MALAWI LAW COMMISSION

REPORT ON THE REVIEW OF THE WILLS AND INHERITANCE ACT

(Cap. 10:02)

Report No. 12

December, 2003

REPORT OF THE LAW COMMISSION ON THE REVIEW OF THE WILLS AND INHERITANCE ACT

TO: THE HONOURABLE PAUL MAULIDI, MINISTER OF JUSTICE

This is the first Report of the Law Commission which was appointed under section 133 of the Constitution to review gender related laws in Malawi. The Report is on the review of the Wills and Inheritance Act (Cap. 10:02).

The Commission hereby submits the Report pursuant to section 135 (d) of the Constitution and commends the recommendations contained in this Report to the Government, Parliament and people of Malawi.

MEMBERS

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Dated : 30th December, 2003

Changes in the membership of the Commission

One Commissioner, Dr. Garton Kamchedzera, Dean of Law, Chancellor College, University of Malawi, resigned his appointment in the course of the review of the Act on account of his other commitments.

Programme Officers

The principal programme officer for this programme was Mr. Chikosa Silungwe, LLB with Honours (Malawi). He was assisted by Mrs. Fiona Mwale, LLB with Honours (Leeds), LLM (Warwick), and Mr. William Msiska, LLB with Honours (Malawi).

Acknowledgements

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BACKGROUND

The Constitution of Malawi (1994) enshrines a Bill of Rights, constitutional principles and principles of national policy. Gender equality forms part of the principles of national policy and is one goal that policies and laws must achieve in Malawi to promote the welfare of the people of Malawi. The Law Commission's first report in 1996 made recommendations on defilement, wills and inheritance, citizenship, marriage and rights of children born outside marriage. In that and subsequent reviews, gender issues have appeared as both crosscutting and significant. None of the Reports so far has adopted a gender perspective. However, to contribute to the achievement of gender equality, social economic justice and development, law reform must address gender-based inequalities and introduce laws that are compatible with achieving gender equality and development.

A thirteen member Special Law Commission to introduce greater gender equality through law reform was appointed in September 2001. The work of the special Law Commission started in earnest in October, 2001, when it embarked on the development of a Paper entitled: *An Overview and Issues For Gender-Based Law Reform in Malawi*. The Overview Paper was finalised in April, 2003, and it covers five thematic areas, namely; Health, Educational and Psychosocial Well-Being; Contractual Relations and the Law; Family Relations and the Law; Property Relations and the Law; and Civil and Political Participation. In the discussion of the five thematic areas, the Commission examined the state of gender relations and gender development in Malawi. The reason for the enjoyment of human rights for both female and male people were identified considering whether and how the law responds to the realities of life in Malawi.

A draft version of the Overview Paper was presented to a Gender Stakeholders' Workshop on 28th November, 2002, and to the Parliamentary Women Caucus on 29th November, 2002; both workshops took place at Le Meridien Capital in Lilongwe, Malawi. The purpose of the two workshops was to assist the Commission in prioritising the areas for its law reform exercise. At the end of the two workshops, the following areas were identified as in need of urgent law reform:

(a) inheritance law, especially the issue of property grabbing;

(b) the law of marriage and divorce; and

(c) the development of a gender equality statute.

In the light of those three prioritised areas, the Commission decided to commence its law reform work by looking at the core statute on succession in Malawi, being the Wills and Inheritance Act, and at other related statutes, namely, the Administrator General's Act (Cap. 10:01) and the Estate Duty Act (Cap. 43:02). Work on this exercise commenced in earnest in February, 2003 with the review of the Wills and Inheritance Act. This is therefore the Report of the Law Commission on the Review of the Wills and Inheritance Act.

In the course of the review of the Wills and Inheritance Act, the Commission held several consultations meetings with various stakeholders including the Director of Public Prosecutions,

the Administrator General, representatives from the office of the Registrar General, District Commissioners from selected districts, namely; Balaka, Karonga, Mulanje, Mzimba, Nkhata Bay, Nsanje, Ntcheu and Salima and Chiefs from Chiradzulu, Lilongwe, Mzimba and Rumphi. The Commission also conducted public hearings with rural communities in Karonga and Mzimba in the Northern Region of Malawi, Ntcheu and Salima in the Central Region, and Mulanje and Nsanje in the Southern Region. Finally, the Commission held a national consultative workshop at Le Meridien Capital, Lilongwe on 10th and 11th December, 2003 where it presented its findings and recommendations on the review of the Wills and Inheritance Act to participants drawn from a wide cross section of Malawian society.

STRUCTURE OF THE REPORT

The narrative part of this Report contains specific findings and recommendations made by the Commission; and all recommendations for enactment made by the Commission are indicated in **bold.**

Further, in the narrative part of this Report, the Commission has assigned Part numbers and section numbers, where appropriate, to new provisions that have been recommended as contained in the draft legislation.

DRAFT LEGISLATION

Drafts of legislation for the enactment of the recommendations of the Commission are attached as part of this Report. These include a draft Bill of the proposed **"Deceased Estates (Wills, Inheritance and Protection) Act"** which will replace the present Wills and Inheritance Act and drafts of subsidiary legislation.

USE OF MASCULINE OR FEMININE GENDER

The Commission noted that the Wills and Inheritance Act makes reference to the masculine gender to include the feminine gender unless the context specifically demands that the use of either a masculine or feminine gender should be deployed.

The Commission was aware that such universal use of the masculine gender is not unique to the Wills and Inheritance Act but applies to all laws of Malawi, at least from 1968 when the last extensive law revision exercise was conducted.

The Commission was further aware that the universal use of the masculine gender in the laws of Malawi is based on subsection (2) of section 2 of the General Interpretation Act (Cap. 1:01) which provides as follows-

> (2) In every written law, unless a contrary intention appears, words and expressions importing the masculine gender include females, and words and expressions importing the feminine gender include males.

The Commission does not find the position tenable that the specific reference to one gender imports the other. The Commission, particularly the special Law Commission as the review of Gender-related laws, resolved that it shall use both the masculine and feminine gender

throughout the narrative of the Report and in the draft Bills unless the context requires otherwise. The text of the narrative part of the Report and draft Bill will automatically reflect this position as has been taken by the Commission. Beyond this Report, the Commission recommends the use of both male and female pronouns, where appropriate, in all newly drafted legislation.

SPECIFIC FINDINGS AND RECOMMENDATIONS

TITLE AND LONG TITLE

The long title of the Wills and Inheritance Act is as follows-

> "An Act to provide for the making of wills, and for inheritance to the estates of deceased persons, the administration of estates, the functions of courts in relation to such matters and for matters incidental thereto."

The Commission recognised the fact that the Act is the comprehensive legislation on the law of succession in Malawi comprising of wills and inheritance. It was the view of the Commission that the totality of the Act concerns the administration of deceased estates disposable under a will or upon intestacy (where there is no will). The Commission was also of the view that the criminalization of property grabbing is not captured in the long title of the Act and that it is prudent to reflect in the long title the need for the protection of a deceased person's estate.

At one point the Commission recommended that the title of the Act should be "Deceased Estate (Inheritance and Protection) Act" replacing the present one of "Wills and Inheritance Act". The question that arose was whether the phrase "inheritance" is wide enough to cover all aspects of succession or whether it is also closely associated with wills so that by referring to "deceased estate", the average reader will automatically know that wills are covered too. The question arises given that wills import a sense of testamentary disposition. The Commission discovered however that "inheritance" in fact is confined to intestate succession[1] and for that reason it is necessary to bring out the aspect of wills as well in the title to the Act.

According to Ngwira, *et al* [2], " the objective of the Wills and Inheritance Act is to provide for the making of wills, inheritance of the estate of deceased persons, administration of estates, functions of the courts in relation to such matters and for connected matters." Ngwira, *et al* found it necessary to refer to the two terms, that is, "wills" and "inheritance" of deceased estates as two separate terms. The Commission confirms that that would be the proper approach in the light of what "inheritance" technically entails.

The Commission also looked at cases in other Commonwealth jurisdictions. In Australia, the word "estate" is of general import and *prima facie* covers all of the disposable property of the testator: In *Re Seccombe (deceased), Queenslands Trustees v Seccombe*[3], the court (Douglas, J.)

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[1] Black's Law Dictionary, 6th edn. , (St. Paul, Minnessota, West Publishing, 1990), p. 782.

[2] Ngwira, Naomi, *et al, Women's Property and Inheritance Rights in Malawi* (Gender Studies Unit, Chancellor College, Zomba, 2002), p.46.

[3] (1948) St. R. Qd. 1117. In *Schaefer v Schuhmann* [1972] 1 All E. R. 621, the court said that "estate" must be confined to the net estate available to answer the dispositions made by the will.

said that the word "estate" in relation to property left under a will is of general import and prima facie covers all the disposable property of a testator.

In Canada, on the other hand, it has been said that whether it is a lawyer or a lay person, the word "estate", means either of only two things:

(a) if the deceased is long dead, the totality of his or her real property; or

(b) if the deceased is recently dead, the totality of what he or she leaves behind him or her, his or her real and personal possessions, his or her chose in action, indeed all his or her substance: *In re Harvey, Assessor of Taxes v Walsh* [4].

With those considerations, therefore, the Commission recommends the following new title for the legislation on succession under wills and on intestacy in place of the present one:

Deceased Estates (Wills, Inheritance and Protection) Act.

The Commission further recognised that as the aspect of the protection of a deceased person's estate has been captured in the name of the statute the long title itself will have to change to reflect the shift in the philosophy of the law of succession with the introduction, in 1997, of the penal provisions in the Act under, for example, section 84A of the Act.

