to have been invalidated or become invalid, by reason of accumulation also having been made as aforesaid during such minority.

17. Restriction on accumulation for the purchase of immovable property

- (1) No person may dispose by will of any property in such manner that the income thereof shall be wholly or partially accumulated for the purchase of immovable property only, for any longer period than the duration of the minority or respective minorities of any person or persons who, under the limitations of the will directing the accumulation, would for the time being, if of full age, be entitled to the income so directed to be accumulated.
- (2) This paragraph shall not apply to accumulations to be held as capital money for the purpose of the Trusts of Land Act ([Cap 290](#)), whether or not the accumulations are primarily liable to be laid out in the purchase of immovable property.

18. Terminations of accumulations

- (1) The foregoing paragraphs shall not affect the right of a beneficiary of full age and capacity who has an absolute vested and indefeasible interest in property at any time to require the transfer of the property to him and the termination of any accumulation.
- (2) Paragraph 3 shall apply to any question under this paragraph.

FIFTH SCHEDULE

[[section 54](#)]

FORMS OF LIMITED GRANT

Grant Limited in Duration

1. Probate of copy or draft of lost will

When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident, and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it be produced.

2. Probate of copy where original exists

When a will is in the possession of a person residing out of Kenya, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary (or the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it be produced.

3. Administration until will produced

Where no will of a deceased is forthcoming, but there is reason to believe that there is a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it be produced.

Grants for the Use and Benefit of Others having Right

4. Administration, with will annexed, to attorney of absent executor

When any executor is absent from Kenya and there is no executor within Kenya willing to act, letters of administration with the will annexed, may be granted to the attorney of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration granted to himself.

5. Administration with will annexed, to attorney of absent person, who if present would be entitled to administer

When any person to whom, if present, letters of administration, with the will annexed, might be granted, is absent from Kenya, letters of administration, with the will annexed, may be granted to his attorney, limited as above mentioned.

6. Administration to attorney of absent person entitled to administer in case of intestacy

When a person entitled to administration in case of intestacy is absent from Kenya, and no person equally entitled is willing to act letters of administration may be granted to the attorney of the absent person, limited as before mentioned.

7. Administration during minority of sole executor or residuary legatee

When a minor is sole executor or sole residuary legatee, letters of administration, with the will annexed, may be granted to the legal guardian of such minor, or to such other person as the court shall think fit until the minor shall have attained full age, at which period, and not before, probate of the will shall be granted to him.

8. Administration during minority of several executors or residuary legatees

When there are two or more minor executors, and no executor who has attained majority, or two or more residuary legatees, and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have attained full age.

9. Administration for use and benefit of person of unsound mind

If a sole executor or a sole universal or residuary legatee or a person who would be solely entitled to the estate of the intestate according to the rules for the distribution of intestates' estates, be a person of unsound mind, letters of administration, with or without the will annexed, as the case may be, shall be granted to the person to whom the care of his estate has been committed by competent authority, or, if there be no such person, to, such other person as the court may think fit to appoint for the use and benefit of the person of unsound mind until he shall become of sound mind.

10. Administration *pendeme lite*

Pending any suit touching the validity of the will of a deceased person, or for obtaining or revoking any probate or any grant of letters of administration, the court may appoint an administrator of the estate of such deceased person, who shall have the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the court, and shall act under its direction.

Grants for Special Purposes

11. Probate limited to purpose specified in will

If an executor be appointed for any limited purpose specified in the will, the probate shall be limited to that purpose, and, if he should appoint an attorney to take administration on his behalf, the letters of administration, with the will annexed, shall accordingly be limited.

12. Administration, with will annexed, limited to particular purpose

If an executor appointed generally gives an authority to an attorney to prove a will on his behalf, and the authority is limited to a particular purpose, the letters of administration, with the will annexed, shall be limited accordingly.

13. Administration limited to property in which person has beneficial interest

Where a person dies leaving property of which he was the sole or surviving trustee, or in which he had no beneficial interest on his own account, and leaves no general representative, or one who is unable or unwilling to act as such letters of administration, limited to such property, may be granted to the person beneficially interested in the property, or to some other person on his behalf.

14. Administration limited to suit

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties or any other parties, touching the matters at issue in the said cause or suit, and until a final decree shall be made therein, and carried into complete execution.

15. Administration limited to purpose of becoming party to suit to be brought against administrator

If, at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has been granted is absent from Kenya, it shall be lawful for any court to grant, to any person whom it may think fit, letters of administration, limited to the purpose of becoming and being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect.

16. Appointment of person not normally entitled to a grant

Where it appears to the court to be necessary or convenient to appoint some person to administer an estate or any part thereof other than the person who would in ordinary circumstances be entitled to a grant of representation, the court may, in its discretion and having regard to all the circumstances of the case, appoint such other person to be administrator and grant letters of administration, whether limited or otherwise, as it shall think fit.

Grants with Exception

17. Probate or administration with will annexed subject to exception

Whenever the nature of the case requires that an exception be made, probate of a will, or letters of administration with the will annexed, shall be granted subject to such exception.

