



The exclusion of adopted children from inheritance: recent developments

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"We are hard pressed on every side, but not crushed; perplexed, but not in despair; prosecuted, but not abandoned; struck down but not destroyed."

2 Corinthians 4:8-10

I thank God for carrying me through this journey. For giving me the strength to fight and complete my studies. I have faced an immense number of obstacles, but they have not destroyed me.

I would like to thank my parents for always being there for me. For never losing hope in my dreams and standing by my side to ensure that I accomplish the goals I have set for myself.

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ABSTRACT

The exclusion of adopted children from inheritance: recent developments

The study aims to discuss the position of the adopted child in relation to the law of succession in light of recent developments. It further aims to discuss how *de facto* and *de lege* adoptions according to both common law and customary law affect adopted children's right to inherit under the law of intestate succession. This study makes recommendations based on the common law, and customary law findings respectively. The *Intestate Succession Act* 81 of 1987, and the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 will be frequently referred to in order to determine the adopted child's position. The study found that *de facto* adopted children are still not considered children of the deceased. It further found that a testator's freedom of testation is not allowed to exclude adopted children. This creates a problem especially for children who have been adopted according to customary law seeing as the customary law practice of adoption is outdated and does not require a formal Court document. Alleged adoptive parents would take on the full role of care and guardianship over the alleged adopted child but when they die the child cannot inherit mainly because they are not considered a legally adopted child.

Keywords: adopted children, children's act, testamentary instrument, intestate succession, will, inherit, bequeath, intention, common law, customary law

LIST OF ABBREVIATIONS

CILJSA	Comparative and International Law Journal of South Africa
EJCL	Electronic Journal of Comparative Law
Fundamina	Fundamina: A Journal of Legal History
JOL	Journal Online
J.law soc.dev	Journal of Law, Society, and Development
PER/PELJ	Potchefstroom Electronic Law Journal
TSALJ	The South African Law Journal
ZAGPJHC	South Gauteng High Court, Johannesburg
ZAGPHC	North Gauteng High Court, Pretoria

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Chapter 1

1 Problem statement

1.1 Background

The words "descendants" and "children" are defined in *Boswell v Van Tonder*¹ in the context of the repealed *Children's Act* 31 of 1937² to include only the blood relations of a testator.³ Which contrasts both the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009⁴ and the *Intestate Succession Act* 81 of 1987.⁵ The latter Acts state that adopted children are to be considered the descendants of the deceased person.⁶ The Acts that regulated adoption after the the *Children's Act* 31 of 1937 was repealed and before the *Intestate Succession Act* 81 of 1987 was enacted shall be discussed in Chapter 2.

According to Section 71(2)(a) of the *Children's Act* 31 of 1937, adopted children are to be regarded as legitimate children of their adoptive parents.⁷ This is similar to Section 1 of the *Children's Act* 38 of 2005, which defines an adopted child as "a child who has been legally adopted by someone".⁸

However, section 71(2)(a) of the *Children's Act* 31 of 1937 qualified this statement by saying that they shall not have any rights of entitlement to the adoptive parents' property or any property that should succeed to the children of the deceased⁹ unless the testamentary instrument displayed the intention of the testator to deliberately dispose of his assets to the adopted children.¹⁰ If the testator did not expressly state his intention, the adopted child would have no right to claim from his estate.¹¹ Even

¹ See para 2.7.3.1 of Chapter 2.

² See para 2.7.2 of Chapter 2.

³ *Boswell v Van Tonder* 1975 3 ALL SA 162 (A) 169-170 (hereafter the *Boswell* case).

⁴ See para 3.6 of Chapter 3.

⁵ See para 3.2 of Chapter 3.

⁶ Sections of the Act will be discussed in detail in chapter 3.

⁷ Section 71(2)(a) of the *Children's Act* 31 of 1937.

⁸ Section 1 of the *Children's Act* 38 of 005.

⁹ *Wilkinson v Crawford* 2021 6 BCLR 618 (CC) para 39 (hereafter the *Wilkinson* case).

¹⁰ The *Wilkinson* case para 39.

¹¹ Testamentary instrument is a document that stipulates how the testator wishes to dispose of his estate upon his death.

though an adopted child may be considered the adoptive parent's legitimate child, the adoptive parent had to ensure that the intention to dispose of his or her assets or property to the adopted child is conveyed in the testamentary instrument.¹²

The section created a problem with regard to children inheriting according to the law of intestate succession. The section implied that adopted children were not considered in the event the testator died according to the law of intestate succession.

The *Children's Act* 31 of 1937 was repealed and replaced by the *Children's Act* 33 of 1960.¹³ The *Children's Act* 33 of 1960 was then replaced by the *Child Care Act* 74 of 1983.¹⁴ The latter was replaced by the *Children's Act* 38 of 2005 which is still operative today.¹⁵ The *Children's Act* of 1960 contained a provision that is similar to section 71(2)(a) of the 1937 *Children's Act*.¹⁶ In contrast to the 1937 *Children's Act* and the *Children's Act* 33 of 1960, the *Child Care Act* 74 of 1983 did not contain provisions that require the testator to expressly state his intention to include the adopted child.¹⁷ The *Children's Act* 38 of 2005 does not contain a provision relating to the inheritance of adopted children, but it does define adopted children as children that have been adopted by a person.¹⁸ Provisions contained in the *Intestate Succession Act* 81 of 1987 will be discussed in Chapter 3 of this dissertation.

Currently, legislation dealing with succession rules does not seem to place additional requirements on adoptive parents. For example, the *Intestate Succession Act* 81 of

¹² The *Wilkinson* case para 40.

¹³ The *Wilkinson* case para 40.

¹⁴ The *Wilkinson* case para 40.

¹⁵ The *Wilkinson* case para 40.

¹⁶ Section 74(2) of the *Children's Act* of 1960 states that "Subject to the provisions of section 82 an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent: Provided that an adopted child shall not by virtue of the adoption (a) become entitled to any property devolving on any child of his adoptive parent by virtue of any instrument executed prior to the date of the order of adoption (whether the instrument takes effect *inter vivos* or *mortis causa*), unless the instrument clearly conveys the intention that that property shall devolve upon the adopted child; (b) inherit any property *ab intestatio* from any relative of his adoptive parent".

¹⁷ Section 20(2) of the *Child Care Act* states that "an adopted child shall for all purposes whatsoever be deemed in law to be the legitimate child of the adoptive parent, as if he was born during the existence of a lawful marriage".

¹⁸ Section 1 of the *Children's Act* 38 of 2005.

1987 allows adopted children to inherit without making any mention of the adoptive parent's intention to expressly include their adopted children. It simply states that an adopted child is a descendant of the adoptive parent.¹⁹ Similarly, section 2D(1)(a) of the *Wills Act 7* of 1953 states that an adopted child shall be regarded as a child that is born from the adoptive parents.²⁰ In addition, section 242(3) of the *Children's Act 38* of 2005 states that an "adopted child must be regarded as the child of the adoptive parent for all purposes".²¹ Considering that neither of these Acts contains the intention of the adoptive parent as a requirement, one could argue that adopted children are descendants and, thus, legitimate children of their adoptive parents.

Similarly, the *Reform of Customary Law of Succession and Regulation of Related Matters Act 11* of 2009 does not state intention as a requirement however, it makes mention of the fact that children who are not adopted according to common law can be adopted in terms of customary law.²² Customary law is a separate legal system from common law.²³ Customary law adoption and the consequences thereof have issues of their own which will be discussed in depth in Chapter 3.

As mentioned above, the *Children's Act 38* of 2005 states that adopted children should be regarded as the child of the adopted child, the South African Courts differentiate between factually adopted children and legally adopted children. Factually adopted children are not regarded as the legal child of the testator. This differentiation is problematic because it excludes the potential adopted child from inheriting. Legal and factual adoption shall be discussed in depth in Chapter 3.

In *Wilkinson*, the Court dealt with the exclusion of adopted children from receiving a benefit in terms of a trust instrument and the question of whether their exclusion amounted to unfair discrimination. The testator failed to expressly specify his intention (in the trust deed) to dispose of the assets in the trust to any of his

¹⁹ Section 1(4)(e)(i) *Intestate Succession Act 81* of 1987.

²⁰ Section 2D(1)(a) of the *Wills Act 7* of 1953.

²¹ Section 242(3) of the *Children's Act 38* of 2005.

²² See para 3.2 of Chapter 3.

²³ See para 3.6 of Chapter 3.

children's adopted children.²⁴ In an attempt to discern the intention of the testator, section 71(2) of the *Children's Act* 31 of 1937 was interpreted by the Court as set out in the next section.

1.2 Motivation

In *Wilkinson*, the Constitutional Court interpreted the meaning of section 71(2) of the *Children's Act* of 1937 as it was operative at the time the trust in question was created.²⁵ The Court found that section 71(2) required the testator to expressly state his intention to let the adopted child inherit from the trust.²⁶ After considering the evidence, it concluded that no such clear intention could be gathered from the wording of the trust deed.²⁷ The next question that had to be answered was whether the exclusion of the adopted children from the wording of the trust was unfair discrimination and contrary to public policy.²⁸ The Court followed a constitutional approach and found that:

Based on the conclusion I reached in the interpretative exercise above, the words 'children'; 'descendant'; 'issue' and 'legal descendants' in the trust deed refer to biological grandchildren only. Therefore, there is a differentiation between biological and adopted grandchildren. In my view, the differentiation is on the basis of birth, a listed ground in section 9(3) of the Constitution²⁹ or adoptive status as an analogous ground. I am of the view that adoption neatly fits the ground of 'birth' since one may face discrimination simply because they were not born of their adoptive parents; more on this below. As such, since birth is a listed ground, the discrimination is presumptively unfair.³⁰

To rectify the exclusion of adopted children from the trust deed, it had to be amended according to section 13 of the *Trust Property Control Act* 57 of 1988 to include them.³¹

²⁴ The *Wilkinson* case para 8.

²⁵ The *Wilkinson* case para 46.

²⁶ The *Wilkinson* case para 55.

²⁷ The *Wilkinson* case paras 59 and 74.

²⁸ The *Wilkinson* case paras 73 and 100.

²⁹ The *Constitution of the Republic of South Africa*, 1996.

³⁰ The *Wilkinson* case para 78.

³¹ The *Wilkinson* case para 100.

As pointed out by the Court, this was the first judgement that considered unfair discrimination against adopted children based on birth in the context of succession.³²

1.3 Research aims and objectives

The research in this mini-dissertation aims to determine whether adopted children can be excluded from inheriting and, if so, on what grounds. This paper aims to examine what recent developments say about excluding adopted children from inheriting. It also touches on how adoption and the adoption process affect the prospects of adopted children inheriting according to the laws of testate and intestate succession. The objective is to determine the position of the adopted child in both common law and, customary law, and provide recommendations based on the findings. To strengthen this aim, the following will also be discussed:

-A historical background on the position of adopted children inheriting from their adoptive parents before and after the enactment of the *Constitution of the Republic of South Africa, 1996*.

-How the Courts consider *de facto* and *de lege* adopted children when it comes to them inheriting according to the law of intestate succession.

-Freedom of testation.

1.4 Research question

Given the above background, the research question in this study aims to answer is: "What do recent legal developments say about excluding adopted children from inheriting?"

1.5 Research method

The study will involve a literature study of relevant research articles, case law, textbooks and applicable legislation. The study will not be a comparative study in a broad sense as its scope is limited to South African law, but it will compare the South African common law with the South African customary law. This study will

³² The *Wilkinson* case paras 82 and 144.

specifically refer to the following legal Acts: the *Children's Act* 31 of 1937, the *Children's Act* 33 of 1960, the *Children's Act* 35 of 2005, the *Intestate Succession Act* 81 of 1987, and the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.

1.6 Framework

Chapter 1 offers an introduction to what the research question entails. This chapter also provides the reader with an outline of the study.

Chapter 2 presents a historical overview of the exclusion of adopted children. It provides a historical overview of the position of adopted children when devolving the estate intestate and testate. It provides an overview of Roman law, Roman-Dutch law, and the common law during the period of the Cape Colonies. It will also provide historical context on the first legislative measure to regulate adoption and legislative measures enacted thereafter.

Chapter 3 discusses the current legal position regarding the exclusion of adopted children concerning recent developments in the law of succession. It also explains which statutes are currently operative when it comes to adopted children and inheritance. It discusses the position of the adopted child in the current *Children's Act* 35 of 2005, the *Intestate Succession Act* 81 of 1987, and the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009. The position of the adopted child under the customary law and under the common law will be discussed in this chapter. Furthermore, the differentiation of legally and factually adopted children by the South African Courts and how this excludes a certain type of adopted child from inheriting will be discussed as well.

Chapter 4 concludes the study and offers suggestions on how the courts can approach the exclusion of adopted children from inheriting.

1.7 Relevance for the research unit

The law of succession forms part of South African law. It is defined as the rules that are applicable when transferring the assets that belong to a deceased person to the

beneficiaries of such deceased person.³³ Section 1(4)(e) of the *Intestate Succession Act* 81 of 1987 states that an adopted child shall be deemed a descendant of their adoptive parents.³⁴ Adopted children are, therefore, entitled to inherit from their adoptive parents according to the law of succession. This dissertation encompasses laws that relate to the law of succession as well as family law, specifically adoption.

Adopted children and children are a vulnerable group in South Africa, as they are subject to "social stigma and impairment of dignity".³⁵ Their status depends on legislative intervention, and they are subject to discriminatory laws that do not regard them as a fully-fledged member of a family.³⁶ Therefore, a study of this kind falls under "Vulnerable Societies", a subdivision of the Research Unit "Law, Justice and Sustainability".

³³ Du Toit 2009 *TSALJ* 463.