The Commission therefore recommends that the long title to the Act should replaced as follows-

> **An Act to provide for the making of wills and the devolution of property under a will; the inheritance to the estates of persons dying without valid wills; the protection of deceased estates; the administration of deceased estates; the prosecution of offences relating to deceased estates; the civic education of the public; the functions of courts in relation to deceased estates and for other connected matters.**

SECTION 1*[Short title and application]*

Subsection (1) *[Short title]*

The Commission recommends that the provision should become the new section **1** so as to separate the citation and application of the law. Further, in the light of recommendations in relation to the title and long title of the Wills and Inheritance Act, the Commission recommends that the provision will now read as follows-

> **1. - This Act may be cited as the Deceased Estates (Wills, Inheritance and Protection) Act.**

[4] (1950) 24 *MPR* 360, 392.

Subsection (2) *[Application]*

The provision dealing with application will become the new section **2**. The provision states as follows-

> (2) This Act shall apply to the administration of the estates of all persons dying domiciled, or leaving property in Malawi, on or after the date upon which the Act comes into operation.

The Commission observed that, by virtue of the subsection, the Act also applies to the administration of estates of persons who are not domiciled in Malawi but die leaving property in Malawi. The Commission queried whether the position of the Act alters the position of private international law in respect of the law applicable to the movable and immovable property of a non- domiciliary. The Commission however established[5] that the *lex fori* deals with matters of debt management in respect of the estate of a deceased person regardless of the domicile of that person. Succession to the property comprising the estate of a deceased person however is dealt with by the *lex domicili* applicable to the deceased person. The Commission therefore found the position of the subsection tenable and recommends its retention.

- *Domicile*

Since one of the functions of the Law Commission is to simplify the laws and the terminology used in the laws, the Commission considered whether the term "domicile" could be simplified as the term sounds or appears rather technical. The word "domicile" on the face of it, can be simplified by replacing it with any one of its synonyms such as "abiding place", "abode", "accommodation", "address", "dwelling", "habitation", "home", "place of residence" etc.

However, for the purposes of the law, the term "domicile" is used to indicate, in one sense, the country in which a person is, or is presumed to be, permanently resident. It depends upon the physical fact of residence coupled with the intention of remaining there. In another sense, domicile relates to choice of law that governs the affairs of a person. For example, a person may be permanently resident in Malawi but by reason of the choice of law applicable to that person, the law that may apply to him or her is that of another country. The civil status of a person or his or her legal rights and duties as well as his or her capacity to marry are all determined by the law of his or her domicile. Political status or nationality though is not dependent on domicile.

What the synonyms listed above do not convey is the legal relationship between the individual and the distinctive territory, and the laws which operate on him or her as his or her personal laws. It is this relationship that is vital in the definition of domicile. While a person may not have a permanent abiding place or abode etc. the law requires him or her to have a domicile. A person may have more than one home but may only have one domicile for purposes of the law.

[5] See Cheshire and North, *Private International Law* (London: Butterworths: 1999)*;* Morris, JHC, *Private International Law* (London: Steven and Sons: 1984) for an in depth discourse on the subject.

It is therefore difficult to simplify the terminology denoting "domicile" whilst still retaining the important aspect of the legal system of the territory which determines the law applicable to the individual.

Domicile may be attained in any one of three ways, namely, (a) by origin or birth; (b) by operation of law; and (c) by choice. To acquire a domicile of choice a person must have a definite determination to abandon the old domicile coupled with an intention to establish residence and actually take up residence in a new domicile. The acquisition of domicile by choice is very important for foreigners dying in Malawi as mere residence in Malawi does not automatically mean they are domiciled in Malawi as they would actually have to satisfy conditions in (a) or (b) in this paragraph. It is therefore important for the purposes of the subsection that the term "domicile" is understood within its legal context as outlined above before, if at all, any attempts are made to simplify it.

In light of the foregoing, the Commission recommends the retention of the use of the term "domicile" in the provision.

- *Commencement of operation of the Act*

In discussing the provisions on application, the issue of operation of the law was called in question. Subsection (2) of the provision states that the Act was to apply to the estate of persons dying domiciled in Malawi *on* or *after* the date the Act came into operation. The Commission was concerned that adopting this formulation would mean that the reforms it will recommend will not benefit the undistributed property of persons dying before the new law comes into operation. However, to apply to such property requires some retrospective application of the law. The Commission deliberated at length as to whether on a close look at sections 20, 58 and 74 of the Constitution, the law cannot be made to apply retrospectively. Some in depth legal research was carried out and the following is the discussion of the findings.

Any proposed legislation set to replace the Wills and Inheritance Act will have to take effect or apply or commence from a certain date and great care will have to be taken when picking the operative date of the new legislation.

Generally, as death is the operative circumstance in succession, the new Act could be drafted to be operational upon the death of the deceased after a certain date, this date being immediately after the repeal of the existing legislation or, conversely, upon the coming into operation of the new law. The effect of this would be that for all persons dying before the new improved gender sensitive law is in effect, their property will have to be distributed under the old undesirable law even if the property is distributed at a time when the new legislation is in force. The question for the Commission was whether to recommend a provision that would enable the property of a deceased person who died *before* the new Act came into effect but is distributed *after* the new Act comes into effect. This is what raised the issue of retrospectivity.

It has been said that laws that have retrospective effect are generally considered to be of questionable policy and contrary to the general principle regarding legislation by which the conduct of mankind is to be regulated. A statute ought to deal with future acts and not to change

the character of past transactions carried on upon the faith of the then existing law: see Willes, J., in *Phillips v Eyre*[6].

The undue injustice that the general rule seeks to avoid is best illustrated by recourse to the criminal law where in the absence of this rule, a person would be held guilty of a criminal offence on account of conduct which did not constitute a criminal offence at the time when it was committed.

Under the general principles of English law, the rule against retrospection is a rebuttable presumption. Unless a contrary intention appears, no statute shall be construed as having retrospective effect. It therefore follows that unless a retrospective construction of the statute appears very clearly in the terms of the Act, the general rule against retrospection will be applied.

Section 74 of the Malawi Constitution states:

> "No law made by Parliament shall come into force until it has been published in the *Gazette*, but Parliament may prescribe that a law shall not come into force until some later date after its publication in the *Gazette*.".

Whether or not section 74 of the Constitution is an articulation on the general rule against retrospection is a subject of legal debate. Upon a simple reading of the provision, it could be said that retrospection is permitted, that is, a law can come into force retrospectively after it has been published in the *Gazette.* This is a dangerously wide interpretation against which it could alternatively be argued that it cannot be sustained if the maxim *expressio unius est exclusis alterius* (the mention of one thing excludes another) is applied.

Section 74 of the Constitution makes it clear that a law shall come into force after its publication in the *Gazette* or Parliament can expressly state that the law shall not come into force until some later date after its publication in the *Gazette*. In other words, a law can be published in the *Gazette* on 10th July 2004, but Parliament can still prescribe notwithstanding the fact that the law was gazetted on 10th July, 2004, that it shall come into force on 10th July, 2005. Section 74 of the Constitution provides for a law to come into force or to commence after a certain date in the future and by operation of the drafting maxim referred to above the fact that only a later date has been expressly mentioned means that the application of the law at an earlier date is excluded.

The fundamental rule is that the presumption against retrospection is to be applied with vigour in the criminal law. This is due to the fact that there is another presumption that penal enactments are construed strictly and not extended beyond their clear meaning. The same cannot be said of the civil law except in cases where the injustice caused would be as great as in the criminal law; for example, a civil law that takes away rights and liberties of persons.

Subparagraph (vi) of subsection (2) (f) of Section 42 of the Constitution in relation to criminal law, provides that every person arrested for, or accused of the alleged commission of, an offence has the right not to be convicted of an act or omission which was not an offence at the time when it was committed or omitted to be done, and not to be sentenced to a more severe

[6] (1870) *LR 6 QB 23.*

punishment than the one that was applicable at the time of the commission of the offence. This paragraph, therefore, in keeping with the general principles of English law, expressly forbids retrospection in criminal cases. The argument that could be employed in this premise is that if section 74 of the Constitution was intended to completely forbid retrospection why does subparagraph (vi) of subsection (2) (f) of section 42 of the Constitution only refer to criminal law? Further, under the general maxim of *expressio unius est exclusio alterius* the fact that retrospective criminalization has expressly been mentioned as forbidden, it means that the Constitution did not intend to outlaw retrospection of legislation in every instance.

- *Assuming section 74 does not prohibit retrospective legislation*

The Commission is seeking to ensure that justice is done so that spouses and children who could have benefited under the proposed new legislation should not be unable to take benefit merely because the deceased died before the new Act comes into force. The Commission felt that it would be fair and just to permit the distribution of all deceased property after the new Act comes into operation to be done in accordance with the new Act even where death occurred before the new Act came into operation. A provision that states that all deaths occurring before the Act comes into force and where the property is to be distributed after the new Act comes into force, the new Act will apply may therefore be vital. As the intended reform is of a civil and non-penal nature, such provision may be possible under the reasoning put forward above. The general principles of English law permits retrospection if it confers a benefit on private persons without imposing an obligation.

The legislator should judge what is reasonable in the circumstances for both the individual and the State. Proposed retrospective laws should take into account the reasonable expectations of persons that arrangements they make under existing laws will not be affected by changes in the law. It is only when the proposed reform is potently unreasonable or is an affront to equity and the general principles of law that such reform will be objectionable.

The proposed reform is intended to confer a benefit upon those spouses and children whose entitlement to a deceased estate would be affected if the existing legislation was used to distribute the deceased's estate.

- *Section 20 of the Constitution*

Section 20 of the Constitution lays down the principle of equality before the law and prohibits discrimination. However, the provision recognizes that legislation may be passed to address inequalities in society. In the view of the Commission, the retrospective application of the law in this respect would be an example of legislation passed to address the injustice under the present Act. It is this injustice that the reforms by the Commission intend to address and which is sanctioned by subsection (2) of section 20 of the Constitution as necessary to ensure equality. The Commission also felt that the spouse and children of the deceased would be better served by the retrospective legislation that entitled them to acquire and keep property as equals in society as provided for under section 28 of the Constitution.