18. Administration with exception

Whenever the nature of the case requires that an exception be made, letters of administration shall be granted subject to such exception.

Grants of the Rest

19. Probate or administration of rest

Whenever a grant, with exception, of probate, or letters of administration, with or without the will annexed, has been made, the person entitled to probate or administration of the remainder of the deceased's estate may take a grant of probate or letters of administration, as the case may be, of the rest of the deceased's estate.

Grants of Effects Unadministered

20. Grant of effects unadministered

If the executor to whom probate has been granted has died, leaving a part of the testator's estate unadministered, a new representative may be appointed for the purpose of administering such part of the estate.

21. Administration when limited grant expired and still some part of estate unadministered

When a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

SIXTH SCHEDULE

[sections 88 and 91]

ABATEMENT AND REFUNDING OF LEGACIES

Abatement

1. Abatement of general legacies

- (1) If the assets, after payment of debts, necessary expenses, and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportion, and the personal representative has no right to pay one legatee in preference to another nor to retain any money on account of legacy to himself or to any person for whom he is a trustee:

Provided that nothing contained herein shall prejudice or affect the priority of the remuneration to which any personal representative may be entitled under the will (including any general legacy which is expressly or impliedly conditional on his proving the will) or otherwise.

- (2) For the purpose of abatement, a legacy for life, a sum appropriated by the will to produce an annuity, and the value of an annuity when no sum has been appropriated to produce it, shall be treated as general legacies.

2. Non-abatement of specific legacy when assets sufficient to pay debts

Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

3. Right under demonstrative legacy when assets sufficient to pay debts and necessary expenses

Where there is a demonstrative legacy, and the assets are sufficient for the payment of debts and necessary expenses, the legatee shall have a preferential claim for payment of his legacy out of the fund from which the legacy is directed to be paid until such fund is exhausted, and, if, after the fund is exhausted, part of the legacy still remains unpaid, he shall be entitled to rank for the remainder against the general assets as for a legacy of the amount of such unpaid remainder.

4. Rateable abatement of specific legacies

If the assets are not sufficient to answer the debts and the specific legacies, an abatement shall be made from the latter rateably in proportion to their respective amounts.

5. Distribution after notice

Where personal representatives have given such notice as may be prescribed for creditors and others to send in their claims against the estate of the deceased, the personal representatives shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets of the estate or any part thereof in discharge of any lawful claims of which they have notice, and shall not be liable for the assets so distributed to any person of whose claim they have not had notice at the time of such distribution:

Provided that nothing herein contained shall prejudice the right of any creditor or claimant to follow such assets or any part thereof, in the hands of the persons who may have received the same respectively.

Refunding

6. Refund of legacy to personal representatives

Where personal representatives have paid any legacy which, but for such payment, would have been liable to abatement in accordance with the foregoing provisions of this Schedule, they shall be entitled to call upon the legatee to refund the amount by which such legacy should have been abated-

- (a) if such legacy was paid under any order of the court; or
- (b) if and so far as such abatement is rendered necessary by discovery of a debt of which notwithstanding compliance with the provisions of [section 90](#) of this Act, the personal representatives had no notice at the time of voluntary payment of such legacy, but not otherwise.

8. When legatee not satisfied or compelled to refund, he cannot oblige one paid in full to refund

If the assets of a testator's estate were sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy, or who has been compelled to refund the legacy in accordance with the provisions of paragraph 7, cannot oblige another legatee who has received payment in full to refund his legacy, whether that legacy was paid to him with or without suit, although the assets have subsequently become deficient by waste on the part of the personal representatives.

9. When unsatisfied legatee must first proceed against personal representatives if solvent

If the assets of the testator's estate were not sufficient to satisfy all the legacies at the time of the testator's death, a legatee who has not received payment of his legacy shall, before he can call on a satisfied legatee to refund, first proceed against personal representatives, if they or any of them be solvent, but, if no personal representative be solvent or liable to pay, the unsatisfied legatee can oblige each satisfied legatee to refund in proportion:

Provided that the refunding by one legatee to another shall not exceed the sum by which the satisfied legacy ought to have been abated if the estate had been properly administered.

10. Refund when legacy has become due on performance of condition within further time allowed

Where the time prescribed by the will for the performance of a condition has elapsed, without the condition having been performed, and the personal representatives have thereupon, without fraud, distributed the assets of the testator's estate, in such case, if further time has for any reason been allowed by the court for the performance of the condition; and the condition has been performed accordingly, the

legacy cannot be claimed from the personal representatives, but those to whom he has paid it shall be liable to refund the amount.

11. Refunding to be without interest

In all cases arising under this Schedule, any refunding shall be without interest.

SEVENTH SCHEDULE

[[section 90](#)]

INVESTMENT OF FUNDS TO PROVIDE FOR LEGACIES AND INTEREST ON LEGACIES

Investment

1. Investment of sum bequeathed where general legacy given for life

Where a general legacy is given for life, the sum bequeathed shall, at or before the end of a year after the death of the testator be invested in any authorized investment:

Provided that, where an annuity is given and no fund is charged by the will with its payment or appropriated by the will to answer it, a sum sufficient to produce the annuity shall be invested in any authorized investment.