³⁴ Section 1(4)(e) of the *Intestate Succession Act* 81 of 1987.

³⁵ The *Wilkinson* case para 89.

³⁶ The *Wilkinson* case para 90.

Chapter 2

2 Historical overview of adopted children

2.1 Introduction

Historically speaking, it is evident that adopted children were placed at a disadvantage as they were not entitled to an inheritance according to intestate succession.³⁷ Before the commencement of the *Adoption of Children's Act 25* of 1923, there were no statutes that dealt with adopted children and their rights to inherit.³⁸ Even though there was a period when statutes that governed the inheritance of adopted children did exist, there was a period that it did not.³⁹ In these times, Roman law, Roman-Dutch law, and common law prevailed, respectively.⁴⁰ Only at a later stage did legislation become operative to regulate adoption and the consequences thereof.

This section of the dissertation aims to ascertain how adopted children were treated when placed in a position of inheriting under Roman law, Roman-Dutch law, and common law during the time of the Cape Colonies. It will also consider the legislation that was applied in those times to such situations.

Before delving into the historical aspect of this discussion, it's important to briefly discuss the concept of freedom of testation. To fully understand the position of adopted children throughout history. This includes examining whether laws or principles allowed a testator to exercise their right of freedom of testation to exclude adopted children.

2.2 Historical aspect of freedom of testation

As stated above, before the historical context of adopted children inheriting can fully be discussed, it is important to touch upon the historical aspect of the freedom of testation. Freedom of testation is an individual's right to dispose of their assets in a

³⁷ Dyason 1971 *De Rebus* 187.

³⁸ Dyason 1971 *De Rebus* 187.

³⁹ Ferreira 2007 *Fundamina* 1.

⁴⁰ Dyason 1971 *De Rebus* 187.

manner they choose.⁴¹ This would entail the testator making a testamentary instrument in which he decides how his property is disposed of and to whom certain assets are bequeathed to.⁴² In essence, a testator had the right to exclude adopted children if they chose to. This right was acknowledged in English law, Roman-Dutch law, and Roman law.⁴³ However, this right was restricted under common law, legislation and at a later stage the *Constitution of the Republic of South Africa, 1996*.⁴⁴

Under common law, a testator's right to freedom of testation was limited by *bonis mores*,⁴⁵ and this was applied since 1910.⁴⁶ The Courts did not enforce clauses that were *contra bonos mores*.⁴⁷ As mentioned above, Roman law acknowledged the testator's right to freedom of testation, and this was a dominant principal in their law of succession.

2.3 Roman law

During this time a testator had complete freedom to dispose his property as he saw fit.⁴⁸ Creating a testamentary instrument was a duty reserved for the upper class, and the dispositions contained within the will generally favoured surviving family members.⁴⁹ The same principle applied to adopted children, who were not considered beneficiaries but rather a means of benefiting existing family members.⁵⁰ As a result, adoption was not seen as a way to benefit the adopted child but rather a way to benefit surviving family members.⁵¹ In those times, the prevalent form of

⁴¹ Matsemela 2015 *J.law soc.dev* 94.

⁴² Matsemela 2015 *J.law soc.dev* 94.

⁴³ Matsemela 2015 *J.law soc.dev* 94.

⁴⁴ Matsemela 2015 *J.law soc.dev* 94.

⁴⁵ Which can be defined as good morals. It is also the test used for wrongfulness. The test based on objectivity and reasonableness, it also looks at whether harm was caused in a legally disgraceful way.

⁴⁶ Matsemela 2015 *J.law soc.dev* 95.

⁴⁷ Matsemela 2015 *J.law soc.dev* 95.

⁴⁸ Kroppenburg 2012 https://max-eup2012.mpipriv.de/index.php/Freedom_of_Testation#:~:text=Since%20the%20later%20Roman%20Republic,least%20to%20their%20closest%20relatives

⁴⁹ Kroppenburg 2012 https://max-eup2012.mpipriv.de/index.php/Freedom_of_Testation#:~:text=Since%20the%20later%20Roman%20Republic,least%20to%20their%20closest%20relatives

⁵⁰ Ferreira 2007 *Fundamina* 1.

⁵¹ Ferreira 2007 *Fundamina* 1.

adoption was dynastic adoption.⁵² According to Ferreira, the purpose of such an adoption was to acquire an heir and carry on the family name in instances where the affluent family did not have their natural heir.⁵³ This kind of adoption was aimed at serving the needs of the adoptive parent and the adoptive parent's family.⁵⁴ This meant that the heir only inherited to serve the surviving family members and preserve the family dynasty.⁵⁵ Only at a later stage, during the Justinian reign, did adoption consider the needs and rights of the adopted child.⁵⁶ Adoption was created to form a beneficial relationship to help preserve assets in the adoptive family. The Roman law principle of adoption was similar to the Roman-Dutch law principle of adoption. Under both laws, adoption did not give the adopted children the right to inherit from their adoptive parents.

2.4 Roman-Dutch law

According to Van Der Walt, Roman-Dutch law became operative in the 1650s.⁵⁷ Roman-Dutch law was a mixture of early law from the Netherlands and Roman law principles.⁵⁸ Under Roman-Dutch law, adoption did not create a legitimate relationship between the adopted child and the adoptee.⁵⁹ Under the Roman-Dutch law, there were no formal references to adoption.⁶⁰ It was argued that a lot of informal adoptions took place, and there were thus no formal consequences of adoption.⁶¹ Legally, those informally adopted children were still regarded as the children of where they originally came from.⁶² Under Roman-Dutch law, adopted children did not have any rights to inherit according to intestate succession.⁶³ Adopted children were not included in the definition of any statutes that included the words "children" or "descendants".⁶⁴ After Roman-Dutch law was established in

⁵² Ferreira 2007 *Fundamina* 1.

⁵³ Ferreira 2007 *Fundamina* 1.

⁵⁴ Ferreira 2007 *Fundamina* 1.

⁵⁵ Higgs 2022 *The Sociological Review* 1.

⁵⁶ Ferreira 2007 *Fundamina* 2.

⁵⁷ Van der Walt 2014 *Obiter* 429.

⁵⁸ Van Der Walt 2014 *Obiter* 429.

⁵⁹ Van Der Walt 2014 *Obiter* 429.

⁶⁰ Van Der Walt 2014 *Obiter* 429.

⁶¹ Van Der Walt 2014 *Obiter* 429.

⁶² Van Der Walt 2014 *Obiter* 429.

⁶³ Spiro 1983 *CILJSA* 242.

⁶⁴ Spiro 1983 *CILJSA* 242.

the Cape colonies, common law came into effect.⁶⁵ However, certain principles of Roman-Dutch law were disregarded in the context of common law.⁶⁶

2.5 South African common law

The Dutch incorporated Roman-Dutch law into the South African legal system.⁶⁷ It was first implemented in South Africa when the Dutch settlers arrived and settled in the Cape in 1652.⁶⁸ The British occupied the Cape in 1795 to 1803, and again in 1806.⁶⁹ Even after the British occupation, Roman-Dutch law was still retained in the Cape.⁷⁰ As a result, the Cape came under increased English legal influence, and a mixed legal system developed.⁷¹ Roman-Dutch law remains the foundation of South African common law.⁷² It is evident that South African common law was and continues to be heavily influenced by Roman-Dutch law.

As mentioned above, under Roman-Dutch law adopted children were not awarded the right to inherit from their adoptive parents based on adoption.

Informal adoptions frequently took place in South Africa during the Roman-Dutch law period, and because there was no legislation governing this it remained a problem under South African common law.⁷³ The solution was to create the very first legislation to regulate adoption.⁷⁴ According to Ferreira, that solution was the *Adoption of Children's Act* of 1923.⁷⁵ Adoption was then legalised under common law.⁷⁶ It, however, did not create a legal relationship which could result in legal

⁶⁵ Department of Justice and Constitutional Development 2023 <https://www.justice.gov.za/policy/african%20charter/afr-charter02.html>.

⁶⁶ Department of Justice and Constitutional Development 2023 <https://www.justice.gov.za/policy/african%20charter/afr-charter02.html>.

⁶⁷ Department of Justice and Constitutional Development 2023 <https://www.justice.gov.za/policy/african%20charter/afr-charter02.html>.

⁶⁸ Supreme Court of Appeal 2023 <https://www.supremecourtofappeal.org.za/index.php/history>.

⁶⁹ Supreme Court of Appeal 2023 <https://www.supremecourtofappeal.org.za/index.php/history>.

⁷⁰ Du Toit 2014 <https://core.ac.uk/download/pdf/62635332.pdf>.

⁷¹ Du Toit 2014 <https://core.ac.uk/download/pdf/62635332.pdf>.

⁷² Supreme Court of Appeal 2023 <https://www.supremecourtofappeal.org.za/index.php/history>.

⁷³ Spiro 1983 *CILISA* 242.

⁷⁴ Spiro 1983 *CILISA* 242.

⁷⁵ Ferreira 2007 *Fundamina* 4.

⁷⁶ Van Der Walt 2014 *Obiter* 430.

consequences between the adoptive parents and the adopted child.⁷⁷ This principle was confirmed in *Robb v Mealey's executor*.

2.5.1 *Robb v Mealey's Executor* 1899 16 (SC)

In *Robb v Mealey's Executor* 1899 16 SC, the plaintiff sought to have a will that was drafted on three pieces of leaves valid.⁷⁸ The plaintiff, Miss Robb, was the adopted child of the testator.⁷⁹ In this instance, the law of the Cape colonies applied, and this was mainly Roman-Dutch law.⁸⁰ Adopted children were not entitled to inherit according to the law of intestate succession and were excluded from inheriting unless the testator showed his direct intention for the adopted children to inherit.⁸¹ Once the Court of first instance determined that the will was not valid, Miss Robb then took the matter up to the Court of Appeal.⁸²

In the Court of Appeal, Miss Robb argued that the deceased bequeathed benefits to her in the will as the adopted daughter of the deceased.⁸³ The executor denied this and proposed to administer the estate according to the law of intestate succession.⁸⁴

The legal representative of Miss Robb argued that the doctrine of privileged wills⁸⁵ was applicable and that it extended to the adopted child, who was, in this instance, Miss Robb, and not only to legitimate children.⁸⁶ The Court of Appeal stated that adopted children were not entitled to inherit under Roman-Dutch law.⁸⁷ This was because there was no legal consequence of adoption, and the adoption did also not create a relationship between the adopted child and the adoptive parent. The Court also considered that there was no "machinery" to regulate adoption in Roman-Dutch

⁷⁷ Van Der Walt 2014 *Obiter* 430.

⁷⁸ *Robb v Mealey's Executor* 1899 16 (SC) 133-134. (hereafter the *Robb v Mealey's Executor* case)

⁷⁹ *The Robb v Mealey's Executor* case 134-134.

⁸⁰ *The Robb v Mealey's Executor* case 134-135.

⁸¹ *The Robb v Mealey's Executor* case 134-135.

⁸² *The Robb v Mealey's Executor* case 134-135.

⁸³ *The Robb v Mealey's Executor* case 134-135.

⁸⁴ *The Robb v Mealey's Executor* case 134-135.

⁸⁵ A privileged will is defined as, a will that a member of the military service.

⁸⁶ *The Robb v Mealey's Executor* case 135-136.

⁸⁷ *The Robb v Mealey's Executor* case 135-136.

law and the law of the Cape at that time.⁸⁸ Even though it was familiar in Roman law, which was not yet established in South Africa.⁸⁹

When it came to inheriting according to the law of intestate succession, the Court stated that "the adopted child is regarded as a stranger to the adoptive parent".⁹⁰ The Court of Appeal declared the will invalid, and the deceased's estate was distributed according to the law of intestate succession.⁹¹ Miss Robb was, therefore, excluded from inheriting as the law of intestate succession at the time did not make provision for adopted children to inherit.

After the British permanently acquired the Cape in 1814, customary law began to receive partial recognition.⁹²

2.6 South African customary law

It should be noted that during the colonial period of the Dutch administration, there was no evidence that the Dutch acknowledged the customs of the indigenous people they encountered.⁹³ As mentioned above South African customary law was partially recognised after 1814.

Customary law was recognised in the form of rules and regulations, which were contained in proclamations and different pieces of legislation.⁹⁴ To mention a few, these pieces of legislation were the *Natal Code* of 1878, and the amendment thereof which was the *Natal Code of Native Law* 19 of 1891.⁹⁵

⁸⁸ *The Robb v Mealey's Executor* case 135-136.

⁸⁹ *The Robb v Mealey's Executor* case 135-136.

⁹⁰ *The Robb v Mealey's Executor* case 135-136.

⁹¹ *The Robb v Mealey's Executor* case 135-136.

⁹² Wall 2014 <https://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-womens>.

⁹³ Wall 2014 <https://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-womens>.

⁹⁴ Monye 2017 *J.law soc.dev* 2.

⁹⁵ Wall 2014 <https://www.sahistory.org.za/article/customary-law-south-africa-historical-development-legal-system-and-its-relation-womens>.

South African customary law was only constitutionally incorporated into the legal system in 1994.⁹⁶ According to Osman, historically, customary law only gave power to men and excluded women and children.⁹⁷ Sometimes, customary law was applied if it was not against public policy.⁹⁸ Customary law experts, such as Osman, Manye and Maithufi, state that the customary law of succession distinguishes between succession and inheritance.⁹⁹

Succession entailed occupying the status of the deceased during his lifetime.¹⁰⁰ The successor steps into the shoes of the deceased and acquires the obligations and duties of the deceased.¹⁰¹ With regards to inheritance, the person inherits certain eligible assets.¹⁰² The rule of primogeniture governed the succession aspect of customary law.¹⁰³ According to Monye, in customary law, an adult male could be adopted into the family.¹⁰⁴ This was done by giving a bull or a cow to the adoptive person's family.¹⁰⁵ This could have been done to preserve the family line.¹⁰⁶ The rule of male primogeniture has since been abolished by the Constitutional Court in *Bhe v Magistrate, Khayelitsha* 2005(1) BCLR (CC).¹⁰⁷

However, with regards to inheriting, Monye argues that there may have been practices of adoption in customary law, but that is not backed up by sufficient research.¹⁰⁸

⁹⁶ First under s 181 of the *Constitution of South Africa 200 of 1993* and now under s 211 of the final Constitution. Also see Osman 2019 *PER/PELJ* 3.