The Commission understood the provision under subsection (2) of section 20 of the Constitution, as, in part, espousing affirmative action and that it can be argued from this interpretation that retrospective legislation, if it brings about this desirable effect, would be

within the ambit of the provision. If section 74 of the Constitution were construed to negate any possibility of retrospective legislation, subsection (2) of section 20 of the Constitution would be read as qualifying section 74 by allowing retrospective legislation to the extent necessary to correct an existing injustice or inequality.

- *Transitional Provisions*

The Commission also considered whether it would be possible, alternatively, to insert a transitional provision in the law that would cater for the administration of estates of persons dying before the commencement of the new Act.

Transitional provisions in an Act or other instrument spell out precisely when and how the operative or substantial parts of the Act are to take effect. The purpose of transitional provisions is to facilitate change from one statutory regime to another. A transitional provision is in its operation expected to be temporary in that it becomes spent when all the past circumstances which it is designed to deal with have been dealt with.

The Commission, however, observed that the problem with a transitional provision in dealing with deceased estates is that it would be difficult to determine a cut off point or date of the application of the transitional provision.

- *Conclusion*

In light of the foregoing discussion, the Commission recommends the following new section **2** which shall allow for the retrospective application, to a limited extent, in respect of the administration of deceased estates which remain partly or wholly undistributed at the time the new Act comes into force.

The provision will now read as follows–

> **2. – This Act shall apply to the administration of estates of all persons dying domiciled, or leaving property, in Malawi on or after the date upon which it comes into operation; but any property belonging to the estate of such persons which, at the commencement of this Act, remains partly or wholly undistributed, shall be distributed in accordance with the provisions of this Act.**

Subsection (3)

The provision excludes the application of the Wills and Inheritance Act to customary land and to the crops growing on such land. The exclusion of customary land and crops growing on that land was criticized by the Commission in so far as:

(a) there is increased individualization of customary land tenure which merits or warrants recognition at law of the added value to such land;

(b) in the light of section 28 of the Constitution which provides for the right of every person to acquire property alone or in association with others; and

(c) it also addresses the issue of certainty in the law if the Act were to apply regardless of the category of land.

The Commission was of the view therefore that the application of the Act should extend to customary land. The Commission therefore recommends deletion of subsection (3).

PART I

PRELIMINARY

SECTION 2 *[interpretation and prescribed trusts]*

Subsection (1) *[Interpretation]*

The Commission recommends the following amendments to the subsection in relation to various existing definitions of terms and expressions and also the introduction of new definitions.

"child"

Presently, the Act defines "child" as follows-

> "child" includes an illegitimate child, an adopted child, and a child *en ventre sa mere;* and "grandchild" has a corresponding meaning;

The Commission noted that the question of the illegitimacy of a child does not arise in the light of section 23 of the Constitution which provides that all children, regardless of the circumstances of their birth, are entitled to equal treatment before the law.

Further, the Commission pondered on the use of the term "child *en ventre sa mere*". Child *en ventre sa mere* is French which, literally translated means "a child in the mother's womb." The Commission observed that there is need to simplify the term child *en ventre sa mere* for easy comprehension of the provision by the average reader. The Commission recommends that the phrase should be simplified as follows-

"unborn child in the womb of its mother"

In fact, Garner [7] has criticized the continued use of the term child *en ventre sa mere* as an "unnecessary legalism."

The Commission moved away from the use of the word "illegitimate" and recommended the definition of "child" under the scheme of section 23 of the Constitution. However for purposes of succession, the Commission did not find it appropriate to attach any age to the definition of "child".

The Commission therefore recommends that the definition of "child" should be deleted and replaced as follows-

[7] Garner, Bryan A., *A Dictionary of Modern Legal Usage,* 2nd edition, (Oxford University Press, 1995), p. 319.

"child" means, a child of the deceased person, regardless of the circumstances of the birth of the child and includes an adopted child, and an unborn child in the womb of its mother ;

"dependant"

The Act defines "dependant" as follows-

"dependant" in relation to a deceased person means a person who was maintained by that deceased person immediately prior to his death and who was-

(a) a child, issue, wife, parent or *Mtsibweni* of that deceased person;

(b) any other person living with that deceased person; or

(c) a minor whose education was being provided for by that person, and who is incapable, wholly or in part, of maintaining himself; ".

The class of "dependants" as defined in the Act is primarily for the purpose of making the application under section 14 of the Act which permits persons in this class, meant to be close family members, to claim as beneficiaries if left out of a will.

The Commission raised a number of issues in relation to the definition. Firstly, the Commission does not find it appropriate to group members of a deceased person's immediate family together with any other relation of such deceased person. The Commission is of the view that the law should differentiate between members of the immediate family and other relations. Members of the immediate family should have a first call for purposes of benefiting from the estate of a deceased person. The Commission therefore recommends the introduction of the concept of immediate family in the Act which shall mean the spouse and the children of the deceased person.

The Commission further recommends the introduction of the definition of a member of immediate family in the interpretation provision as follows-

"member of immediate family", in relation to any person, means that person's spouse and child;

The Commission was aware that under section 2 of the Local Government Act[8], "immediate family member" is defined as including "spouse, child, parent, brother or sister of a person." Notwithstanding the comparable definition in the Local Government Act, the Commission recommends limiting the definition of member of immediate family to spouse and children only for purposes of succession and more so for the purposes of applications that may be made under section 14 of the Act.

The philosophy of the existing law under the Act proceeds on the basis that the husband cannot be a dependant of the wife and the Act excludes husband from the class of dependants.

[8] (Cap. 22:01).

The Commission recognised that while a wife may depend on a husband, in present times, the converse is also true in that a husband may depend on a wife. The Commission therefore recommends that the word "wife" should be replaced with the gender inclusive term **"spouse"**.

There is also the very conspicuous inclusion under the present law of *Mtsibweni* in the class of dependants. The Commission understands *Mtsibweni* to mean the maternal uncle of a spouse in a marriage in matrilineal societies of Malawi and under this particular law it is intended to refer specifically to a man's maternal uncle. The Commission does not find any justification for continuing with the specific inclusion of *Mtsibweni* in the class of dependants to the exclusion of, among others, maternal aunts or paternal uncles or paternal aunts. Accordingly, the Commission recommends deletion of the specific reference to *Mtsibweni* from the scope of a dependant.

Having introduced the concept of immediate family as distinct from "dependant", the scope of "dependant" under paragraph (a) should be limited to one's parents. The Commission therefore recommends replacement of paragraph **(a)** as follows–

(a) his or her parent; or

The Commission also considered defining "parent" beside a deceased person's biological father or biological mother to inlcude any person who brought up or raised the deceased person as his or her own child. This consideration related to the position of a person who stood in *loco parentis* to the deceased (meaning in the place of a parent).

The legal position regarding a person in *loco parentis* is that such a person is charged factitiously with a parent's rights, duties and responsibilities. *Loco parentis* will exist when a person undertakes the care and control of another in absence of such supervision by the latter's natural parents and in the absence of formal legal approval, and is temporary in character and is not to be likened to an adoption which is permanent.[9] The Commission was if the view that, in the case of Malawi, it was possible for several persons at divers times to be in *loco parentis* to an individual. The Commission therefore did not consider it prudent to define "parent" so as to include a person in *loco parentis* for purposes of succession.

The Commission recommends deletion of paragraph (b) (which recognizes as a dependant "any other person living with the deased person") as the breadth of persons who would qualify as dependants under that paragraph is not certain. Paragraph (c) becomes the new paragraph (**b**).

Accordingly, the definition of "dependant" will now read as follows-

" dependant" in relation to a deceased person means a person, other than a member of the immediate family, who was maintained by that deceased person immediately prior to his or her death and who was-

(a) his or her parent; or

[9] See the American case of *Griego v. Hogan* 377 P. 2d. 953.

(b) a minor whose education was being provided for by that deceased person, who is not capable, wholly or in part, of maintaining himself or herself;

"household belongings"

The Act defines "household belongings" as follows-

"household belongings" means furniture, bedding, crockery, cooking utensils, garden and farming implements and the articles used in and for purposes of maintaining and enjoying a dwelling house;

The Commission recommends a broader and more inclusive definition of "household belongings" as follows-

"household belongings" means articles and effects of every description used in, and for the purpose, of maintaining and enjoying a home and family life;

The Commission was of the view that a family vehicle (as opposed to a farm or vehicle used for business purposes) should be regarded as a household belonging. Under the existing principles of fair distribution under section 17, household belongings or effects continue to be used by the surviving spouse.

"inheritable property"

The Commission recommends the specific inclusion of "institutional money" and "clothing" as inheritable property. The Commission from its public consultations noted that these two items tend to be among the most commonly disputed items of succession.

The Commission recommends the following new definition of "inheritable property":

"inheritable property" includes all causes of action which survive a deceased person, clothing and institutional money but does not include any property which passes to another person by right of survivorship;

"issue"

In light of the recommendations made in relation to prescribed trusts below, the Commission recommends deletion of the definition.

"minor"

The Commission recommends to prescribe the age of a minor at 18 years consistent with the emerging trend with regard to the maturity age for entering into marriage and family life. Even with the reduced age of 18 years, there should be allowance for circumstances where adult responsibility is assumed at a lower age than 18 years. The Commission therefore considered that the threshold of 14 years of age was necessary considering that even for purposes of criminal

responsibility 14 years is the minimum age.[10] This has relevance to both disposal of property by will and to inheritance of property by young persons.

The Commission recommends the following definition:
"minor" means a person who has not attained the age of eighteen years unless-

(a) the person is lawfully married;

(b) the person is heading a household and is not below the age of fourteen years; or

(c) the person holds property in his or her own right in accordance with this Act or any other written law;

"near relative"

The Act defines "near relative" as follows-

a relative who would be entitled to a share in the estate of a deceased person if such person had died intestate.