2. Investment of general legacy to be paid at future time

- (1) Where a general legacy is given to be paid at a future time, the personal representatives shall invest a sum sufficient to meet it in any authorized investment.
- (2) The intermediate interest from such investment shall, unless expressly or by implication payable to the legatee or another, form part of the residue of the testator's estate.

3. Transfer to residuary legatee subject to contingent gift

Where gift is contingent, the personal representatives shall of be bound to invest the amount if the legacy, but may transfer the whole residue of the estate to the residuary legatee if any, on his giving sufficient security for the payment of the legacy if and when it shall become due.

4. Investment of residue bequeathed for life without direction to invest in particular securities

Where a testator has given any property to a person for life without any direction to invest it in any particular securities, so much thereof as is not at the time of the testator's death invested in an authorized investment, shall be converted into money, and invested in such an investment.

5. Interest payable pending conversion and investment

Until conversion and investment are completed in accordance with the provisions of this Schedule, or with the terms of the will, and the case may be, the person who would for the time being be entitled to the income of the fund when so invested shall receive interest at the rate of six per centum per annum upon the market value (to be computed as at the date of the testator's death) of such part of the fund as shall not yet have been so converted and invested.

Interest

6. What contingent and future testamentary gifts carry the immediate income

- (1) A contingent or future as well as an immediate specific legacy and a residuary bequest not contingent in its terms of property, whether immovable or movable, shall, subject to the provisions of [section 25](#) of this Act and paragraph 5 of this Schedule, carry the intermediate income of that property from the death of the testator except so far as such income, or any part thereof, may be otherwise expressly disposed of.

- (2) In the case of any contingent or future gift either specific or residuary, not falling under the provisions of subparagraph (1) of this paragraph, such bequest shall not comprise the intermediate income of the property or fund bequeathed between the death of the testator and the vesting of such bequest.

7. Interest on general legacy

Where no time has been fixed for the payment of a general legacy, interest shall begin to run from the expiration of one year general legacy from the testator's death; but where a time has been fixed for such payment, interest shall begin to run from the time fixed; and, in either event, the interest up to such period shall form part of the residue of the testator's estate:

Provided that interest shall run from the death of the testator where-

- (i) the legacy is bequeathed in satisfaction of a debt; or
- (ii) the testator was a parent or more remote ancestor of the legatee, or has put himself in the place of a parent of the legatee, and the legatee is a minor, and no specific sum is given by the will for maintenance; or
- (iii) the legacy is bequeathed to a minor with a direction to pay for his maintenance thereout.

8. No interest on arrears of annuity within first year of testator's death

No interest shall be payable on the arrear of an annuity within the first year from the death of the testator, although a period earlier than the expiration of that year may have been fixed by the will for making the first payment of the annuity.

9. Interest on sum to be invested to produce annuity

Where a sum of money is directed to be invested to produce an annuity, interest shall be payable on such sum from the death of the testator until so invested.

10. Rate of interest

The rate of interest payable under paragraphs 6 to 9 (inclusive), shall, unless otherwise expressly provided, be six per centum per annum.

11. Application

The provisions of paragraphs 6 to 9 (inclusive) shall apply in so far as a contrary intention does not appear from the will.

EIGHTH SCHEDULE

[Act [No. 7 of 1975](#), Sch.]

The Hindu Wills Act of India Act XXI of 1870

The Probate and Administration Act of India... Act V of 1881

The Hindu Succession Act Cap. 158

The Administration of Estates by Corporations Act Cap. 163

The Commonwealth Probates Act Cap. 166

The Africans' Wills Act Cap. 169

The Colonial Probates Act 1892 of England (as applied to Kenya)

NINTH SCHEDULE

The Evidence Act (Cap. 80).	s. 113	Delete.
	s. 114	Delete.
Insert after section 118--		
	Presumption of death.	118A. Where it is proved that a person has not been heard of for seven years by those who might be expected to have heard of him if he were alive, there shall be a rebuttable presumption that he is dead.
The Mohammedan Marriage, Divorce and Succession Act (Cap. 156).	s. 4	Delete.
The Workmen's Compensation Act (Cap. 236).	s. 3 (1)	Delete the definition of "member of the family" and substitute— "member of the family" means any of the following, that is to say, husband, wife, parent, stepparent, grandparent, son, daughter, stepchild, grandchild, brother or sister, half-brother or half-sister, and includes also an adopted child and a child whom the workman had accepted as a member of his family.
The Registered Land Act (Cap. 300).	ss. 120 and 121	Delete.
The Estate Duty Act (Cap. 483).	s. 49 (1)	Delete "no grant of representation shall be made" in the second line and substitute "and save as provided in section 72 of the Law of Succession Act, 1971, no grant of representation shall be confirmed".
The Magistrate's Courts Act (Cap. 10).	s. 2	In the definition of "claim under customary law", delete paragraph (f) and substitute "(f) intestate succession and administration of intestate estates, so far as the same is not governed by any written law".