⁹⁷ Osman 2019 *PER/PELJ* 3.

⁹⁸ Mofokeng et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives 165.

⁹⁹ The practice of an older male child in the family inheriting the estate of the deceased parent.

¹⁰⁰ Mofokeng et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives 165.

¹⁰¹ Mofokeng et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives 165.

¹⁰² Mofokeng et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives 165.

¹⁰³ Mofokeng et al African Customary Law in South Africa: Post-Apartheid and Living Law Perspectives 165.

¹⁰⁴ Monye 2017 *J.law soc.dev* 2.

¹⁰⁵ Monye 2017 *J.law soc.dev* 2.

¹⁰⁶ Monye 2017 *J.law soc.dev* 2.

¹⁰⁷ Rautenbach 2008 *EJCL* 1.

¹⁰⁸ Monye 2017 *J.law soc.dev* 2.

During the British rule in South Africa, there were two wars fought between the Boers and the British.¹⁰⁹ The second war resulted in the creation of the treaty of Vereeniging in 1902 which facilitated the formation of the Union of South Africa.¹¹⁰ As a result of the second war, the Treaty of Vereeniging was created which facilitated the Union of South Africa in 1902.¹¹¹ The Union of South Africa was a unification of the Boers and the English.¹¹² The Union of South Africa allowed certain areas to govern themselves.¹¹³ After this treaty, customary law was regulated according to each territory's legislation.¹¹⁴

2.7 Legal developments

2.7.1 Adoption of Children's Act 25 of 1923

Even though certain territories were independent. South Africa was not an independent state, and could not leave the monarch.¹¹⁵ The Union of South Africa governed South Africa from 1910 until 1934.¹¹⁶

As stated by Ferreira, the first legislation that was enacted to regulate adoption was the *Adoption of Children's Act 25 of 1923*. The Act was promulgated by the Union government on 30 June 1923 and only became operative on 1 January 1924.¹¹⁷ Section 8(1) of the Act stated that:

An order of adoption shall, unless otherwise thereby provided, confer the surname of the adopting parent on the adopted child and the adopted child shall for all purposes whatsoever be deemed in law to be the child born in lawful wedlock of the adopting parent: Provided that, unless the contrary intention clearly appears from any instrument (whether such instrument takes effect *inter vivos* or mortis causa), such adopted child shall not by such adoption –

- (a) acquire any right, title or interest in any property –

¹⁰⁹ Anon 2020 <https://www.sahistory.org.za/article/union-south-africa-1910>.

¹¹⁰ Anon 2020 <https://www.sahistory.org.za/article/union-south-africa-1910>.

¹¹¹ Anon 2020 <https://www.sahistory.org.za/article/union-south-africa-1910>.

¹¹² Anon 2020 <https://www.sahistory.org.za/article/union-south-africa-1910>.

¹¹³ Anon 2020 <https://www.sahistory.org.za/article/union-south-africa-1910>.

¹¹⁴ Anon 2020 <https://www.sahistory.org.za/article/union-south-africa-1910>.

¹¹⁵ Anon 2020 <https://www.sahistory.org.za/article/national-party-np>.

¹¹⁶ Anon 2020 <https://www.sahistory.org.za/article/national-party-np>.

¹¹⁷ Ferreira 2007 *Fundamina* 4.

- (i) devolving on any child of the adopting parent by virtue of any instrument executed prior to the date of such order of adoption:
 - (ii) burdened with a *fideicommissum* in favour of the descendants of the adopting parent; or
 - (iii) devolving on the heirs' ab *intestato* of any child of lawful wedlock of the adopting parent;
- (b) become entitled to any succession (whether by will or *ab intestato*) jure representation is his adopting parent.¹¹⁸

In summary, section 8 stated that adopted children were regarded as the legitimate children of the adoptive parent. This section further provided that if a testamentary instrument that was drafted before the enforcement of the adoption order did not state that the adopted children should inherit, they would not be entitled to an inheritance that was devolving to any of the adoptive parent's children. Adopted children were also not entitled to a property that was devolving according to the law of intestate succession on the deceased adoptive parents' heirs. Adopted children were also not entitled to succeed by either intestate succession or testate succession. An adoption order did not automatically enable their inheritance when compared to the heirs or descendants of the adoptive parent.

This section was applied in *Cohen v Minister for the Interior* 1942 TPD.¹¹⁹ Even though the matter was not one regarding succession, it was a matter concerning the legal adoption of a minor who was adopted in Russia by an individual who was naturalised as a British person under the law of the Cape colonies. The Court stated that an adopted child was deemed to have been born in wedlock.¹²⁰ This would mean that the child has all rights and liabilities equated to the child who was born in wedlock.¹²¹ The Court further stated that the adoption was, however, subject to the exemptions mentioned in section 8 of the *Children's Act* 25 of 1923.¹²² Such exemptions have been stated above.

¹¹⁸ Section 8(1) of the *Adoption of Children's Act* 25 of 1923.

¹¹⁹ *Cohen v Minister for the Interior* 1942 TPD 151 -152 (hereafter the *Cohen v Minister for the Interior* case).

¹²⁰ The *Cohen v Minister for the Interior* case 151-152.

¹²¹ The *Cohen v Minister for the Interior* case 151-152.

¹²² The *Cohen v Minister for the Interior* case 151-152.

The *Adoption of Children's Act* 25 of 1923 was repealed and replaced by the *Children's Act* 31 of 1937.

2.7.2 *Children's Act* 31 of 1937

In 1937, the British rule was still operative and the Union of South Africa was still governing.¹²³ The *Children's Act* 31 of 1937 was promulgated by the Union of South Africa on 13 May 1937 and commenced on 18 May 1937.¹²⁴ Section 71 of the *Children's Act* 31 of 1937 stated that adopted children were seen as the biological children of the adoptive parent.¹²⁵ Section 71(2)(a) of the *Children's Act* 31 of 1937 disqualified adopted children from inheriting in terms of the law of intestate succession.¹²⁶ Testators were explicitly required to mention that they were intentionally disposing of their assets to the adopted child.¹²⁷ According to Ferreira and Pretorius, this section further stated that an adopted child was not entitled to any property that was bequeathed to any of the adoptive parent's children before the date of legally recognised adoption unless the testamentary instrument conveys that.¹²⁸ It should also be noted that section 71(2)(a) of the *Children's Act* 31 of 1937 was very similar to section 8(1) of the *Children's Act* 25 of 1923 with regards to adopted children inheriting before they were legally adopted. An interpretation of section 71(2)(a) of the *Children's Act* 31 of 1937 was provided for in *Cohen v Roetz*.¹²⁹

2.7.2.1 *Cohen v Roetz* 1992 4 All SA 106 (AD)

The South African Court of Appeal interpreted section 71 of the *Children's Act* of 1937. In *Cohen v Roetz*, the Court of Appeal had to determine whether the meaning of the words "eldest child" was inclusive of adopted children.¹³⁰ Matthys and Margaretha (hereafter, the testator, and testatrix) drafted a mutual will that stated

¹²³ Anon 2020 <https://www.sahistory.org.za/article/union-south-africa-1910>.

¹²⁴ Ferreira and Pretorius 2020 *Obiter* 450.

¹²⁵ Ferreira and Pretorius 2020 *Obiter* 450.

¹²⁶ Ferreira and Pretorius 2020 *Obiter* 450.

¹²⁷ Ferreira and Pretorius 2020 *Obiter* 450.

¹²⁸ Ferreira and Pretorius 2020 *Obiter* 450.

¹²⁹ *Cohen v Roetz* 1992 4 All SA 106 (AD) 107-108 (hereafter the *Cohen* case).

¹³⁰ The *Cohen* case 107-108.

that their eldest children were to inherit certain farm properties in the event of their death.¹³¹ If the children died before the testator and testatrix, they were to be represented by their children.¹³² Meaning that the grandchildren of the testator and testatrix stood a chance to inherit through their parents by representation.¹³³ When the testatrix died, the will came into operation.¹³⁴ According to their mutual will their eldest child would inherit their massed estate.¹³⁵ At their request, their eldest son, Andries, inherited the property at that time.¹³⁶ At a later stage, Andries passed away.¹³⁷

The question placed before the Court was who between Jennifer and Catherine was next in line to inherit as the "eldest child". Catherine was the testatrix's child from another marriage whom the testator had adopted in terms of the *Children's Act 31* of 1937, and Jennifer was the biological child of both the testator and testatrix.¹³⁸ The legal question was did the words "eldest child" contained in the mutual will included the adopted child.¹³⁹

At the time the mutual will came into effect, the only legislation that governed adoption was still the *Children's Act 31* of 1937. Section 71(2) of the *Children's Act 31* of 1937 clearly stated that adopted children were only entitled to inherit if the testamentary instrument specifically conveyed the testator's intention to dispose of their assets to the adopted child.¹⁴⁰ In an attempt to answer the legal question, the Court a quo stated that because the will did not deliberately exclude adopted children, that had to mean that the adopted child was to be considered and that Catherine was in the line of succession as the eldest child.¹⁴¹

¹³¹ The *Cohen* case 107-108.

¹³² The *Cohen* case 107-108.

¹³³ The *Cohen* case 107-108.

¹³⁴ The *Cohen* case 107-108.

¹³⁵ The *Cohen* case 107-108.

¹³⁶ The *Cohen* case 107-108.

¹³⁷ The *Cohen* case 107-108.

¹³⁸ The *Cohen* case 107-108.

¹³⁹ The *Cohen* case 107-108.

¹⁴⁰ The *Cohen* case 110-111.

¹⁴¹ The *Cohen* case 110-111.

Contrary to the Court a quo's decision, the Supreme Court of Appeal ruled that it was evident that the testator had no intention of including adopted children in the definition of the "eldest child".¹⁴² While applying a direct interpretation of section 71(2)(a) of the *Children's Act* 31 of 1937, the Court considered the intention of the testator.¹⁴³ The Court held that the testators did not convey the intention to include adopted children in the will.¹⁴⁴

The *Children's Act* 31 of 1937 was then repealed and replaced by the *Children's Act* 33 of 1960.

2.7.3 *Children's Act* 33 of 1960

The *Children's Act* 33 of 1960 came into operation on 14 April 1960.¹⁴⁵ Section 74 of the *Children's Act* 33 of 1960 mirrored section 71 of the *Children's Act* 31 of 1937.¹⁴⁶ It stated that adopted children were only allowed to inherit through a testamentary deed that specifically had a provision that stated that property was to be bequeathed upon the adopted child.¹⁴⁷ It should also be noted that the *Children's Act* 25 of 1923 had an identical provision.¹⁴⁸ An interpretation of section 74 of the *Children's Act* 33 of 1960 was handed down in *Boswell v Van Toner* 1975 3 All SA 162 (A),¹⁴⁹ and *Board of Executors v Vitt Board of Executors v Vitt* 1989 4 ALL SA 872 (C).¹⁵⁰ It can also be noted that this Act did not apply to adoptions made in African customary law, which was discussed in *Kewana v Santam Insurance Co Ltd*.¹⁵¹ The Court in this matter stated that In this matter the Court stated that the *Children's Act* 33 of 1960 did not apply with regard to adoptions made according to African customary law.¹⁵²

¹⁴² The *Cohen* case 113-114.

¹⁴³ The *Cohen* case 113-114.

¹⁴⁴ The *Cohen* case 111-113

¹⁴⁵ Van Der Walt 2014 *Obiter* 434.

¹⁴⁶ Dyason 1971 *DeRebus* 187.

¹⁴⁷ Dyason 1971 *DeRebus* 187.

¹⁴⁸ Dyason 1971 *DeRebus* 187.

¹⁴⁹ *Boswell v Van Tonder* 1975 3 ALL SA 162 (A) (hereafter the *Boswell* case).

¹⁵⁰ *Board of Executors v Vitt* 1989 ALL SA 872 (C) 871-872 (hereafter the *Vitt* case).

¹⁵¹ *Kewana v Santam Insurance Co Ltd* [1993] 4 ALL SA 339 (TKA) 342-343 (hereafter the *Kewana* case).

¹⁵² The *Kewana* case 342-343.

2.7.3.1 *Boswell v Van Tonder* 1975 3 ALL SA 162 (A)

The Court, in this matter, also had to decide if an adopted child was considered a legal issue/descendant regarding a joint will.¹⁵³ In the will, the testators stated that immovable property subject to conditions will be transferred to their descendants.¹⁵⁴ In this case, a portion was transferred to Johannes Wilhem Van Zijl.¹⁵⁵ The conditions were as follows: the descendants were not allowed to sell the land during their lifetime, and upon their death, the lawful descendants would inherit the land.¹⁵⁶ In the event the descendant died without leaving behind any child or children, their portion of the land would devolve amongst a legatee or other descendants.¹⁵⁷

The conditions containing the words "legal descendants", "child", and "children" as mentioned above were contained in both clauses b and c in the will. Clause b stated that the transfer of the immovable property shall only occur in the names of the respective children after the death of the surviving spouse provided that the children are not allowed to sell the properties and that if said child passes away, their portion shall be registered in the name of their lawful descendant.¹⁵⁸ In the event where there were no lawful descendants then the portion would be registered in the name of a legatee.¹⁵⁹ Clause c stated that if a legatee had no descendants, his portion would have to be registered according to their children or other lawful descendants.¹⁶⁰

Johannes passed away on 22 January 1973.¹⁶¹ In her will, she left her estate to her surviving husband, Daniel Francois Van Tonder, whom she married out of

¹⁵³ The *Boswell case* 162-163.