The Commission considered whether the concept should be done away with or that the definition be limited to the extended family.

The Commission noted that the concept of "near relative" arises in the case of section 61 of the Act where all near relatives of a deceased person who are not minors may agree on the manner of distribution and administration of a small estate. The Commission has recommended the proper delineation of the class of persons who may qualify to enter into the agreement envisioned under section 61 of the Act.

The Commission therefore recommends deletion of the definition.

"prescribed trusts"

The concept of "prescribed trusts" is defined under subsection (3) of this provision and arises under subsection (2) of section 17 of the Act where it caters for interests of minors upon intestacy under Part V of the Act. The Commission considered at length as to whether the concept can still be retained.

The Commission noted that under subsection (3) of this provision the concept arises where a class of relatives is entitled to the estate of a deceased person. The Commission will show in its recommendations under Part V of the Act that no class of relatives or any class of persons is entitled to take benefit under a deceased estate as a class. Secondly, the Commission has recommended a new scheme of inheritance under Part V of the Act which dispenses with the application of the concept of "prescribed trusts".

[10] Report of the Law Commission on the Review of the Penal Code, Law Commission Report No. 4, *Malawi Gazette Extraordinary, 28th June, 2000.*

The Commission therefore recommends deletion of the definition.

"probate"

The Act defines "probate" as follows-

"probate" means the certificate of the Court that a will, of which a certified copy is attached, has been proved a valid will;

The Commission has recommended extending the jurisdiction over grants of probate and letters of administration to courts of resident magistrate and magistrate of the first grade. Secondly, the Commission recommends that the certification of a copy of the will must be in accordance with the Oaths, Declarations and Affirmations Act (Cap. 4:07) for reasons of certainty of legality.

The Commission recommends the following new definition of "probate":

probate" means the certificate of the court that a will, of which a certified copy in accordance with the Oaths, Declarations and Affirmations Act is attached, has been proved a valid will;

Cap. 4:07

"small estate"

The Act defines "small estate" as follows-

" small estate" means the estate of a deceased person consisting of property which does not exceed K20,000 in value at the date of the death of the deceased without making any deductions for debts;**"**

The Commission was concerned with the amount specified in the definition which was considered to be too low. The Commission recognised that while the value of money rapidly declines , revision of specified amounts in parent statutes tends to lag and recommends that the amount specified as a threshold for small estates should be specified in a schedule or subsidiary legislation where it may be varied by the Minister by notice in the *Gazette*. However, the Commission recommends a new starting point of K1,000,000 to be specified in the Act, which would then fall to be revised from time to time by subsidiary legislation.

Therefore, the Commission recommends the following new definition of small estate:

"small estate" means the estate of a deceased person consisting of property which does not exceed K1,000,000 or such higher amount as the Minister shall from time to time specify by notice in the *Gazette*, in value at the date of the death of the deceased without making any deduction for debts;

Insertion of new or other terms**:**

"court"

In light of the recommendation made in relation to section 21 of the Act to extend the jurisdiction over matters of wills and inheritance to courts of resident magistrates and magistrates of the first grade, the Commission recommends the inclusion of the following definition of "court" in the Act:

> **"court" means the High Court or a court having jurisdiction as specified under section 20;**

"court of probate"

The Commission recommends that the definition of "court of probate", being of general application in the Act, should be moved from section 57 of the Act and introduced as part of subsection (1) of section 2 as follows-

> **"court of probate" means a court or an authority by whatever name designated, in any country, having jurisdiction in matters of probate;**

"institutional money"

The Commission noted that this expression has been defined under section 63 of the Act and considers that, being a definition of general application in the Act, the appropriate place for this definition is under subsection (1) of section 2 of the Act, the general interpretation section.

With regard to the text of the definition of "institutional money", the Commission therefore recommends that the definition of "institutional money" should be provided for under subsection (1) of section 2 of the Act.

The Commission debated at length as to whether shares or money due under a court order or compensation under the Workers' Compensation Act (Cap. 55: 02), presently not listed as institutional money, do not come within the ambit of "institutional money". The Commission was aware that shares are not readily liquidated and compensation under the Workers' Compensation Act is subject to a court order before it becomes available to the worker. However, the Commission was convinced that any money due under a court order and compensation under the Workers' Compensation Act should form part of "institutional money" and did not find sufficient ground for a contrary position. Additionally, the Commission recommends to include as "institutional money", money in treasury bills and other Government bonds, and (for future developments) money held with any institution to be prescribed by the Minister.

The Commission therefore recommends the following new definition of "institutional money":

> **"institutional money" means money –**

(a) held on a deposit or current account with a bank or a financial or similar institution;

(b) due under any policy of insurance or assurance;

(c) due under provisions of any provident fund;

(d) by way of gratuity, pension, terminal benefits, leave pay or otherwise under the terms of employment of the deceased;

(e) received by any public officer, other than the Administrator General, or received by a bank or a financial or similar institution, as representing the property of a person domiciled in Malawi who has died outside Malawi;

(f) held by way of treasury bills or other government bonds;

(g) due under a court order;

Cap. 55:02 **(h) due under the Workers' Compensation Act; or**

(i) held in or with such other institution as the Minister may prescribe by an order published in the *Gazette;*

"Probate Rules"

The Commission recommends the definition of the expression as follows-

"Probate Rules" means rules made by the Chief Justice under section …;

"Provident Fund"

The Commission recommends the definition of the expression as follows-

"provident fund" means a fund for the future welfare of any person and includes a similar provision for employees;

"spouse"

The Commission having, for gender inclusiveness, introduced the concept of spouse under the definition of member of immediate family considered whether there was need to provide for a definition of spouse to take account of the types of marriages that are recognised under section 22 of the Constitution. Some Commissioners felt that it is possible for a mistress (or a male equivalent) to fall within the ambit of spouse and therefore claim a benefit under the estate of the deceased person if the term is not properly defined. Of great concern were the concepts of marriage by repute or marriage by permanent cohabitation under subsection (5) of section 22 of the Constitution and the consequences and effect of such marriages.

In the ordinary sense, "spouse" means "a person's partner in marriage." The word originates from the Latin word "*sponsus*" which literary translated means "betrothed man". Black's Law Dictionary defines "spouse" as "one's husband or wife". The definition entails that celebration of a valid marriage or indeed the recognition of a relationship as a valid marriage is a determinant of whether any two persons can be in a "spouse and spouse" relationship. However, Garner[11] is more forthright, stating that "spouse is a word that lawyers use much more often than non-lawyers, who are accustomed to husbands and wives. Certainly in referring to a particular husband or wife, spouse is not the best word…" Perhaps Garner is a bit too blunt. The point however remains that spouse can only refer to persons in a marital relationship.

In the New Zealand case of *Re CCR and DJR (infants)*[12], Leicester, J., in interpreting the word "spouse" in section 8 (4) of the Adoption Act, 1955 (of New Zealand) [the provision allows a court to dispense with the consent of a spouse if it is satisfied that the spouses are living separately and that their separation is permanent] said: "Before it can make use of this subsection, the Court must be satisfied that at the time of the application the spouses are living apart and that their separation is likely to be permanent…. "spouses"… is a term appropriate to married people in relation to each other as partners in marriage, a husband to his wife or a wife to her husband…". In the case, consent of a spouse in considering the petition for adoption was dispensed with.

Finally therefore the concerns that spouse may include a mistress (or a male equivalent) are unfounded as it is a matter of proof both of fact and law as to whether a particular relationship is marital or not. In the end, the Commission resolved not to define the term "spouse".

Subsection (2) *[Meaning of intestate]*

The provision states as follows-

> **"**(2) A person is said to die intestate if he dies without leaving a valid will.".

While the Commission agrees in principle with the provision, the Commission recognised the fact that validity of a will is in accordance with Part II of the Act. The Commission therefore recommends that the subsection should specifically make reference to Part II of the Act. Subsection (2) should therefore be redrafted as follows-

> **(2) A person is said to die intestate if he or she dies without leaving a will which is valid in accordance with Part II of this Act.**

Subsection (3) *[Prescribed Trusts]*

The Commission recommends deletion of the provision following its recommendation above in relation to the definition of "prescribed trusts".

[11] *op. cit.*, 825.
[12] (1962) *NZLR* 561 at 563.

SECTION 3 *[Variation of customary law relating to inheritance]*

The provision states as follows-

Except as provided for in this Act, no person shall be entitled, under customary law, to take by inheritance any of the property to which a deceased person was entitled at the date of his death.

The effect of this provision is to recognise that the law of succession in Malawi has been fully codified under this Act and that customary law does not apply or applies only as provided in this Act.

The Commission recommends retention of the provision but that it should be extended to similarly exclude the application of other written laws. The Commission therefore recommends insertion of the phrase **"under any other written law or"** before the phrase "under customary law".

PART II

WILLS

SECTION 4 *[Powers which may be exercised by will]*

Subsection (1)

The Commission recommends retention of the provision subject to transposing the phrase "subject to this Act" to the beginning of the sentence.

The provision will now read as follows-

> **(1) Subject to this Act, a person who is of sound mind and is not a minor may dispose of all or any of his or her property after his or her death by will.**

Subsection (2)

The Commission recommends the insertion of the phrase "**who are not minors**" after the word "persons" in the first line of the provision, as a necessary qualification for persons to administer a will.

The provision will read as follows-

> **(2) A will may appoint persons who are not minors to administer the estate of the testator or any property which is disposed of by will.**

Subsection (3)

The Commission recommends retention of the provision.

Subsection (4)

The Commission noted that the subsection does not bring out the fact that the minor child is actually the beneficiary under the person's will. The Commission therefore recommends insertion of the phrase "**for the administration of the benefits of such child under the will**" after the word "child" in the first sentence.