¹⁵⁴ The *Boswell case* 162-163.

¹⁵⁵ The *Boswell case* 162-163.

¹⁵⁶ The *Boswell case* 162-163.

¹⁵⁷ The *Boswell case* 162-163.

¹⁵⁸ The *Boswell case* 164-165.

¹⁵⁹ The *Boswell case* 164-165.

¹⁶⁰ The *Boswell case* 164-165.

¹⁶¹ The *Boswell case* 162-163.

community of property.¹⁶² Johannes never had any biological children; however, she and Daniel legally adopted a son, Dan Johan van Tonder, who survived her.¹⁶³

The question placed in front of the Court was, whether Dan Johan would be entitled to land that Johannes inherited from her deceased parents.¹⁶⁴ Daniel Johan claimed that section 74(2) of the *Children's Act* 33 of 1960 stated that adopted children were regarded as the lawful child of the adoptive parent.¹⁶⁵ Therefore, his adopted son Dan Johan was entitled to inherit as the lawful descendant of Johannes.¹⁶⁶

Certain relatives of Johannes contested this.¹⁶⁷ They stated that Johannes died without leaving any children behind and that Daniel Johan was not a child for inheritance.¹⁶⁸ The matter was brought before the Orange Free State Provincial Division.¹⁶⁹ Johannes's surviving spouse, Daniel Johan, sought an order declaring that he was entitled to transfer the immovable property in his name.¹⁷⁰ The Court granted the order.¹⁷¹

The Appellants went on to appeal the matter in the appellate division.¹⁷² The Court stated that to remedy this matter, they needed to extensively consider the conditions upon which the deed of transfer was based.¹⁷³ The Court further stated that the intention of the will, which came into effect at the death of the first testator, is very clear.¹⁷⁴ The immovable property was subject to a usufruct in favour of the surviving spouse, and amongst other bequests, specific pieces of land being bequeathed to each of the seven children.¹⁷⁵ However, the land bequests were

¹⁶² The *Boswell case* 162-163.

¹⁶³ The *Boswell case* 162-163.

¹⁶⁴ The *Boswell case* 162-163.

¹⁶⁵ The *Boswell case* 162-163.

¹⁶⁶ The *Boswell case* 162-163.

¹⁶⁷ The *Boswell case* 163-164.

¹⁶⁸ The *Boswell case* 163-164.

¹⁶⁹ The *Boswell case* 163-164.

¹⁷⁰ The *Boswell case* 163-164.

¹⁷¹ The *Boswell case* 163-164.

¹⁷² The *Boswell case* 163-164.

¹⁷³ The *Boswell case* 164-165.

¹⁷⁴ The *Boswell case* 164-165.

¹⁷⁵ The *Boswell case* 164-165.

subject to certain conditions.¹⁷⁶ They were burdened with a *fideicommissum* in favour of the children's lawful descendants.¹⁷⁷ If the children did not have lawful descendants, then their portion had to be inherited by their siblings in equal shares.¹⁷⁸

The Court stated that the ordinary rules of interpretation did not count.¹⁷⁹ They did not support the respondent.¹⁸⁰ The Court was of the view that section 74(2) of the *Children's Act* 33 of 1960 did not establish a rule where the definition of "defendants" and "children" do not include adopted children.¹⁸¹ Section 74(2) should not be used as an interpretive measure, but it should be used substantively to equate the place of the adopted child on an equal footing to the natural child.¹⁸²

The Court concluded that the words "descendants" and "descendant" contained in the conditions (c) and (b) of the joint will cannot be interpreted in a manner that is inclusive of adopted children.¹⁸³ The intention that is required by section 74(2) is therefore not fulfilled.¹⁸⁴ To consider Dan Johannes as the "child" of Johannes would conflict with the testator's intentions.¹⁸⁵ The Court, therefore, ruled that adopted children were not included in the joint will, and only the blood-related children were included.¹⁸⁶ This is because the testators showed no intention to include adopted children.¹⁸⁷

2.7.3.2 *Board of Executors v Vitt* 1989 4 ALL SA 872 (C)

It is clear that in instances of testate succession, adopted children only stood a chance to inherit in the instance where the testator directly stipulated that he intended to do so. Another question that had come before the Court was the

¹⁷⁶ The *Boswell case* 164-165.

¹⁷⁷ The *Boswell case* 164-165.

¹⁷⁸ The *Boswell case* 164-165.

¹⁷⁹ The *Boswell case* 164-165.

¹⁸⁰ The *Boswell case* 167-168.

¹⁸¹ The *Boswell case* 168-169.

¹⁸² The *Boswell case* 168-169.

¹⁸³ The *Boswell case* 169-170.

¹⁸⁴ The *Boswell case* 169-170.

¹⁸⁵ The *Boswell case* 169-170.

¹⁸⁶ The *Boswell case* 169-170.

¹⁸⁷ The *Boswell case* 169-170.

question of whether section 74 of the *Children's Act* 33 of 1960 applied to foreign adopted children.

This was answered in *Board of Executors v Vitt* 1989 4 All SA. In this matter, the Court was faced with the question of whether foreign-adopted children were included in the definition of "legal issues". The testator drafted a will stating how her assets are to be divided in the event of her death.¹⁸⁸ The testator requested that capital from her investments be divided amongst her sisters and, in the event of their death, the capital be allocated to Eileen.¹⁸⁹ If that Eileen died and left no legal issues, then the capital would be paid to certain non-profit organisations.¹⁹⁰

Eileen died intestate on 31 March 1987.¹⁹¹ Before Eileen had died, she adopted the first respondent.¹⁹² The first respondent was born in Florida, Ohio and was adopted in Florida.¹⁹³ The first respondent claimed that since he was legally adopted, and that he was, therefore, entitled to inherit in terms of intestate succession.¹⁹⁴

The respondent referred to the *Boswell* case and stated that this case allowed him to inherit based on the definition of "legal descendant".¹⁹⁵ However, as seen above the *Boswell* case clearly stated that the term "descendants", and "children" only refer to blood relations, and that excludes adopted children.¹⁹⁶ In addition, the first respondent was not entitled to inherit in accordance with section 74(2) of the *Children's Act* 33 of 1960 or any other legislation pertaining to adopted children at the time.¹⁹⁷ Adopted children were only regarded as adopted children and not the legitimate children of the adoptive parent/parents.

In answering the legal question, the Court did not agree with the respondent's interpretation of the *Boswell* case. The Court stated that in the *Boswell* case, the

¹⁸⁸ The *Vitt* case 872-873.

¹⁸⁹ The *Vitt* case 872-873.

¹⁹⁰ The *Vitt* case 872-873.

¹⁹¹ The *Vitt* case 872-873.

¹⁹² The *Vitt* case 872-873.

¹⁹³ The *Vitt* case 873-873.

¹⁹⁴ The *Vitt* case 873-874.

¹⁹⁵ The *Vitt* case 873-874

¹⁹⁶ The *Boswell* case 169-170.

¹⁹⁷ The *Vitt* case 874-875.

Court clearly stated that the testator's intention was not to include adopted children in the term "legal descendant" or "children".¹⁹⁸ The Court further stated that in this present matter, there was no evidence showing that the legally adopted child should not be considered a legal issue.¹⁹⁹ The Court stated that if the first respondent had been adopted according to South African law, then it would have been easier to show that the testator intended to allow him to inherit, therefore placing him on an equal footing to the natural child.²⁰⁰

The Court compared the issue at hand to that in *Guggenheim v Rosenbaum*.²⁰¹ Stating that in this matter, the adoption and its consequences are the same as determining the status of a marriage that was concluded in foreign law. ²⁰² In applying *Seedat's Executors v The Master* 1917 AD 302, the High Court stated that the general principle is if the law of his domicile considers a person as divorced, then he would be regarded in our law as divorced.²⁰³ By this reasoning, if the adoption was legally recognised in Ohio, then it should be recognised in South Africa.²⁰⁴ It is evident that the adoption and its consequences are fully recognised in South African law as it was recognised in the state of Florida, Ohio.²⁰⁵ The first response is therefore considered a "lawful issue" of Eileen.²⁰⁶

Later on, the *Children's Amendment Act* 50 of 1965 was enacted to amend the *Children's Act* 33 of 1960.²⁰⁷

2.7.4 Other legislation before 1994

The *Children's Amendment Act* 50 1965 came into operation, and its purpose was to amend certain provisions contained in the *Children's Act* 33 of 1960.²⁰⁸ The

¹⁹⁸ The *Vitt* case 874-875.

¹⁹⁹ The *Vitt* case 874-875.

²⁰⁰ The *Vitt* case 874-875.

²⁰¹ *Guggenheim v Rosenbaum* 1961 4 SA 21 (W).

²⁰² The *Vitt* case 875-876.

²⁰³ The *Vitt* case 875-876.

²⁰⁴ The *Vitt* case 875-876.

²⁰⁵ The *Vitt* case 875-876.

²⁰⁶ The *Vitt* case 875-874.

²⁰⁷ Van Der Walt 2014 *Obiter* 447.

²⁰⁸ Van Der Walt 2014 *Obiter* 447.

provisions contained in section 74(2) of the *Children's Act* 33 of 1960 were not amended by the *Children's Amendment Act* 50 of 1965.²⁰⁹ Both the amendment of the *Children's Act* 33 of 1960 and the *Children's Amendment Act* 50 of 1965 were repealed and replaced by the *Child Care Act* 74 of 1983.²¹⁰ The *Child Care Act* 74 of 1983 came into operation on 1 February 1983.²¹¹ The *Child Care Act* 74 of 1983 was then amended by multiple *Acts* which were the *Child Care Amendment Act* 96 of 1996, the *Adoption Matters Amendment Act* 56 of 1998, the *Welfare Laws Amendment Act* 106 of 1997 and eventually the *Child Care Amendment Act* 13 of 1999.²¹² The Amendment Acts did not provide any amendments to section 74 of the *Children's Act* 33 of 1960 and are not relevant to this discussion.

2.8 Conclusion

Under Roman law, it is evident that adoption was only recognised as a tool utilised by mostly affluent families to secure inheritance or have an heir who would utilise the inheritance to benefit the surviving family. In Roman-Dutch law, there was no legal relationship, and therefore no legal consequence in relation to the law of succession resulting from the familial relationship of adopted children and their adoptive parent. As mentioned above, it is evident that in both these time periods, the adoptive child was not considered a legal descendant of the deceased or the testator.

Roman-Dutch law was and continues to be the foundation of South African common law. It is a mixture of Roman-Dutch law and English law. Under common law, adoption did not create a legal relationship between adopted children and their adoptive parents. This was verified in the *Robb v Mealey's Executor* case.

South African customary law was partially applicable as long as it was not against public policy. It seems that succession relating to adopted children was not common. This is because, historically, the widespread practice of succession was

²⁰⁹ According to Van Der Walt the only provisions that were amended were provisions contained in section 35(2) of the *Children's Act* 33 of 1960.

²¹⁰ Van Der Walt 2014 *Obiter* 447.

²¹¹ Van Der Walt 2014 *Obiter* 447.

²¹² Van Der Walt 2014 *Obiter* 447.

male primogeniture, and this tended to isolate both women and children other than the eldest male child.

The very first piece of legislation that governed adoption in South Africa was the *Adoption of Children's Act 25 of 1923*. It stated that adopted children were considered the biological children of the adoptive parent. Adopted children were placed on a similar footing as children born within a marriage. However, section 8 (1) of the Act contained exemptions. One of the exemptions was that if the testator had children of his own, the adopted child was not entitled to inherit any property that was allocated to the other children. It further stated that this was only applicable if the Court order for adoption was made before the testamentary instrument would be dissolved.

Acts that would later follow would have similar provisions as section 8 of the *Adoption of Children's Act 25 of 1923*, such as the *Children's Act 31 of 1937*. Section 71(2)(a) stated that adopted children were only entitled to inherit according to testate succession if the testator indicated a clear intention to bequeath his assets to the adoptive child. If the testator's intention to bequeath his assets upon the adopted children is not displayed, then the children do not stand a chance to inherit. This section of the *Children's Act 31 of 1937* did not make mention of a Court order that was enforced before the testator drafted their will or making preference to the testator's biological children in the event that a testamentary instrument was drafted before the adoption Court order was enforced like section 8 of the *Adoption of Children's Act 25 of 1923*. It can also be stated that the *Children's Act 33 of 1960* had an identical provision to the *Children's Act 31 of 1937*, which was section 72(4). It provided the same provisions and required the same intention from the testator as section 71(2)(a) of the *Children's Act 31 of 1937*.

As seen in the *Cohen* case and the *Boswell* case, it is evident that historically, the application of section 71(2) of the *Children's Act 31 of 1937* and section 72(4) of the *Children's Act 33 of 1960* required the Court to seek the intention of the testator. These provisions were used as a measure of interpretation. Seeking the testator's intention often led to applying the above-mentioned provisions, which excluded

adopted children. This was because the general consensus was that the testator would have specifically made mention of the adopted children. The testator had to intentionally state that he wanted to dispose of his assets to the adopted child for the child to inherit according to the law of testate succession. The Courts would often rule that according to intestate succession, the adopted child was not considered a "descendant" or "legal issue" or "legal descendant" for purposes of inheriting.