Further, the Commission recommends that the two sentences of this subsection should be combined by deleting the full stop after the insertion of the phrase as recommended in the foregoing and replacing it with a semi-colon and inserting the conjunction "**and**" immediately after the semi-colon. The subsection will now read as follows-

> **(4) A parent may by his or her will appoint a guardian of his or her minor child for the administration of the benefits of such child under the will; and, subject to Part XIII, a guardian so appointed shall, to the exclusion of any customary guardian, have such powers as are conferred by law upon a guardian.**

Further more, the Commission noted that there is no provision in the Act in the event of resignation or death of the guardian appointed by the testator. The Commission recommends the following provision as a new subsection **(5)**:

> **(5) Where a person appointed as a guardian appointed under subsection (4) dies or otherwise desists from taking up the appointment, the court shall appoint a guardian in his or her place.**

Subsection (5)

The provision will now become a new subsection **(6)**.

Further, the Commission observed that while traditional or local courts are recognised under subsection (3) of section 110 of the Constitution, traditional courts under the scheme of the Traditional Courts Act (Cap. 3:03) are no longer functional.

The Commission noted that prior to independence, notwithstanding the passing of the Local Courts Act, the system obtaining in Malawi was a High Court system modeled upon the High Court system in England and Wales with no parallel court system of similar jurisdiction. With the coming into force of the Traditional Courts Act, 1971, Malawi adopted two parallel court systems:

(a) The High Court system comprising subordinate courts (magistrates courts), the High Court and the Supreme Court of Appeal. Regulation of this system is through the Courts Act (Cap 3:02) and the Malawi Supreme Court of Appeal Act (Cap 3:01), respectively. The High Court system forms the judicial branch of Government.

(b) There was also the Traditional Courts system comprising, Traditional Courts of Grades A and B, Traditional Appeal Court, District Traditional Court, Regional

> Traditional Court and the National Traditional Appeal Court. The Traditional Courts Act regulated this court system.

The control of the Traditional Courts system vested in the Ministry of Justice through the Chief Traditional Courts Commissioner and formed part of the executive branch of Government. This was an anomaly in that it breached the doctrine of separation of powers. Further, since the executive directly controlled these courts, their independence was greatly compromised. The executive cannot enforce or execute the law and at the same time be an arbitrator of the law.

Such concerns and the injustices brought by these courts compelled the framers of the Constitution to clearly spell out in section 9 of the Constitution that the Judiciary shall have the responsibility of interpreting, protecting and enforcing the Constitution and all laws in an independent and impartial manner. In doing so, the courts shall have regard to legally relevant facts and the prescriptions of law. Resulting from the above, the Constitution (in Chapter IX) establishes a single court system which has the Supreme Court of Appeal at the top, then the High Court and finally courts subordinate to the High Court.

However, the Constitution also provides, in subsection (3) of section 110, that Parliament can make or enact a law for the regulation of traditional or local courts which are to be presided over by lay persons or chiefs. Such courts shall have limited jurisdiction exclusively to civil cases at customary law and such minor common law and statutory offences which can be prescribed by an Act of Parliament. As yet, no law has been enacted to date to establish this class of subordinate courts.[13]

A close look at the present Traditional Courts Act reveals that the Act is grossly inconsistent or at variance with the Constitution in so far as jurisdiction is concerned. Traditional Courts had very wide jurisdiction as can be demonstrated by section 15 of the Constitution Act of 1966 (repealed) which stated as follows-

> "Until Parliament otherwise provides, the civil and criminal jurisdiction of the Supreme Court of Appeal, the High Court and all subordinate courts (including Traditional Courts) shall, subject to this Act and to any law in force in Malawi, be exercised in conformity with the existing laws and the substance of the common law and the doctrines of equity.".

There are several gray areas in the Traditional Courts Act which need not be discussed in the current discourse. With the shortcomings identified above, no action has as yet been taken to address the inconsistencies of the Act with the Constitution in terms of the proviso to section 200 of the Constitution.

No amendment or repeal of Traditional Courts Act nor declaration of the Act to be unconstitutional has ever taken place. The only thing Government did was to suspend the operation of traditional courts in practice and incorporated such courts into the High Court system and renaming them as magistrate's courts of the fourth grade and are recognized as such under the Courts Act.

[13] The Law Commission has commenced a law reform programme that will consider the establishment of this Cadre of Courts.

It is debatable whether Traditional Courts are at law still in existence even though they are not in physical operation.

In light of the foregoing, the Commission recommends deletion of any reference to "Traditional Courts" as established by the Traditional Courts Act. Instead the reference should be to "**subordinate court**".

The Commission recommends to combine the two sentences in subsection (6). The provision will now read as follows-

> **(6) A will may nominate a subordinate court or a traditional or local court to which applications relating to the administration of the testator's estate may be made and a court so nominated shall, subject to section 20, have jurisdiction accordingly.**

SECTION 5 *[Making of wills]*

Subsection (1)

The Commission observed that subsection (1) of section 4 of the Act provides that a person of sound mind and *sui juris* (a person who has attained the age of majority at law and is not under a legal disability to act in his or her own right), can dispose of all or any of his property after his death by will.

In examining subsection (1) of section 5 of the Act, the Commission noted that:

(a) a will must be in writing and signed by the testator;

(b) the testator and the two competent witnesses must all sign in the presence of each other; and

(c) a person is a competent witness to the attestation of a will if he is a person of sound mind and *sui juris*.

The Commission queried the requirement of having a will in writing and considered whether the law cannot provide for oral wills keeping in mind that the literacy rate in Malawi stands at 44% for women and 72% for men[14] and further that women are one of the vulnerable groups of our society.

By way of background, in England (from where Malawi draws its common law including the law of succession, oral wills were effective in respect to all types of property up to 1540 and in respect of personal property up to 1837. The use of oral wills in fact declined after 1677, by reason of the Statute of Frauds, and except for privileged wills, oral wills were abolished in 1837.

[14] Malawi Poverty Reduction Strategy Paper (Government of Malawi, 2002), p. 88.

In 1540, a Wills Act was passed which enabled most real property to be devised by will. The will was required to be in writing although there was no requirement for the signature of the testator or for attestation by a witness or indeed for the writing itself to be that of the testator.

Notwithstanding the enactment of the Wills Act, 1540, ecclesiastical (church) courts applied the law relating to personal property and they permitted the making of oral wills in certain circumstances. Such wills which were termed "nuncupative" wills could be validly made provided the testator declared his or her will before a sufficient number of witnesses.

In 1677, stringent formalities in relation to will - making were introduced in the law with the passing of the Statute of Frauds. Section 5 of the Statute of Frauds required that a will devising real property should be in writing and signed by a testator or some other person in his or her presence and by his or her express direction and should be attested and subscribed in the presence of the testator by three or four credible witnesses. The provision went on to state that in the absence of the elaborate formality, the gift shall be "utterly void and of no effect".

Section 5 of the Statute of Frauds however did not apply to the execution of wills of personal property whose value did not exceed thirty pounds. Beyond such threshold, the Statute of Frauds had vigorous formalities regulating the admission of oral wills to probate.

In jurisdictions where oral wills are permitted, it is often a requirement that they be reduced in writing. In Scotland, for example, oral wills are allowed in relation to small bequests. Oral wills are said to afford a dying person who has no opportunity to make a formal will the privilege of making a last minute oral disposition.

In jurisdictions where oral wills have not been introduced or have since been outlawed or substantially restricted in their application, it is usually on the basis that oral wills create uncertainty and give rise to litigation because of difficulties of proof and interpretation of oral statements.

The Commission also noted that under rule 13 of the Probate (Non-Contentious) Rules in Malawi, a Judge (of the High Court) has to satisfy himself or herself that a testator had knowledge of the contents of a will at the time of its execution before admitting that will to proof if it appears to the Judge that the will in question was made by a blind or illiterate testator.

In light of the discussion above, the Commission noted that even where oral wills have been introduced, it remains a requirement that they should be reduced in writing. On further reflection therefore the Commission resolved to retain the requirement that a will must be in writing and did not pursue the idea of allowing for oral wills.

Subsection (2)

The subsection provides that any person who is of sound mind and is not a minor is a competent witness for the purpose of section 5 of the Act.

The Commission recommends retention of the provision.

Subsection (3)

The subsection provides that a will may be made outside Malawi in respect of property in Malawi. A will that is so made shall only be valid if made in accordance with one of the following three scenarios:

(a) the will complies with subsections (1) and (2) of section 5 of the Act;

(b) the will complies with the law of the place where it was made; or

(c) the will complies with the law of the place where the testator had his or her domicile at the time of making the will.

The application of the provision of this subsection was discussed in the Malawi case of *In the Estate of Barretta*[15]. In that case, Skinner, CJ, held that the formalities of attestation of wills prescribed by subsection (1) of section 5 of the Act apply only to wills made in Malawi and required to be executed in accordance with Malawi law.

The subsection allows the admission of wills valid under foreign law. It applies to foreign nationals as well as to citizens of Malawi and to real and personal property. However, the will must have been made outside Malawi.

Finally, the Court stated that there is nothing in section 5 of the Act as a whole that would prevent a will being admitted to probate under the common law rule that a will of movable property had to conform to the formalities required by the law of the domicile of the testator or at the time of his or her death.

In *Barretta*, the deceased person was domiciled in Italy. Prior to his death and while in Malawi, he made an unwitnessed holograph will which complied with the law in Italy. The Court granted the letters of administration with a will annexed as prayed for on the basis that the common law rule on the formalities of a will in respect of movable property applied and not so much on the basis of subsection (3) of section 5 of the Act.

The Commission therefore recommends retention of the provision. The two sentences in the subsection should be combined into one.