To further conclude this chapter, it can be stated that historically, according to case law and legislation, adopted children were not placed on an equal footing as biological children with regard to the law of succession. In theory, it seemed that statute did consider them as the natural child, but in practice, it was something different. Adopted children were seen as a stranger to the adoptive parent if the adoptive parent died according to the law of intestate succession.

Chapter 3

3 Legal position of adopted children post-1994

3.1 Introduction

On May 31, 1963, the Union of South Africa declared that South Africa would be a Republic. This was the end of the British rule, and South Africa was now governed solely by the National Party.²¹³ The National Party was elected to government in 1948. They ruled certain independent states and still governed under the monarch. They enacted racial legislation, including apartheid. In the early 1990's under the South African president F.W de Klerk, legislation supporting apartheid was repealed.²¹⁴ This would usher the country into a new era.

In its current state of affairs, South Africa follows a dual legal system.²¹⁵ This system comprises both customary law and common law respectively.²¹⁶ This section of the dissertation aims to take a look at how the South African Courts interpret the laws that govern the inheritance of adopted children. The Court's application of the *Intestate Succession Act*, together with the *Children's Act* 38 of 2005, and if it is applied to children who are adopted according to customary law. Freedom of testation in South Africa's constitutional development will also be discussed. The focus will mainly be on case law, and how the South African Courts determine if an adopted child is a descendant of the deceased person.

3.2 The new constitutional dispensation and the rights of adopted children

The new constitutional dispensation came into effect on 27 April 1994.²¹⁷ The *Constitution of the Republic of South Africa*, 1996, came into operation on 4 February 1997.²¹⁸ The main aim of the *Constitution of the Republic of South Africa*,

²¹³ Office of the Historian date unknown <https://history.state.gov/countries/south-africa#:~:text=On%20May%2031%2C%201961%2C%20the,the%20South%20African%20Foreign%20Office.>

²¹⁴ Office of the Historian date unknown <https://history.state.gov/countries/south-africa#:~:text=On%20May%2031%2C%201961%2C%20the,the%20South%20African%20Foreign%20Office.>

²¹⁵ Rautenbach 2010 *Legal Pluralism* 144.

²¹⁶ Rautenbach 2010 *Legal Pluralism* 144.

²¹⁷ Robinson 2003 *PER/PELJ* 22.

²¹⁸ Van Der Walt 2014 *Obiter* 488

1996, was to revolutionise legal, social, and social structures.²¹⁹ Section 9(1) of the *Constitution of the Republic of South Africa*, 1996 states that "Everyone is equal before the law".²²⁰ Section 9(2) further states that "Equality includes full and equal enjoyment of all rights".²²¹

The *Children's Act* 38 of 2005 came into operation on 1 July 2007²²² and has been in place until today. As mentioned in Chapter 1, the *Children's Act* 38 of 2005 defines an adopted child as a child that has been adopted by anyone according to any law.²²³ In addition, section 242(3) of the Act states that for all purposes, adopted children are regarded as the legitimate children of their adoptive parents.²²⁴ Similarly, The *Intestate Succession Act* 81 of 1987 has a provision that acknowledges a legal relationship between the adoptive parent and the adoptive child. Section 1(4)(e) of the *Intestate Succession Act* 81 of 1987 states that:

An adopted child shall be deemed-

- (i) to be a descendant of his adoptive parent or parents;
- (ii) not to be a descendant of his natural parent or parents, except in the case of a natural parent who is also the adoptive parent of that child or was, at the time of the adoption, married to the adoptive parent of the child.²²⁵

In essence, section 1(4)(e) of the *Intestate Succession Act* 81 of 1987, states that an adopted child shall be regarded as the descendant of a deceased person in the event the person's estate is administered according to the law of intestate succession. This provision acknowledged the legal relationship between adopted children and their adoptive parents

Section 2D(1) of the *Wills Act*²²⁶ also contains a provision that recognises the legal relationship between adopted children and their adoptive parents and the consequences thereof. The provision states that when interpreting a will unless

²¹⁹ Robinson 2003 *PER/PELJ* 22.

²²⁰ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

²²¹ Section 9(2) of the Constitution of the Republic of South Africa, 1996.

²²² Van Der Walt 2014 *Obiter* 488.

²²³ Section 242 (3) of the *Children's Act* 38 of 2005.

²²⁴ See paragraph 1.1 above.

²²⁵ Section 1(4)(e) of the *Instate Succession Act* 81 of 1987.

²²⁶ See paragraph 1.1 above.

stated otherwise, "an adopted child shall be born of his adoptive parents, and not the child of the adoptive parent".²²⁷

Another result of the constitutional dispensation is the *Reform of Customary Law of Succession and Regulation of Related Matter Act* 11 of 2009 which has made a significant contribution to the rights of adopted children.²²⁸ Section 8 of the Act now provides adopted children with an opportunity to inherit according to intestate succession by including them in the definition of descendants. However, it is important to note that freedom of testation is not covered under intestate succession, but it is dealt with under testate succession.

3.3 Freedom of Testation post-1994 and whether it allows adopted children to be excluded by the testator

Freedom of testation is considered one of the cornerstones of the law of succession in South Africa.²²⁹ It is still a very relevant aspect of the law of succession today.²³⁰ The idea behind the principle is to allow a testator to distribute his assets in a way that the testator wishes.²³¹ As seen in Chapter 2, freedom of testation is subject to limitations.²³² This right may be limited according to common-law, and legislation.²³³

The common law limitation allows the South African Courts to declare certain or complete provisions contained in testamentary instruments invalid.²³⁴ This happens in instances where the Court finds that such provisions are *contra bonos mores*, conflict with the law or if they are vague.²³⁵

The question now moves to whether adopted children can be excluded when a testator exercises his right to freedom of testation. Does the exclusion of adopted

²²⁷ Section 2D(1) of the *Wills Act* 7 of 1953.

²²⁸ Osman 2019 *PER/PELJ* 2.

²²⁹ Roux 2013 *De Rebus* 48.

²³⁰ Roux 2013 *De Rebus* 48.

²³¹ Roux 2013 *De Rebus* 48.

²³² Matsemela 2015 *J.law soc.dev* 99.

²³³ Matsemela 2015 *J.law soc.dev* 99.

²³⁴ Matsemela 2015 *J.law soc.dev* 99.

²³⁵ Matsemela 2015 *J.law soc.dev* 99.

children from inheriting by the testator automatically amount to unfair discrimination? Such will be discussed below.

3.4 Evaluation of how the Courts dealt with interpreting clauses contained in a trust deed to include or exclude common law adopted children

3.4.1 Introduction

As it is seen in Chapter 2 of the dissertation, specifically paragraph 2.6.2, section 71(2)(a) of the *Children's Act* 31 of 1937 expressly requires the testator to show their intention to bequeath their assets to their adopted children.²³⁶ The below-mentioned cases involved a dispute concerning a trust deed. The trust deed was drafted by Mr Louis John Druiff. It was alleged that certain provisions contained in the testamentary instrument were discriminatory against the testator's adopted grandchildren. The dispute started in *Harper v Crawford* 2018 1 SA 589 (WCC).²³⁷ in the High Court Western Cape Division. After not receiving a favourable judgement, the matter was appealed in the Supreme Court of Appeal and was cited as *Harvey v Crawford* 2019 2 SA 153 (SCA). The latter was dismissed with costs on 17 October 2018. The matter was then taken to the Constitutional Court, and by then, certain parties involved in the initial proceedings had been deceased and were substituted by others; the Constitutional Court judgement was cited as *Wilkinson v Crawford* 2021 6 BCLR 618 (CC).²³⁸

3.4.2 Harper v Crawford 2018 1 SA 589 (WCC)

The judgement in *Harper v Crawford* 2018 1 SA 589 (WCC) gives an indication of how the High Court interpreted provisions in the testamentary deed to include or exclude adopted children.

3.4.2.1 Facts

As mentioned above, Mr Louis John Druiff drafted and registered a notarial trust deed in which he stated that the capital that would be accrued to the trust was to

²³⁶ See paragraph 2.6.2 above.

²³⁷ *Harper v Crawford* 2018 1 SA 589 (WCC) 33-34 (hereafter the *Harper* case).

²³⁸ See paragraphs 1.1 and 1.3 above.

be divided amongst his children, and if his children passed away, they were to be represented by their children *per stirpes*.²³⁹ The clause contained in the deed made no mention of adopted children; instead, it contained terminology referring to the biological children of the testator, such as "descendants", "issue", "children", and "legal descendants".²⁴⁰

The applicants required that adopted children be put on an equal footing as the biological grandchildren of the testator.²⁴¹ They sought to have the clause declared unconstitutional on the grounds of unfair discrimination as contained in sections 9(4) and 9(5) of the *Constitution of the Republic of South Africa, 1996*.²⁴² The applicants also sought the remedy contained in section 17 of the *Trust Property Control Act 57 of 1988*, which allows the Court to interpret the clause in a manner they think the testator would have wanted after having the unconstitutional provision removed.²⁴³

Three clauses were in question.²⁴⁴ Clause 4 stated the beneficiaries of the testator, which were Mr Druiff's children and his children's children were entitled to revenue and income possessed by the trust.²⁴⁵ The trust was a discretionary trust, and when Mr Druiff passed on, the trustee's discretionary power would cease, and the net revenue and income would be distributed in equal portions to the beneficiaries.²⁴⁶ If his children predeceased him, then their share would devolve upon their descendants *per stirpes*.²⁴⁷ Clause 5 stated that if the capital of the trust had not been applied in a manner that was beneficial to the beneficiaries, then the trust would still operate for one year after Mr Druiff had died.²⁴⁸ Clause 6 spoke of the position of the trust following its termination.²⁴⁹

²³⁹ The *Harper* case 34-35.

²⁴⁰ The *Harper* case 34-35.

²⁴¹ The *Harper* case 34-35.

²⁴² The *Harper* case 34-35.

²⁴³ The *Harper* case 34-35.

²⁴⁴ The *Harper* case 34-35.

²⁴⁵ The *Harper* case 34-35.

²⁴⁶ The *Harper* case 34-35.

²⁴⁷ The *Harper* case 34-35.

²⁴⁸ The *Harper* case 34-35.

²⁴⁹ The *Harper* case 34-35.

In clause 6, there was a portion that read that in the event any of his children dies before the termination of the trust, then the child's share would go to their surviving legal descendants *per stirpes*.²⁵⁰ Four months after Mr Druiff had implemented the trust deed, he amended clause 5 so that it stated that in the event one of his children died, then the deceased child's share would go to their "descendants" *per stirpes*.²⁵¹ Mr Druiff died in 1953.²⁵²

3.4.2.2. Court *a quod's* ruling

The Court considered averments contained in sections 1(4)(e) and 1(5) of the *Intestate Succession Act* 81 of 1987.²⁵³ Section 1(4)(e) of the Act states that an adopted child is deemed to be a descendant of his adoptive parents as they are considered as the descendants of their birth parents.²⁵⁴ Section 1(5) of the Act adds to the former section mentioned.²⁵⁵ In that, it says that an adopted child is deemed to be the descendant of the adoptive parent, and the adoptive parent is the ascendant of the adopted child.²⁵⁶

The Court noted that the remedy that the applicants sought was "far-reaching".²⁵⁷ This was because the trust deed in question was a private one and thus did not affect members of the public in any way.²⁵⁸ The Court held that section 20(2) of the *Child Care Act* 74 of 1983 ought to be interpreted in correlation with the provisions provided for in section 74(2) of the *Children's Act* 33 of 1960.²⁵⁹ Ultimately, the Court found that the clause was not against public policy and that the words that were alleged to have bared discrimination were very much inclusive of adopted children.²⁶⁰ It was just a matter where the testator did not intend on bequeathing

²⁵⁰ The *Harper* case 34-35.

²⁵¹ The *Wilkinson* case para 11.

²⁵² The *Wilkinson* case para 12.

²⁵³ The *Harper* case 41-42.

²⁵⁴ The *Harper* case 41-42.

²⁵⁵ The *Harper* case 41-42.

²⁵⁶ The *Harper* case 41-42.

²⁵⁷ The *Harper* case 45-46.

²⁵⁸ The *Harper* case 45-46.

²⁵⁹ The *Harper* case 48-49.

²⁶⁰ The *Harper* case 55-56.

his assets to the adopted children.²⁶¹ The Court further ruled that the clauses contained in the trust deed in question are not prejudicial to any of the descendants and that this is not an application where non-beneficiaries should be made beneficiaries.²⁶² The bereaved applicants ended up taking the matter higher up to the Supreme Court of Appeal.

3.4.3 *Harvey v Crawford* 2019 2 SA 153 (SCA)

After the matter was taken to the High Court, it was taken on appeal to the Supreme Court of Appeal. The appellants in this matter were Amanda Bridget Truter, Gavin Charlton Harvey and David Louis Ayschough Wilkinson.

3.4.3.1 Facts

The same remedy was sought. To have the Supreme Court of Appeal declare the words "legal descendant", "issue", "descendants" and "children" contained in the trust deed unconstitutional and remedy it by interpreting the trust deed according to section 13 of the *Trust Property Control Act* 57 of 1988.²⁶³

Before interpreting the trust deed, the Court took into account section 8 of the *Adoption of Children's Act* 25 of 1923.²⁶⁴ Stating that the adopted child shall not, by virtue of adoption, be entitled to acquire any rights or interest in any property that is bequeathed to the adoptive child's biological children before the date of the adoption order.²⁶⁵ Nor shall that adopted child be entitled to any succession by means of testate succession or intestate succession.²⁶⁶

3.4.3.2 Supreme Court of Appeal Ruling

To lay the basis for the matter, the Court further referred to the *Cohen v Minister of Interior* case,²⁶⁷ which applied section 8 of the *Adoption of Children's Act* 25 of

²⁶¹ The *Harper* case 55-56.

²⁶² The *Harper* case 55-56.

²⁶³ *Harvey v Crawford* 2019 2 SA 153 (SCA) para 13 (hereafter, the *Harvey* case).

²⁶⁴ The *Harvey* case para 14.

²⁶⁵ The *Harvey* case para 14.

²⁶⁶ The *Harvey* case para 14.

²⁶⁷ See para 2.6.2.1 of Chapter 2.

1923.²⁶⁸ The Court agreed with what was stated in the *Cohen v Minister of Interior* case, which stated that the rights of the adopted child were similar to the child that is born in wedlock.²⁶⁹ This is, however, subject to exceptions as contained in section 8 of the *Adoption of Children's Act* 25 of 1923.²⁷⁰ Even though the Act was not applicable, it was very similar to the *Children's Act* 31 of 1937. The applicable Act in this instance was section 71(2) of the *Children's Act* 31 of 1937.²⁷¹

In determining whether adopted children were included in the definitions of the terms contained in the trust deed, the Court of Appeal considered the *Boswell* case.²⁷² The Court stated that section 71(2) of the *Children's Act* 31 of 1937 created a legal fiction in which adopted children were regarded as the biological children of their adoptive parents.²⁷³

The Court stated that for them to intervene, two requirements would have to be met.²⁷⁴ The first requirement would be that the testator did not foresee that the provision would bring offending consequences.²⁷⁵ The second requirement would be met if the provisions were against public policy, or the provision hampered the intention of the testator or adversely affected the beneficiaries.²⁷⁶ The Court ruled that the language used in the trust deed could not hamper the testator's intention.²⁷⁷ It was very direct, and the provisions did not conflict with the interests of the public, nor was it prejudicial towards the beneficiaries.²⁷⁸ The requirements were not met, and the appeal failed.²⁷⁹

²⁶⁸ The *Harvey* case para 15.

²⁶⁹ The *Harvey* case para 15.

²⁷⁰ The *Harvey* case para 15.

²⁷¹ The *Harvey* case para 17.

²⁷² The *Harvey* case para 27.

²⁷³ The *Harvey* case para 27.

²⁷⁴ The *Harvey* case para 72.

²⁷⁵ The *Harvey* case para 72.

²⁷⁶ The *Harvey* case para 72.

²⁷⁷ The *Harvey* case para 72.

²⁷⁸ The *Harvey* case para 72.

²⁷⁹ The *Harvey* case para 72.

3.4.4 *Wilkinson v Crawford* 2021 6 BCLR 618 (CC)

Almost three years later, the matter was taken to the Constitutional Court. The Constitutional Court also determined that the trust deed was drafted and registered during the time the *Children's Act* of 1960 was in operation.²⁸⁰ The Constitutional Court was required to determine the constitutionality of the clauses contained in the trust deed.

3.4.4.1 Facts

Certain aspects pertaining to the Court's decision and application of the law have already been mentioned in Chapter 1. To avoid redundancy, this paragraph of the dissertation will extend on what has already been mentioned in Chapter 1.

The applicants in this matter were the adopted children of Ms Dulcie Helena Harper.²⁸¹ The applicants in this order were the late Mr David Lous (who is now represented by his executors) and the second applicant, Ms Amanda Bridget Truter.²⁸² At the time the matter was heard before the High Court, Ms Dulcie Harper was the only surviving child of Mr Louis John Druiff (the testator). The respondents were Mr Louis John Druiff's biological grandchildren and great-grandchildren, as well as his trustees.²⁸³

3.4.4.3 Constitutional Court's Ruling

The Court stated that the golden rule of interpreting what the intentions of the testator were was to determine the intention of the testator with the words they use.²⁸⁴ This also meant that the words that were required to be interpreted were given the meaning they had at the time the testamentary deed was created.²⁸⁵ Applying this is very important in determining what Mr Druiff had intended when

²⁸⁰ The *Wilkinson* case para 1.

²⁸¹ The *Wilkinson* case para 3.

²⁸² The *Wilkinson* case para 3.

²⁸³ The *Wilkinson* case para 3.

²⁸⁴ The *Wilkinson* case para 35.

²⁸⁵ The *Wilkinson* case para 35.

using the terms indicated above.²⁸⁶ If determining Mr Druiff's intention led to ascertaining that his intention was not to include adopted children, then the next step would have been to determine which statutes were in effect at the time the testamentary instrument was drafted.²⁸⁷ In the event it is found that the trust deed did not convey the intention to include adopted children, then the Court would have to consider whether they should consider Mr Druiff's wishes or whether the exclusion is against public policy, which would mean they are unenforceable.²⁸⁸

The Court stated that the relevant section is section 71(2) of the *Children's Act 31* of 1937.²⁸⁹ That section 71(2)(a) excludes adopted children from inheriting.²⁹⁰ It requires a testamentary instrument to specify the testator's intention to bequeath his assets to his adopted child.²⁹¹ This Act was repealed by the *Children's Act 33* of 1960.²⁹² However, section 20(2) of the *Child Care Act 74* of 1983, which encompasses similar provisions, dismisses the portion that excludes adopted children from inheriting without express intention.²⁹³ Section 242(3) of the *Child Care Act* further provides that an adopted child must be, for all purposes regarded as the child of the adoptive parents.²⁹⁴

The Constitutional Court held that the applicable provisions of the *Children's Act 31* of 1937 were applied correctly by the Supreme Court of Appeal in the *Harvey* case.²⁹⁵ They further stated that words of a will are to be given the meaning they had at the time the will was created.²⁹⁶ They stated that the applicable legislation was "uncontentious and correct".²⁹⁷

²⁸⁶ The *Wilkinson* case para 36.

²⁸⁷ The *Wilkinson* case para 36.

²⁸⁸ The *Wilkinson* case para 37.

²⁸⁹ See para 3.2.2 of Chapter 3.

²⁹⁰ The *Wilkinson* case para 40.

²⁹¹ The *Wilkinson* case para 40.

²⁹² See paragraph 1.1 above.

²⁹³ The *Wilkinson* case para 40.

²⁹⁴ The *Wilkinson* case para 40.

²⁹⁵ The *Wilkinson* case para 113.

²⁹⁶ The *Wilkinson* case para 113.

²⁹⁷ The *Wilkinson* case para 113.

The Constitutional Court also touched on the common law principle of freedom of testation.²⁹⁸ That freedom of testation includes the testator's right to dispose of their assets in a manner that they see fit during their lifetime or at death.²⁹⁹ A testatrix's decision of who to include and exclude is an indication of kinship, loyalties, and personal love and affection.³⁰⁰ It is, therefore, clear that the clauses were intended to exclude adopted children and that the previous Courts made the correct interpretation. The Constitutional Court further stated that section 9(3) of the *Constitution* prohibits unfair discrimination based on "birth".³⁰¹ Section 9(3) should be interpreted to exclude differentiation between children based on circumstances existing at conception or birth.³⁰²

In its conclusion, the Constitutional Court stated that clause 5 could not have been applied to determine who should have received the late Ms Harper's share.³⁰³ Doing that would interfere with the wishes of the testator, and the testator made it very clear that he intended to bequeath his assets to his blood relatives only.³⁰⁴ This is also evident in the fact that he amended the clause and included clause 6.³⁰⁵ Reference was made to the *Cohen* case,³⁰⁶ which determined that the meaning of descendants only relates to people of blood relations, but this did not isolate the word from being used in a different sense.³⁰⁷

The Court relied on the interpretation of section 71(2). Subsection (a) made it obvious that legally adopted children were not entitled to inherit from their adoptive parents simply by virtue of adoption.³⁰⁸ Section 71(2)(b) further substantiates this by stating that adopted children may not inherit by means of intestate succession.³⁰⁹ Currently, in the case at hand, subsection (b) clearly indicated that the late Ms

²⁹⁸ The *Wilkinson* case para 118.

²⁹⁹ The *Wilkinson* case para 118.

³⁰⁰ The *Wilkinson* case para 118.

³⁰¹ The *Wilkinson* case para 161.

³⁰² The *Wilkinson* case para 161.

³⁰³ The *Wilkinson* case para 190.

³⁰⁴ The *Wilkinson* case para 190.

³⁰⁵ The *Wilkinson* case para 190.

³⁰⁶ See para 2.6.2.1 of Chapter 2.

³⁰⁷ The *Wilkinson* case para 194.

³⁰⁸ The *Wilkinson* case para 197.

³⁰⁹ The *Wilkinson* case para 197.

Harper's adopted children could not inherit by means of intestate succession.³¹⁰ Furthermore, subsection (b) did not issue any conditions.³¹¹ Subsection (a) was based on two conditions.³¹² The first condition was that adopted children were not entitled to inherit property from their adoptive parents.³¹³ The second condition is that the trust deed needs to have been executed before the adoption date.³¹⁴ The Court stated that it was obvious that this condition spoke about inheriting property.³¹⁵

The following needs to arise for the first condition to be met. The late Ms Harper would have had to have her biological children.³¹⁶ On the recorded facts, she did not have any other children to whom her fourth-quarter share from the trust would go.³¹⁷ To qualify for this requirement, the adoptive parent must have had other children other than the adopted children to whom her share would have gone.³¹⁸ Despite failing to meet the condition, the Supreme Court of Appeal holds that the condition was triggered.³¹⁹ That was not the case.³²⁰ The South African law is clear: provisions cannot be invoked if the conditions are not met. Judge President Jafta further mentioned that he was not aware of any legislation that stipulated otherwise.³²¹

As stated above, the Constitutional Court stated that for the second condition contained in section 71(2)(a) to be met, the testamentary instrument must have been executed before the date of adoption.³²² This would mean that the provision would not apply if the trust deed was executed after the adoption order was granted.³²³ In the instance where section 71(2)(a) is applicable, nothing stands

³¹⁰ The *Wilkinson* case para 197.

³¹¹ The *Wilkinson* case para 197.

³¹² The *Wilkinson* case para 198.

³¹³ The *Wilkinson* case para 198.

³¹⁴ The *Wilkinson* case para 201.

³¹⁵ The *Wilkinson* case para 198.

³¹⁶ The *Wilkinson* case para 199.

³¹⁷ The *Wilkinson* case para 199.

³¹⁸ The *Wilkinson* case para 199.

³¹⁹ The *Wilkinson* case para 200.

³²⁰ The *Wilkinson* case para 200.

³²¹ The *Wilkinson* case para 200.

³²² The *Wilkinson* case para 201.

³²³ The *Wilkinson* case para 201.

between the adopted child being entitled to inherit from the trust deed like any of the other children of the donor.³²⁴ The words would be interpreted to include adopted children if the adoption order was granted before the trust deed was enacted.³²⁵

Both conditions must have existed before section 71(2)(a) could be triggered.³²⁶ The reason is that these conditions are mentioned together in a continuing sentence.³²⁷ As a result, there is no legal basis that the conditions should be separated.³²⁸

It can be further stated that section 71(2)(a) does not apply in this matter.³²⁹ Therefore, the requirement that requires the testator to state their intention to bequest their property to the adopted child falls away.³³⁰ It falls away in the same manner as the requirement that requires the testamentary deed to be executed after the adoption took place.³³¹ Furthermore, the Court stated that applying section 71 of the 1937 *Children's Act* was not appropriate.³³²

This is because it may result in ridiculous interpretations depending on when the trust deed was executed.³³³ If the trust deed were executed before the adoption of the child took place, then the words "child" and "children" would rightfully exclude adopted children.³³⁴ However, if the trust deed was executed after the adoption, then the same words would have been interpreted to include the adopted children.³³⁵ Moreover, the section does not define those words; therefore, it becomes difficult for the Court to find the relevance in using the section to determine the intention of the donor.³³⁶ For those reasons, the Court concluded that section

³²⁴ The *Wilkinson* case para 201.

³²⁵ The *Wilkinson* case para 201.

³²⁶ The *Wilkinson* case para 202.

³²⁷ The *Wilkinson* case para 202.

³²⁸ The *Wilkinson* case para 202.

³²⁹ The *Wilkinson* case para 202.

³³⁰ The *Wilkinson* case para 203.

³³¹ The *Wilkinson* case para 203.

³³² The *Wilkinson* case para 204.

³³³ The *Wilkinson* case para 204.

³³⁴ The *Wilkinson* case para 204.

³³⁵ The *Wilkinson* case para 204.

³³⁶ The *Wilkinson* case para 204.

71 of the *Children's Act* 31 of 1937 should not be used to interpret the trust deed.³³⁷ All this section does is restrict the interpretation of the trust deed.³³⁸ This section is in place to protect the other children of the adoptive parents.³³⁹ This is achieved by excluding adopted children from inheriting.³⁴⁰ In the case that the adoptive parents had no other children, then that provision would serve no purpose.³⁴¹

For these above-mentioned reasons³⁴², the trust deed was amended according to section 13 of the *Trust Property Control Act* 57 of 1988 to include adopted children.³⁴³

This matter shows how a testator's right to freedom of testation cannot be used in a manner that excludes adopted children, even though legislation at the time provided for the exclusion of adopted children. Excluding adopted children amounts to unfair discrimination and therefore also limits the testator's right to freedom of testation. It is also worth noting that the Court differentiate between factually adopted children and legally adopted children. This distinction can be seen in the case discussed below.

3.5 De facto vs de lege adopted children inheriting under intestate succession

3.5.1 Flynn v Farr 2009 Jol 239000 (C)

A case that reflects the difference between children who were adopted formally and those who were not, and whether such children were entitled to inherit is *Flynn v Farr* 2009 Jol 239000 (C), which was decided upon in 2008. A child that was not formally adopted claimed a right to a portion of the alleged adoptive parent's estate. The deceased had failed to draft a will, and as a result, his estate was to be dissolved in accordance with intestate succession.³⁴⁴

³³⁷ The *Wilkinson* case para 205.