Subsection (4)

The provision allows a member of the armed forces of Malawi in actual service as such to make a will that does not necessarily comply with the formalities set out under subsection (1) of section 4 of the Act and subsection (1) of this section.

The Commission recommends retention of the provision.

[15] 11 MLR 110.

New subsection **(5)**

The Commission considered that there was need for the law to prescribe a format of a valid will which would serve as a guide to the general public. While some reservations were made to guard against over-formalization of the will-making process it was resolved that the Minister should be empowered to prescribe a format of a valid will and the Commission has developed the requisite draft format.

The Commission therefore recommends the following provision as the new subsections **(5)** and **(6)**:

> **(5) The Minister may, for the guidance of the general public, by notice in the *Gazette,* prescribe a form in which a will may be made.**
>
> **(6) The validity of a will shall not be affected by reason of the fact that it is not made in the form or any other form prescribed by the Minister if that will otherwise complies with the requirements of this section.**

SECTION 6 *[Witnesses may not take benefit under will]*

The Commission observed that the provision states that neither a witness nor the spouse of a witness to a testator's signature is entitled to take any benefit under the will.

The original rule of evidence at common law was that a person, and that person's spouse, were disqualified from giving evidence in a case in court in which either of them was interested. Consequently, if a beneficiary or the spouse of a beneficiary witnessed a will that witness could not testify to the execution of the will in probate proceedings. The result was that sometimes a will could not be admitted to probate at all and the testator's obvious intention tended to be frustrated.

By the Wills Act, 1752, of England, the rule was changed to enable a witness to give evidence in probate proceedings but at the same time disqualifying the witness and the witness's spouse from taking a benefit under the will. The rule remained embedded in the Wills Act, 1837, of England.

The rule as captured under section 6 was intended to prevent fraud and to ensure testamentary freedom as potentially such a witnessing beneficiary could influence the testator by duress or other undue means to make a substantial bequest or devise in their favour. Romer, L.J., in the English case of *Re Royce's Will Trusts*[16], summarized the purpose of a like provision to section 6 as "to ensure that a man's testamentary disposition really does truly and freely express his own wishes, uncoerced by outside influence." Lord Russell L.J. further stated *In the Estate of Bravda*[17] that "this is necessary to ensure reliable unbiased witness of due execution".

It has been argued that this provision is too stringent if applied in the Malawian context[18]. As the formal requirement for witnesses under the provision only relates to the witnessing of the

[16] [1959] Ch. 626, 637.
[17] [1968] 1*WLR* 479, 492.
[18] Naomi Ngwira, *et al, op. cit.,* p. 52.

signature of the testator and not the actual contents of the will, it is actually possible that the witness can attest to the will without actually knowing what the substantial provisions of the will are. However, the United Kingdom Law Reform Committee[19], also noted that, "it is those who help the testator to prepare his will who are really in a position to influence its contents yet there are no rules preventing them from benefiting under it". On its part, the Commission queried that if the lawyer who actually not only views the contents of a will but influences the testator can lawfully benefit under it (notwithstanding that he or she is bound by ethics not to unduly influence the testator), why should the witness who is a witness only to signature and not the contents be deprived of his or her benefit?

In this regard, the Commission felt that the evidential uncertainty as to whether or not the attesting witness actually saw or knows of the actual contents of the will so as to have influenced the testator unduly could be eliminated by the insertion of a provision to the effect that the attesting witness should not see the contents of the will and should be a witness of the testator's signature only.

The problems caused by not allowing a witness to benefit from a will arise especially as a person is highly likely to invite close friends, family or confidantes to witness the signing of his or her will. Indeed as Ngwira, *et al*[20] point out these may be the very people that one wishes to be beneficiaries under the will. Further, Lord Mansfield expounded in the case of *Wyndham v. Chetwynd*[21], that "shall tokens of kindness to friends, servants or the like, who may be unwarily called in as witnesses, vitiate a solemn and well-weighed disposition of a man's estate …?"

A scenario that was considered by the Commission to be typical in Malawi in relation to writing wills is presented by circumstances where the testator, at his or her death bed, miles away from home in a foreign hospital receiving treatment will naturally call upon those nearest to him or her. In most cases these persons will be a spouse or a child of the testator and perhaps a nurse. Whilst the formal requirement of two witnesses under section 5 of the Act will have been complied with the gifts made out to the witnessing spouse, child or nurse will not take effect contrary to the wishes of the testator.

As the research by Ngwira, *et al*[22] points out, the majority of people do not know the formal requirements relating to the making of wills. People do not necessarily understand the importance of observing the formal requirements and the effect which the failure to observe them will have on the validity of their will or particularly the validity of the gifts regardless of their intention.

The effect of section 6 therefore is to deny a benefit under a will to an otherwise eligible beneficiary. For the protection of the interests of a spouse, particularly a widow, and children, the Commission did not approve of a provision in the law that operates to deprive a spouse and children of property that the deceased person intended to benefit them.

[19] 22nd Report, Cmnd. 7902, pp 6-7.
[20] Ngwira, *et al, supra,* p. 53.
[21] [1557] 1 Burr. 414.
[22] Ngwira, *et al, supra*.

The Commission acknowledges that circumstances may indeed exist where the benefit accruing to a witness raises suspicion of fraud or undue influence. The converse however is that an innocent witness suffers the consequences of a blanket rule as provided for under this section.

The Commission was of the view that there should not be an absolute disqualification of a witness from taking a benefit under a will at least in relation to members of the immediate family as long as the provision allowing such a benefit to such witness carries sufficient safeguards. The onus should be placed on the interested witness, who is a member of the immediate family, to satisfy a court that it was appropriate for him or her to take the benefit.

The Commission therefore recommends the following new provision on benefits accruing to witnesses:

(1) Subject to subsection (2) a person who witnesses the testator's signature of a will and a spouse of such witness shall not be entitled to take any benefit under the will but shall be entitled to act as executor of the will:

Provided that a legatee under a will shall not be disentitled to a benefit under the will by reason that he or she or his or her spouse has attested a codicil confirming the will.

(2) A benefit under a will to a witness who is a member of the immediate family of the testator shall be valid if a court is satisfied, upon the application of or on behalf of the witness, that-

(a) there was no other competent person who could have been witness to the will;

(b) the benefit is fair in all the circumstances or the benefit consists of property that would have devolved to the witness upon intestacy; and

(c) there is no evidence of fraud, coercion, undue influence or other impropriety or suspicious circumstances surrounding the making of the will.

(3) A benefit to a witness as provided under subsection (2) shall not take effect except upon an order of the court made after hearing the application in respect thereof confirming the conditions set out in that subsection.

SECTION 7 *[Safe custody of wills]*

The provision states that a living person may deposit his will for safe custody with the Registrar of the High Court or at the office of the District Commissioner, subject to such conditions relating to the deposit and withdrawal thereof as may be prescribed in probate rules.

The Commission noted that in practice testators deposit wills with other offices and institutions besides the Registrar or the office of the District Commissioner. The Commission was of the view that there is need to extend the category of institutions mandated to provide safe custody of wills. The Commission considered institutions like magistrates' courts, banks, law

firms, employers, insurers, and administrators of provident funds as appropriate for safe custody of wills.

The Commission deliberated at length the requirement of subjecting the other classes of persons besides the Registrar or the office of the District Commissioner or the magistrate's courts to conditions relating to deposit and withdrawal of wills as prescribed in Probate Rules. However, the Commission was of the view that only the public offices of the Registrar of the High Court, the office of the District Commissioner and, as recommended under section 21 below, a resident magistrate and a magistrate of the first grade, should be subject to Probate Rules on deposit and withdrawal of wills.

The Commission recommends an additional provision under this section as a new subsection **(2)** which shall explicitly recognise that a person may deposit his or her will with any other institution which, however, shall not be subject to Probate Rules regulating deposit and withdrawal of wills.

The Commission therefore recommends the following new provision:

> **(1) A living person may deposit his or her will for safe custody with the Registrar or at the office of the District Commissioner or a resident magistrate or a magistrate of the first grade subject to such conditions relating to the deposit and withdrawal thereof as may be prescribed in Probate Rules.**
>
> **(2) Nothing in this section shall preclude the deposit of a will with any other person, whether such other person is a bank, an insurer, a law firm, an administrator of a provident fund or an employer.**

SECTION 8 *[Revocation and alteration of wills]*

The Commission recommends retention of this provision.

SECTION 9 *[Effect of subsequent marriage]*

The provision states that a marriage registered under the Marriage Act (Cap. 25: 02) or, in the case of a person domiciled outside Malawi, a marriage solemnized or contracted outside Malawi, revokes a will that was not made in contemplation of marriage with a specified person.

It is implicit from the provision that a marriage at custom or a marriage by repute or a marriage by permanent cohabitation cannot revoke a will.

The Commission observed that the provision is discriminatory in terms of section 20 of the Constitution in so far as it favours a spouse whose marriage is contracted under the Marriage Act as against a spouse under a marriage at custom or a marriage by repute or a marriage by permanent cohabitation. Further, in light of section 24 of the Constitution, a woman who marries at custom or whose marriage is by repute or marriage by permanent cohabitation is being discriminated against on the basis of her marital status.

Conversely, the Commission also noted that marriage at custom or marriage by repute or marriage by permanent cohabitation are potentially polygamous and the universal application of the provision will mean that there will be several revocations at the instance of each marriage contract.

In the South African legal system, there is no such rule as revocation of a will by marriage. Therefore, when the South African Law Commission[23] was reviewing the succession laws of that country, it considered whether it was desirable that rules be formulated that explicitly provide for the revocation of a will when a testator marries. After it considered several comments submitted on the question, the South African Law Commission resolved that it was not in favour of revocation of wills by marriage. The main objection was that a rule that effects revocation by marriage would significantly restrict a testator's testamentary freedom. Such a rule would imply that the testator's will, at the time of death, would actually be rewritten in an attempt to compensate for the testator's possible failure to make provision for the surviving spouse or descendants.

The above reasoning by the South African Law Commission would also be expressed in such a way that the legislature should not provide for exceptional or specific cases, especially when such provision would have negative impact on the testamentary freedom to be exercised by any person.

Lastly, the other suggested reason why a general rule on revocation by marriage would not be recommended is where the testator has other heirs in the will who have been appointed or provided for. If the status quo is maintained, there would be experienced prejudicial effects on other beneficiaries or heirs, for example, children.

On the other hand, our Commission noted that in jurisdictions where the rule has been retained the reforms have either increased the number of exceptions to the general rule or allowed more flexibility in respect of the exemption relating to a will made in contemplation of marriage. Examples of this approach include the State of Ontario in Canada, the States of Victoria, Queensland, New South Wales and Western Australia in the Commonwealth of Australia, and in England.

The strongest argument for retention of the rule is that when a person marries he or she assumes certain responsibilities due to the change of status and these are more likely to be reflected in the intestacy provisions than in a prior will which, in any event, was not made in contemplation of marriage.

The Commission having considered the arguments in favour of and against the rule recommends that the general rule should be retained and should apply to all types of marriages recognised under the Constitution or any other law in Malawi.

Further, the Commission considered the issue of qualification to the general rule, that is, whether exception should be made in relation to wills made in contemplation of a particular marriage or marriage generally. The Commission was of the view that the exception to the rule should be made in respect of a will made in contemplation of marriage to a particular person. The Commission took the view that in the case of the will made in contemplation of marriage to

[23] www.wits.ac.za/salc

a particular person the testator of such a will is most likely to have addressed his or her mind to the importance of the step he or she is about to take and will have arranged his or her affairs with full knowledge of the consequences.

- *Effect of divorce on a will*

Further still, the Commission noted that while marriage generally revokes a prior will, divorce does not. A gift in a will, in the event of a divorce, remains in full effect unless the will itself specifically provides otherwise. Therefore, unless a contrary intention appears in a will, a reference to a "husband" or a "wife" in a will means the husband or wife at the time the will was made and a beneficiary so described is entitled to take the benefit: see *In re Coley, Hollinshead vs Coley* [24].

When the Wills Act, 1837, of England was enacted, it was unnecessary for Parliament to consider the question of the effect which divorce should have on an existing will. Until 1857, a divorce in England was only possible by an Act of Parliament and was therefore rare. Today, the position in England is different and divorce is within the purview of the courts. The situation in Malawi is not any different.

The Commission was of the view therefore that as divorce proceedings will have taken care of matters of distribution of property, custody of children, maintenance of the (former) spouse and maintenance of the children of the marriage, at least in the case of a marriage under the Marriage Act, the law should provide for the revocation of gifts to the former spouse under a will in the subsequent event of a divorce.

In light of the recommendations of the Commission above, the provision will now read as follows-

(1) A will shall be revoked by the marriage after the making of the will by the testator unless the will was made in contemplation of marriage with the person who becomes the spouse of the testator.

(2) Upon the end of a marriage of a testator by reason of divorce, unless the will provides otherwise-

(a) any gift made in a will in existence at the time the marriage ends by the testator to the spouse; or

(b) any appointment of the spouse as an executor, trustee, advisory trustee or guardian made by the will,

shall be revoked.

[24] [1903] 2 Ch. 102.

PART III

CONSTRUCTION OF WILLS

SECTION 10 *[Intention of testator to prevail]*

The Commission recommends retention of the provision, except the reference to "Court" should be to "**a court**" to refer to the High Court and courts of resident magistrates and of first grade magistrates as the Commission has recommended in relation to section 21 as to courts that may exercise jurisdiction in the Probate and administration of deceased estates.

SECTION 11 *[Where two constructions possible]*

The provision states that where any clause of a will is susceptible of two meanings, one of which has some effect and one of which can have none, the former shall be preferred. The provision reinforces the general rule of interpretation as expressed in the maxim "*utres magis valeat quam pareat*" (it is better for a thing to have effect than to be made void).

The Commission was initially concerned that the law does not seem to cover the status of a bequest or devise in the event that a particular provision under the will has no effect.

The Commission noted however that under section 10 of the Act, the intention of the testator shall as much as possible prevail and be given effect and that the intention of a testator as disclosed by his or her will cannot be set aside merely because it cannot take effect to the full extent.

By operation of law, where property has not been fully disposed of under a will, one may turn to the clause in the will dealing with property falling in the residue. If there is no clause under the will dealing with property falling in the residue, then such property falls into intestacy. Therefore, in the present scheme of the Act, Part V of the Act, on intestacy, shall apply.

In the case of *Attorney General of Nyasaland v Administrator General of Nyasaland and Four Others*[25], Tredgold, P., delivering the judgement of the Court of Appeal of Rhodesia and Nyasaland, held that it is a general principle of the construction of wills that the intention of the testator is to be collected from a consideration of the will as a whole. A testamentary gift which has failed falls into the residue of the estate. As already stated, the residue of the estate may be covered under a will or intestacy rules may apply.

In the end, the Commission recommends retention of the rule under the section on construction of wills.

SECTION 12 *[Will to speak as from death]*

The Commission recommends retention of the provision subject to deletion of the provision making the presumption of a gift to a child or issue of the testator. This is in line with

[25] (1952) 1 ALR Mal. 249. See also *Kampila vs. Republic* [1966 – 68] 4 ALR Mal. 320.

the recommendation the Commission has made regarding "issue" and "prescribed trusts". Further, the deletion would be consistent with common law rule against perpetuities.[26]

SECTION 13 *[Technical words and terms not necessary]*

The Commission recommends retention of this provision which states that it shall not be necessary for technical words to be used in a will. However, the Commission noted that the provision is silent as to the language in which a will may be written. As the law does not specify any language in which a will may be written the converse is that a will may be written in any language. In the end, the Commission did not consider it necessary that the section should expressly provide that a will may be written in any language.

PART IV

PROVISION FOR DEPENDANTS

The Commission observed that the provision for dependants is in respect to wills and nothing else.

This Part applies only in respect of wills to allow for dependants make claims where the deceased has not made adequate provision for them in his or her will. It consists of only one section to that effect, namely, section 14.

SECTION 14 *[Provision for dependants not adequately provided for by will]*

The Commission observed that the provision allows a dependant to challenge a will where he or she feels that the will has inadvertently omitted to make provision for the dependant. The Commission considered this position of the law undesirable and was strongly of the view that persons who are not members of the testator's immediate family but are members of his or her extended family should not be allowed to challenge his or her wishes. Instead, the Commission considered it appropriate to allow only the members of a testator's immediate family to challenge a will on the basis of this provision.

The Commission therefore recommends that the provision should be redrafted to incorporate the changes as proposed. The heading of the Part and the marginal note will change accordingly.

The Part and the provision will now read as follows-

PART IV

PROVISION IN A WILL FOR MEMBERS OF THE IMMEDIATE FAMILY OF THE TESTATOR

[26] See also *Somanje vs. Somanje and Ors. (No. 2)* [1993] 16(2) MLR 826.

Provision for members of immediate family not adequately provided for by will

(1) On the application in the prescribed manner of a person claiming to be, or to be acting on behalf of, a member of the immediate family of a testator, a court may, if it is satisfied that-

(a) the applicant is a member of the immediate family or person acting on behalf of such member; and

(b) the testator has, intentionally or inadvertently or otherwise, omitted to make a reasonable provision in his or her will for such member,

order that a reasonable provision shall be made for the member in accordance with this section.

(2) Where an application is made under subsection (1), it shall be competent for the court to order, as the court considers on reasonable grounds to be just and proper, that such part of the value of the testator's estate after payment of the testator's debts and funeral and administration expenses of the estate, be applied for the maintenance of the member, and the manner in which it is to be so applied.

(3) In considering whether an order under this section should be made and, if so, what order is proper, the court shall have regard to-

(a) the nature of testator's property;

(b) any past, present or future capital or income from any source of the applicant;

(c) the conduct of the applicant in relation to the testator and otherwise;

(d) the circumstances of the other members of the immediate family and the beneficiaries under the will; and

(e) the general circumstances of the case.

PART V

INTESTACY[27]

SECTION 15 *[Property in respect of which there is intestacy]*

Section 15 of the Act provides that if a person dies without having left a will which is valid under section 5 there shall be an intestacy in respect of the property to which he or she was entitled at the date of his or her death. It is also recognised under this section that intestacy may

[27] see also Necton Mhura, *Intestacy* (Chancellor College, Zomba, 1981) (unpublished) which is a very useful monograph on the law of intestacy under this Act.

occur even in instances where a deceased person does not dispose of all of his or her property under a will. In that case, there is an intestacy in respect of the property which is not disposed of by will.

Sections 16 to 19 inclusive of the Act provide for the rules governing the inheritance of property upon an intestacy. The Act divides the categories or regimes of inheritance upon intestacy into five, namely:–

(a) The intestate property of a person to whose estate customary law would, if it were not for the Act, apply. This category is governed by sections 16 and 17 of the Act;

(b) The intestate property of a person domiciled in Malawi to whose estate customary law would not have applied whether or not the Act had not come into operation. This category is governed by subsections (1) and (2) of section 18 of the Act;

(c) The immoveable property of a person not domiciled in Malawi who dies intestate. This category is also governed by subsections (1) and (2) of section 18 of the Act;

(d) The property of a member of a minority community among whom an established custom existed prior to the coming into operation of the Act, governing the rights of inheritance to his or her property. This category is governed by subsection (3) of section 18 of the Act; and

(e) The moveable property of a non-domiciled deceased person leaving children by a mother who is a citizen of Malawi. This category is governed by section 19 of the Act.