³³⁸ The *Wilkinson* case para 206.

³³⁹ The *Wilkinson* case para 206.

³⁴⁰ The *Wilkinson* case para 206.

³⁴¹ The *Wilkinson* case para 206.

³⁴² The *Wilkinson* case para 206.

³⁴³ The *Wilkinson* case para 206.

³⁴⁴ *Flynn v Farr* 2009 JOL 23900 (C) 2-3 (hereafter the *Flynn* case).

The rule of law regarding adopted children at the time Flynn’s mother was married to Flynn’s father was the *Children’s Act 33* of 1960, which stated that adopted children were to be considered legitimate children.³⁴⁵

3.5.1.1 Facts

The facts of the case were as follows: Flynn and Farr had a very close relationship.³⁴⁶ Farr was married to Flynn’s mother but had not taken any legal steps to adopt Flynn.³⁴⁷ Farr died intestate in 2006, and according to the *Intestate Succession Act 81* of 1987, Flynn was not entitled to inherit because he was not recognised as a descendant.³⁴⁸ Flynn died shortly after while he was in the process of instituting a claim against Farr’s estate.³⁴⁹ Flynn’s estate then brought an application before the High Court to question the constitutionality of the discrimination against children that have not been formally adopted.³⁵⁰

The argument made on behalf of Mr Flynn’s estate was that the reference made in the *Intestate Succession Act 81* of 1987 to adopted children did not include *de facto*³⁵¹, but only *de lege*³⁵² adopted children and should, therefore, be ruled as unconstitutional.³⁵³ They further alleged that the non-inclusion of such children was against public policy and should, therefore, be interpreted to include both *de facto* and *de lege* adopted children.³⁵⁴

The legal representative of the applicant referred to a foreign case to strengthen their argument. The applicant’s heads of argument referred to the case of *Samoa*

³⁴⁵ The *Flynn* case 9-10.

³⁴⁶ The *Flynn* case 9-10.

³⁴⁷ The *Flynn* case 3-4.

³⁴⁸ The *Flynn* case 3-4.

³⁴⁹ The *Flynn* case 3-4.

³⁵⁰ The *Flynn* case 19-20.

³⁵¹ *De facto* adoptions are defined as adoptions that take place factually instead of legally. An example would be when a child is raised by a 3rd party as though they have been adopted by the 3rd party. This is done without having gone through the legal process of adopting the child.

³⁵² *De lege* adoption refers to adoption that has gone through the legal system, and a Court order has been provided for by the Court.

³⁵³ The *Flynn* case 19-20.

³⁵⁴ The *Flynn* case 19-20.

Estate of Tuinanao Fuinaono, which was heard by an American High Court.³⁵⁵ The American High Court stated that a *de facto* adoption occurs when duties relating to the child are performed by a parent, and such a child performs familial duties in return like those performed in an adoptive family³⁵⁶. In this matter, the deceased's *de facto* son, Atto, sought to inherit from the deceased's estate by means of intestate succession.³⁵⁷ The deceased never formally adopted Atto, but some documents showed that the deceased exercised parental power over Atto.³⁵⁸ There was also evidence that showed that the deceased took care of Atto as though he had adopted him.³⁵⁹ The American Court ruled that there was sufficient evidence to show that the deceased had become Atto's father.³⁶⁰

3.5.1.2 High Court's Ruling

The question placed before the High Court was whether the words "adopted child", as contained in the *Intestate Succession Act* 81 of 1987, include *de facto* and *de lege* adopted children.³⁶¹ When the Court made reference to the legal framework of adoption, the Court referred to section 71(2) of the *Children's Act* 33 of 1960 and pointed out that those were the necessary requirements that determine whether an adoption took place *de facto*. For a child to be adopted, the child's current guardian/parent would have to consent to the adoption, and such consent could not be unreasonably withheld.³⁶² Furthermore, the consent had to be "in writing and signed in the presence of the Commissioner of Child Welfare".³⁶³ In this instance, Flynn's biological father's consent was required.³⁶⁴ He did not consent to the adoption.³⁶⁵

³⁵⁵ The *Flynn* case 19-20.

³⁵⁶ The *Flynn* case 34-35.

³⁵⁷ The *Flynn* case 34-35.

³⁵⁸ The *Flynn* case 35-36.

³⁵⁹ The *Flynn* case 35-36.

³⁶⁰ The *Flynn* case 35-36.

³⁶¹ The *Flynn* case 37-42.

³⁶² The *Flynn* case 5-7.

³⁶³ The *Flynn* case 5-7.

³⁶⁴ The *Flynn* case 7-8.

³⁶⁵ The *Flynn* case 7-8.

The Court also considered the affidavit that was made by the Chief Director of the National Department of Social Development. In her affidavit, she stated that a system of *de facto* adoptions is not reconcilable when one needs to keep track of all adoptions.³⁶⁶ Because of the nature of such an adoption, there would be no records of such adoptions, and this would not be conducive, especially in the instance where a child later in their life wishes to ascertain where they come from.³⁶⁷

It can be stated that Flynn was not formally adopted by the deceased, as there is no evidence pointing to such an adoption.³⁶⁸ The Court went on to agree that even though the applicant was able to find a case that was in his favour, there is also compelling evidence from British Columbia that states otherwise.³⁶⁹ The Court further ruled that there was indeed a distinction between *de lege* and *de facto* adoptions.³⁷⁰ Such a difference amounted to differentiation.³⁷¹ Considering the affidavit of the Chief Director, this differentiation served a purpose, and the exclusion of *de facto adoptions* was justifiable.³⁷² Section 1(4)(e) of the *Intestate Succession Act* 81 of 1987 was not unconstitutional.³⁷³ It is clear that in the *Flynn* case, the Courts acknowledged that *de facto* adoptions were excluded from the interpretation of descendants as contained in section 1(4)(e) of the *Intestate Succession Act* 81 of 1987

However, it should be noted that with regard to customary law *de facto* adoption is recognised, only in the instance where adopted children claim for maintenance.³⁷⁴

3.6 Customary law adoption and inheritance: a separate legal system

According to Rautenbach, South African law is a cocktail of laws made up of a mixture of English common law, indigenous law, and Roman-Dutch law.³⁷⁵ As

³⁶⁶ The *Flynn* case 37-38.

³⁶⁷ The *Flynn* case 37-38

³⁶⁸ The *Flynn* case 37-42.

³⁶⁹ The *Flynn* case 37-42.

³⁷⁰ The *Flynn* case 37-42.

³⁷¹ The *Flynn* case 37-42.

³⁷² The *Flynn* case 37-42.

³⁷³ The *Flynn* case 37-42.

³⁷⁴ Louw 2017 *Obiter* 463.

³⁷⁵ Rautenbach 2008 *EJCL* 1.

mentioned in Chapter 2, she confirms that customary law was initially ignored by the colonisers even though it was the law of those who were the original inhabitants of South Africa.³⁷⁶ It was then tolerated, and at a later stage it was recognised.³⁷⁷ Which is where we are today.

As mentioned above, the *Intestate Succession Act* 81 of 1987 mentions the legal relationship between adopted children and the adoptive parents. Similarly, according to section 1 of the *Reform of Customary Law of Succession and Regulated Matters Act* 11 of 2009, a descendant is described as a person who is not a descendant of in terms of the *Intestate Succession Act* 81 of 1987 and includes:

- (a) a person who is not a descendant in terms of the *Intestate Succession Act* of 1987 but who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child.³⁷⁸

This means that children who were adopted according to customary law are also regarded as legal descendants of a deceased person who has died according to intestate succession. This has been applied in the following cases below.

3.6.1 *Maswanganye v Baloyi* ZAGPJHC (unreported) case number 62122/2014 of 4 September 2015

In this case, an adopted daughter sought an order declaring her the legal and only descendant of her late aunt.³⁷⁹ Judge Makgoa J states that what would need to be determined is whether the applicant had been customarily adopted by the deceased, Khengu Maggie Baloyi.³⁸⁰ Furthermore, would she be entitled to inherit?³⁸¹

³⁷⁶ Rautenbach 2008 *EJCL* 1.

³⁷⁷ Rautenbach 2008 *EJCL* 1.

³⁷⁸ Reform of Customary Law of Succession and Regulated Matters Act 11 of 2009.

³⁷⁹ *Maswanganye v Baloyi* ZAGPJHC (unreported) case number 62122/2014 of 4 September 2015 2-3 (hereafter the *Maswanganye* case).

³⁸⁰ The *Maswanganye* case 2-3.

³⁸¹ The *Maswanganye* case 2-3.

3.6.1.1 Facts

Khengu Baloyi, who was the deceased in this matter, was the applicant's biological aunt.³⁸² The applicant and the deceased shared the same surname.³⁸³ The applicant's biological parents were alive and married.³⁸⁴ The applicant states that the deceased had customarily adopted her.³⁸⁵ The applicant further states that this can be proved by the fact that she took her aunt's surname and used it until she got married.³⁸⁶ The applicant also alleged that she also lived with the deceased and the deceased's husband.³⁸⁷ The deceased passed away intestate on 8 May 2011

3.6.1.2 High Court's Ruling

The Court confirmed the Roman law and Roman-Dutch law principles of adoption. They stated that under Roman law, there was no legal relationship between the adopted child and the adoptive parent.³⁸⁸ Their relationship became more formal during the Roman-Dutch, and the *Children's Act* 33 of 1960 did not apply to customary law.³⁸⁹ In customary law, there were requirements to determine whether an adoption has taken place.³⁹⁰ The family of the adoptive child need to be informed and needs to consent to the adoption.³⁹¹ Relatives are called to this public meeting, and usually, the traditional leader is told about the adoption.³⁹²

In coming to its conclusion, the High Court referred to the *Flynn case*³⁹³ and how the Court, in that case, did not grant a declaratory order declaring that a child who was raised by the deceased was adopted *de facto*.³⁹⁴ The Court ruled that the requirement of consent by the biological parent was not met, and therefore, the

³⁸² The *Maswanganye* case 3-4.

³⁸³ The *Maswanganye* case 3-4.

³⁸⁴ The *Maswanganye* case 3-4.

³⁸⁵ The *Maswanganye* case 3-4.

³⁸⁶ The *Maswanganye* case 3-4.

³⁸⁷ The *Maswanganye* case 3-4.

³⁸⁸ The *Maswanganye* case 7-8.

³⁸⁹ The *Maswanganye* case 8-9.

³⁹⁰ The *Maswanganye* case 5-6.

³⁹¹ The *Maswanganye* case 5-6.

³⁹² The *Maswanganye* case 5-6.

³⁹³ See para 3.3.1 of Chapter 3.

³⁹⁴ The *Maswanganye* case 8-9.

applicant could not have been adopted by the deceased and her husband.³⁹⁵ This was relevant because it seemed that, in this case, certain formal requirements were not met.³⁹⁶ Such a requirement is that the alleged adoption did not take place publicly.

The Court further referred to the fact that when the applicant got married, her lobola was paid to her biological parents.³⁹⁷ That is, if the deceased had adopted her, then the applicant's lobola would have naturally gone to her adoptive parents.³⁹⁸

The Court ruled that the applicant is not the sole descendant of the deceased.³⁹⁹ The applicant was not entitled to inherit in accordance with the law of intestate succession.

3.6.2 *Sukati v Executor ZAGPHC* (unreported) case number (2017/39865) of 28 November 2018

In this matter, the High Court was required to determine whether the applicant in this matter was adopted according to the *Children's Act* 38 of 2005 or according to customary law.⁴⁰⁰ This was necessary to determine, seeing as the alleged adopted child sought to inherit from the deceased according to the law of intestate succession.⁴⁰¹

3.6.2.1 Facts

The applicant was originally residing with his grandmother.⁴⁰² After his grandmother died, he then moved in with his uncle, who took care of him in 2011.⁴⁰³ The deceased and the applicant's mother were siblings, and they shared the same

³⁹⁵ The *Maswanganye* case 9-10.

³⁹⁶ The *Maswanganye* case 8-9.

³⁹⁷ The *Maswanganye* case 8-9.

³⁹⁸ The *Maswanganye* case 8-9.

³⁹⁹ The *Maswanganye* case 9-10.

⁴⁰⁰ *Sukati v Executor ZAGPHC* (unreported) case number (2017/39865) of 28 November 2018-3 (hereafter the *Sukati* case).

⁴⁰¹ The *Sukati* case 2-3.

⁴⁰² The *Sukati* case 2-3.

⁴⁰³ The *Sukati* case 2-3.

surname.⁴⁰⁴ The applicant's mother is still alive. She is currently residing in the United States of America.⁴⁰⁵ The applicant's father was not mentioned at any point.⁴⁰⁶ The Applicant sought an order declaring that he is the child of the deceased and, therefore, entitled to inherit along with the deceased's other surviving children according to the law of intestate succession.⁴⁰⁷

The deceased died according to intestate succession on 4 July 2013.⁴⁰⁸ At the time of this hearing, the applicant was 31 years old.⁴⁰⁹ The High Court stated that the following facts were common cause: The applicant used the same surname as the deceased.⁴¹⁰ At the time this application was being made the applicant's mother was still living.⁴¹¹ The deceased had four other children who were to inherit according to the laws of intestate succession.⁴¹²

3.6.2.2 High Court's Ruling

The Court stated that adoption is achieved through customary law, or the *Children's Act* 25 of 2008.⁴¹³ Looking after someone does not mean that adoption has taken place.⁴¹⁴ The Court further stated that it is evident that the applicant was not adopted according to the *Children's Act* 25 of 2008 because he has failed to produce the documents that would prove such an adoption.⁴¹⁵

The Court stated that they do not conclude on matters of adoption in cases where the alleged adopted child's parents are still alive.⁴¹⁶ The Court referred to the *Maswanganye* case⁴¹⁷ and the *Kewana* case.⁴¹⁸ In these cases, the Courts

⁴⁰⁴ The *Sukati* case 2-3.

⁴⁰⁵ The *Sukati* case 2-3.

⁴⁰⁶ The *Sukati* case 3-4.

⁴⁰⁷ The *Sukati* case 3-4.

⁴⁰⁸ The *Sukati* case 3-4.

⁴⁰⁹ The *Sukati* case 3-4.

⁴¹⁰ The *Sukati* case 3-4.

⁴¹¹ The *Sukati* case 3-4.

⁴¹² The *Sukati* case 4-5.

⁴¹³ The *Sukati* case 4-5.

⁴¹⁴ The *Sukati* case 4-5.

⁴¹⁵ The *Sukati* case 4-5.

⁴¹⁶ The *Sukati* case 5-6

⁴¹⁷ See para 3.3.2 of Chapter 3.

⁴¹⁸ See para 2.6.3 of Chapter 2.

emphasised that the element of publicity is particularly important when customary adoption is concerned.⁴¹⁹

The Court further considered an article written by Maithufii,⁴²⁰ which stated the requirements of customary adoption.⁴²¹ These requirements are the relatives of both parties being called to the place where the adoption is going to take place.⁴²² After the adoption has taken place, it should be reported to the traditional leader of the area or their representative.⁴²³ The publicity aspect of the requirement symbolises that the adopted child has been transferred from one family to another.⁴²⁴

The Court stated that the requirements for customary law adoption were also not met.⁴²⁵ The deceased did not adopt the applicant.⁴²⁶ Furthermore, the applicant could not be considered a descendant of the deceased for purposes of the law of succession.⁴²⁷

3.6.3 *Mxhosana v Mxhosana* 2022 JOL 55892 (GP)

3.6.3.1 Facts

The applicant in this matter sought an order declaring him as the descendant of the deceased according to the *Intestate Succession Act* 81 of 1987 and the *Reform of Customary Law of Succession and Regulation of Related Matter Act* 11 of 2009.⁴²⁸ He also sought the Court to remove the first respondent as the executrix of the deceased's estate.⁴²⁹

⁴¹⁹ The *Sukati* case 5-6.

⁴²⁰ Maithufi I "Adoption According to Customary Law-Kewana v Santam Co Ltd 1993 (4) SA 7771 (TK)".

⁴²¹ The *Sukati* case 5-6.

⁴²² The *Sukati* case 6-7.

⁴²³ The *Sukati* case 6-7.

⁴²⁴ The *Sukati* case 6-7.

⁴²⁵ The *Sukati* case 7-8.

⁴²⁶ The *Sukati* case 7-8.

⁴²⁷ The *Sukati* case 7-8.

⁴²⁸ *Mxhosana v Mxhosana* 2022 JOL 55892 (GP) para 1 (hereafter the *Mxhosana* case).

⁴²⁹ The *Mxhosana* case para 1.

The deceased worked for the South African Defence Force until he retired because of his deteriorating health in May 2018.⁴³⁰ He then passed away six months after his retirement in November 2018.⁴³¹ The deceased was predeceased by his wife, Claudia Sefora Kommane.⁴³² They had no children in their marriage.⁴³³ The applicant in this matter was Claudia's son from a prior relationship.⁴³⁴ The applicant alleges that he had been residing with the deceased since 2001.⁴³⁵ The applicant alleged that the deceased paid his tuition, and once the deceased fell ill, the respondent dropped out to take care of him.⁴³⁶ The applicant felt that from their relationship it was evident that the deceased had taken on the role of being his father, and he was thus entitled to inherit from the deceased's estate.⁴³⁷

The first respondent contested this application. The first respondent alleged that the applicant knew that the deceased was not his father.⁴³⁸ And that he only took responsibility for him because he married the applicant's mother.⁴³⁹ She further denied that the applicant was adopted by customary law or according to the *Children's Act* 25 of 2008.⁴⁴⁰

The Court was left to determine whether the applicant was customarily adopted and, therefore, entitled to be a beneficiary under the previously mentioned legislation.⁴⁴¹

3.6.3.2 High Court's Ruling

The Court considered section 1(b) of the *Intestate Succession Act* 81 of 1987. The section states that in the event a person dies intestate and has no spouse but does

⁴³⁰ The *Mxhosana* case para 2

⁴³¹ The *Mxhosana* case para 2.

⁴³² The *Mxhosana* case para 9.

⁴³³ The *Mxhosana* case para 9.

⁴³⁴ The *Mxhosana* case para 9.

⁴³⁵ The *Mxhosana* case para 9

⁴³⁶ The *Mxhosana* case para 9.

⁴³⁷ The *Mxhosana* case para 9.

⁴³⁸ The *Mxhosana* case para 23.

⁴³⁹ The *Mxhosana* case para 23.

⁴⁴⁰ The *Mxhosana* case para 23.

⁴⁴¹ The *Mxhosana* case para 10.

have a descendant, then the descendant shall inherit intestate.⁴⁴² Reference was also made to section 1(4)(e)(i) of the *Intestate Succession Act* 81 of 1987,⁴⁴³ as well as section 8 of the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009.⁴⁴⁴ It was further stated that section 1(4) of the *Intestate Succession Act* 81 of 1987 provides for adopted children to inherit by deeming them descendants of the deceased.⁴⁴⁵ Section 8 of the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 allows for adopted children to inherit when they do not qualify under the *Intestate Succession Act*.⁴⁴⁶

The High Court also referred to *the Flynn* case.⁴⁴⁷ The Court stated that according to this case, section 1(4)(e) of the *Intestate Succession Act* 81 of 1987 can be interpreted to exclude children who were adopted informally.⁴⁴⁸ That adoption should, therefore, take place in Children's Court.⁴⁴⁹ In this instance, it would not have to be applied, seeing as the applicant was not informally adopted.⁴⁵⁰

The *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 has codified customary law.⁴⁵¹ This would mean that by virtue of the deceased accepting and taking care of the applicant as if it were his child according to Xhosa customary law, it would mean that the applicant would be entitled to being a descendant.⁴⁵² But in this instance, the applicant has failed to prove that the rituals confirming his adoption took place.⁴⁵³ He was not adopted according to customary law and, therefore, cannot be considered a descendant.⁴⁵⁴

⁴⁴² The *Mxhosana* case para 27.

⁴⁴³ See para 3.2 of Chapter 3.

⁴⁴⁴ See para 3.2 of Chapter 3.

⁴⁴⁵ The *Mxhosana* case para 29.

⁴⁴⁶ The *Mxhosana* case para 29.

⁴⁴⁷ See para 3.5.1 of Chapter 3.

⁴⁴⁸ The *Mxhosana* case para 42.

⁴⁴⁹ The *Mxhosana* case para 42.

⁴⁵⁰ The *Mxhosana* case para 42.

⁴⁵¹ The *Mxhosana* case para 58.

⁴⁵² The *Mxhosana* case para 59.

⁴⁵³ The *Mxhosana* case para 59.

⁴⁵⁴ The *Mxhosana* case para 59.

3.7 Conclusion

As seen in the *Wilkinson* case, freedom of testation is limited, and cannot be used in a manner that excludes adopted children.

We see how the Court stated that for purposes of the *Children's Act* 33 of 1960, an adopted child could inherit according to intestate succession or testate succession. Provided that the adoptive parents did not have any other children, which was the case with Ms Harper. She had died not being able to conceive, therefore resulting in her adoption. This approach was different from how the High Courts, and the Supreme Court of Appeal interpreted the provision. The Constitutional Court in *Wilkinson*

In the *Flynn* case, we see that the Court does indeed differentiate between children who were adopted informally and children who were adopted formally. The Court further stated that such differentiation does not amount to unfair discrimination. It was concluded that section 1(4)(e) of the *Intestate Succession Act* 81 1987 does not apply to children who were adopted *de facto*. It can be stated that legal adoption takes place in two instances, according to customary law or according to the *Children's Act* 38 of 2005.

The current legal position as it stands is section 1(4)(e) of the *Intestate Succession Act*, which provides that children who were legally adopted are deemed to be descendants of their adoptive parents in the event the adoptive parent dies intestate. Children who do not qualify to inherit according to section 1(4)(e) of the *Intestate Succession Act* 81 of 1987 can inherit according to the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 is applicable. However, the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 does not provide for adoption. It can also be stated that the *Children's Act* 25 of 2008, together with the *Intestate Succession Act* 81 of 1987, do not apply to the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009. This is because the former forms part of common law, and the latter forms part of customary law, which are two separate legal systems.

As already stated, customary law and common law are two separate legal systems. Children who were not adopted according to common law are still entitled to inherit under customary law. Provided that a customary adoption took place. Section 8 of the *Reform of Customary Law of Succession and Regulation of Related Matters Act* 11 of 2009 makes provision for the adopted child to be regarded as a descendant in the event the adoptive parent dies intestate.

Customary law has a different approach when determining if a child has been factually adopted. There are specific requirements that have to be adhered to. Failure to meet those requirements leads to the alleged adopted children not being able to inherit according to the law of intestate succession from their alleged adoptive parent's deceased estate. It is evident that caring for an alleged adopted child is not enough to constitute that adoption has taken place. Functioning as a regular family is also not enough. There are instances where an alleged adopted child wants to claim from the deceased person's estate because the deceased took on the role of care and guardianship over the alleged adopted child, but because certain procedures were not followed. The alleged adopted child is not regarded as a legally adopted child, and therefore not regarded as the descendant of the deceased.

Chapter 4

4 Conclusion

4.1 Final conclusions

As stated in Chapter 1, adopted children are considered to be part of a vulnerable group in society. They have faced a history filled with discrimination. This was later shown, in Chapter 2.

As seen in Chapter 2 of this dissertation, adopted children's right to inherit was previously not placed on the same footing as the biological children of the testator or deceased adoptive parent. In terms of Roman-Dutch law, adopted children were not regarded as the adoptive parent's legitimate children. Adopted children had no rights regarding inheritance. An adopted child had no right to claim from the adoptive parent's deceased estate. In South African common law, the same practice was adopted. There were no legal consequences regarding the law of succession flowing from a relationship between the adoptive parent and their adopted children. A testator was however required to show his intention when it came to bequeathing his assets to his adopted children. Failure to express such an intention often resulted in adopted children being excluded from inheriting.

It can be seen that initially customary law was not recognised, but as time went on customary law became partially recognised and was later tolerated by the colonial government.

Chapter 3 detailed how the constitutional dispensation brought change. The South African system becomes a dual system and customary law is recognised as an official legal system. Common law, and customary law co-exist but one legal system does not fall into the other. They are both separate systems that are regulated by different pieces of legislation and regulations. Adoption under customary law is regulated differently from adoption under common law, but the consequence of adoption is the same. Chapter 3 details how the Courts interpreted legislation that was created to exclude adopted children. How initially the provisions contained in a trust deed were interpreted according to the legislation that was operative during

the time the trust deed was created. It further shows how section 13 of the *Trust Property Control Act 57 of 1988*.

Furthermore, it can be concluded that when it comes to adopted children and inheritance, the Courts differentiate between legally adopted children and children that were factually adopted. This is seen in the *Flynn* case. As the Court stated, this is just mere differentiation, which does not amount to unfair discrimination. Furthermore, the *Harper, Harver* and *Wilkinson* cases showed us the consistent application of Acts that required the testator to show their intention in instances when they bequeath their assets to their adopted children. The issue with the *Wilkinson* judgement is that it can be argued that the Court's decision could not have been what the testator initially wished, but that is not a discussion for purposes of this dissertation.

It can be concluded that recent developments do show that it is easier to place common law adopted children on an equal footing with the biological children of the testator. With regards to customary adopted children, the procedure of acknowledging a child has been formally adopted proves to be outdated. It is much more complicated than going to the Court and receiving a Court order like how it is done in common law.

Even in the event the adoptive parent dies according to the law of intestate succession, legally adopted children are regarded as the deceased's descendants. The word descendant contained in section 1(4)(e) of the *Intestate Succession Act 81 of 1987* includes legally adopted children. The definition of descendant contained in section 1 of the *Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009* also makes provision for children who were not adopted according to the *Children's Act 38 of 2005* to inherit according to the law of intestate succession.

4.2 Recommendations

4.2.1 Common law

Based on the outcomes of the cases above, and as seen in the *Wilkinson* case, testamentary instruments that were drafted, before the *Constitution* came into effect remain an issue. Amending them to suit the outcome required by the bereaved parties is not an end-all and be-all to the problem. Freedom of testation is also still a key factor when considering this problem. The solution cannot merely be just to apply section 13 of the *Trust Property Control Act 57* of 1988 in each instance where a trust deed excludes adopted children.

The recommendation would be to offer adopted children, who are still excluded from testamentary instruments that were drafted during the historical time periods mentioned in Chapter 2 an opportunity to question such testamentary instruments without having to ensue legal proceedings. That they be given a chance to prove that the testator indeed did wish they inherit.

4.2.2 Customary law

In customary law, it is evident that when a child is adopted certain practices are followed. A ceremony needs to be held in public, both families need to be present, and the chief needs to be informed of the adoption. As seen in the above-mentioned cases, these requirements are very specific, and failure to meet them results in children not inheriting. As discussed in this dissertation there seem to be many cases where the deceased party did take up responsibility and care over the alleged adopted child, but failed to adhere to the formal proceedings which resulted in the adopted child not inheriting.

This problem could be circumvented by creating legislation that would assist in structurally regulating adoption. An example of that would be creating legislation that allows people to approach a traditional Court to finalise the adoption. Another solution would be to recognise *de facto* adoption and allow such children to inherit according to the law of intestate succession.

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