SECTION 16 *[Inheritance of intestate property in certain cases]*

Section 16 of the Act deals with the application of the law to the intestate property of a person to whose estate customary law would, if it were not for the Act, apply. The rules governing the distribution of property upon intestacy are dependent upon the area where the marriage was arranged.

Under paragraph (a) of subsection (2), it is stated that if a marriage was arranged in an area described in the Schedule, the persons entitled to such intestate property shall be-

(i) as to the half share, the persons entitled upon a fair distribution in accordance with section 17 of the Act. Persons entitled under such fair distribution are the wife, issue and dependants of the intestate;

(ii) as to the other half share, the heirs in accordance with customary law.

It should be noted that the areas described under the Schedule are: Chitipa, Karonga, Rumphi, Nkhata Bay, Mzimba and Nsanje. These areas are predominantly patrilineal societies.

Under paragraph (b) of subsection (2), it is stated that if the marriage was arranged in any other area of Malawi the persons entitled to such intestate property shall be-

(i) as to a three-fifths share, the heirs in accordance with customary law;

(ii) as to the remaining two-fifths share, the persons entitled upon a fair distribution under section 17 of the Act. As already stated, persons entitled upon a fair distribution are the wife, issue and dependants of the intestate.

The Commission noted that the areas that would be covered by paragraph (b) of subsection (2) would predominantly be matrilineal societies.

Subsection (3) provides that notwithstanding subsection (2), customary heirs of a deceased man shall not be entitled to any share in the household belongings used by a widow of the deceased during his lifetime, or in the doors, windows or other fittings of any house provided for a widow of a deceased in which she wishes to continue to reside.

Subsection (4) provides that where a deceased man left no wife, issue or dependant surviving him and also in the case of a deceased woman the persons entitled to the property shall be ascertained in accordance with customary law. However, the proviso to the subsection provides that (a) where the (deceased) woman leaves children, such children shall be solely entitled; and "child" shall have the meaning under paragraph (a) of subsection (2) of section 17 of the Act (child includes the issue of the deceased child who is entitled upon prescribed trusts); and (b) where the deceased person left no spouse, issue, dependant, parent or grandparent or issue of any grandparent surviving him, the Government shall be entitled to such property.

Subsection (5) provides that a widow shall hold her share of her deceased husband's estate upon the condition that if she re-marries any portion thereof which still subsists at the date of such re-marriage shall become divisible between her children by the deceased upon a fair distribution in accordance with section 17 of the Act.

Subsection (6) gives the Minister power to amend the First Schedule (the provision should read Schedule as there is only one Schedule to the Act) by adding or removing from the Schedule any area of Malawi. The order may operate retrospectively.

The Commission raised a number of issues upon a consideration of section 16 of the Act. First, the Commission observed that under subsection (1), the choice of law governing the deceased's estate is determined upon the area where the marriage was arranged. The Commission understood the provision to mean the customary law of the area forming the basis of the validity of a marriage. However, despite the issue of the choice of law, the Commission notes that the law discriminates as between (a) the surviving spouse in a patrilineal society who gets a one-half share (jointly with the children and dependants of the intestate) and (b) the surviving spouse in a matrilineal society who gets a two-fifths share (jointly with the children and dependants of the intestate). One half being greater than two-fifths, the law favours one category of the beneficiaries of the intestate against the other category.

Secondly, under subsection (4), the law does not make a like provision for a deceased man as it does for a deceased woman survived by children. On that score, the law is discriminatory as between a man and a woman who are both survived by children.

Thirdly, subsection (5) is discriminatory against women on the basis of marital status as a widow loses her share of the estate upon re-marriage. An argument can be raised that this is contrary to subsection (1) of section 24 of the Constitution which prohibits discrimination on the grounds of marital status. The Commission however recognized that it would be reasonable to make exception with regard to property on customary land to allow for such property to devolve to children in the event that their surviving parent remarries whether or not he or she moves to a different locality.

Fourthly, as the Act does not define customary heirs, the law creates problems in ascertaining the identity of this class of persons often rendering this class very wide.

SECTION 18 *[Inheritance of intestate property in other cases]*

Subsections (1) and (2)

Subsection (1) of section 18 of the Act covers the following two categories:

(a) the intestate property of a person domiciled in Malawi to whose estate customary law would not have applied whether or not the Wills and Inheritance Act had come into operation; and

(b) the immoveable property of a person not domiciled in Malawi who dies intestate.

Subsection (2) provides for the rules governing the distribution of property in the two categories above. The provision states that the persons entitled to the property on intestacy shall be ascertained as follows-

(a) the surviving spouse of the deceased shall be entitled to the first K10,000; and

(b) the remainder of the property shall be distributed as follows-

(i) the remainder (where there is a surviving spouse) or the whole of the property (where there is no surviving spouse) shall be held in trust for the issue of the intestate in accordance with the prescribed trusts;

(ii) if the intestate leaves no issue, the surviving spouse shall be entitled to the remainder of the property unless if the intestate is survived by a parent, brothers and sisters of the intestate of the full or half blood whereupon the surviving spouse shall be entitled to a half of the remainder and the parent, brothers and sisters to the other half equally;

(iii) if the intestate leaves no spouse or issue, the property shall devolve to the surviving parents in equal shares, failing them, property shall devolve to the surviving brothers and sisters of the whole blood in accordance with the prescribed trusts and failing them and their issue, property shall devolve to the brothers and sisters of the half blood in accordance with the prescribed trusts;

(iv) if the intestate dies without leaving a spouse or issue or parent or brother of the full or half blood or sister of the full or half blood, the surviving grandparents shall be entitled in equal shares;

(v) if the intestate dies without leaving a spouse or issue or parent or brother of the full or half blood or sister of the full or half blood or grandparent, the uncles and aunts of the intestate shall be entitled in accordance with the prescribed trusts; and

(vi) if the intestate dies without leaving a spouse or issue or parent or brother of the full or half blood or sister of the full or half blood or grandparent or uncle or aunt, the Government shall be entitled to the property.

The Commission noted that under subsection (2) of section 18 of the Act, the surviving spouse is entitled to the first K10,000. The Commission observed that, in contrast, there is no like provision under section 16 for a surviving spouse under customary marriage, that is, in effect, for the majority of people in Malawi. In this regard, the Commission noted that the law is discriminatory as between the surviving spouse under section 16 and the one under section 18 of the Act.

Subsection (3)

The provision deals with the property of a member of a minority community among whom an established custom existed prior to the coming into operation of the Act governing the rights of inheritance to property. The distribution of property shall be in accordance with such custom.

The Commission observed that the Act does not define "minority community" but the general trend has been to consider persons of Asian origin domiciled in Malawi as belonging to (almost synonymous with) a minority community.

The Commission however observed that "minority community" is a matter of fact as, for example, the various ethnic groups residing at Dzaleka Refugee Camp may qualify within the ambit of this provision. In the Malawi case of *In the Estate of Osman Hussein, Latif Bint Tayub Ali vs. Farouk Haji Osman and Five Others*[28], the High Court held that evidence of similar probates in the past may be used to establish the existence of a custom which derogates from the norm.

SECTION 19 *[Inheritance of intestate moveable property of non-domiciled persons]*

Subsection (1) of the provision states that the persons entitled on the death of a non-domiciled person to such part of his intestate property as consists of moveable property shall be ascertained in accordance with the law of the deceased person's country of domicile. There is a proviso to the subsection which states that in the case of a non-domiciled person leaving children by a mother who is a citizen of Malawi reasonable provision shall be made for such mother and children out of this estate.

[28] (1954) 1 ALR Mal. 276.

Subsection (3) provides that in considering what is reasonable provision regard shall be had to the matters referred to in subsection (3) of section 14 (section 14 deals with provision for dependants not adequately provided for under a will) with such modifications as are necessary in the case of intestacy.

The Commission considers the provision discriminatory in so far as it recognises the children of a mother who is a citizen of Malawi. It may well be that the person who is not domiciled in Malawi is the female spouse and not the male spouse hence there is no basis for the distinction being made in the provision. While the Commission takes recognition of the law under this Act to provide for the woman in the marriage and not the husband, this is to be regarded as discriminatory in terms of the Constitution.

Upon considering sections 16 to 19 inclusive in their totality, the Commission recommends deletion of the provisions. In their place, the Commission recommends that a single set of rules should govern matters of intestacy with uniform application subject, of course, to private international law rules on domicile.

The Commission therefore recommends the following new section:

Principles of fair distribution of intestate property to immediate family and dependants

(1) Upon intestacy the persons entitled to inherit the intestate property shall be the members of the immediate family and dependants of the intestate and their shares shall be ascertained upon the following principles-

(a) protection shall be provided for members of the immediate family and dependants from hardship so far as the property available for distribution can provide such protection;

(b) every spouse of the intestate shall be entitled to retain all the household belongings which belong to his or her household;

(c) if any property shall remain after paragraphs (a) and (b) have been complied with, the remaining property shall be divided between the surviving spouse or spouses and the children of the intestate;

(d) as between the surviving spouse or spouses and the children of the intestate their shares shall be determined in accordance with all the special circumstances including-

(i) any wishes expressed by the intestate in the presence of reliable witnesses;

(ii) such assistance by way of education or other basic necessities any of the spouses or children were receiving or may have received from the intestate during his or her lifetime; and

(iii) any contribution made by the spouse or child of the intestate to the value of any business or other property forming part of the estate of the intestate; and in this regard the spouse shall be considered to have contributed to the business unless proof to the contrary is shown by or on behalf of the child,

but in the absence of special circumstances the spouses and children shall, subject to subsection (3), be entitled to equal shares;

(e) as among the children of the intestate, the age of each child shall be taken into account with the younger child being entitled to a greater share of the property than the older child unless the interests of the children require otherwise; and

(f) in the absence of any spouse or child of the intestate the property described in paragraph (c) shall be distributed between the dependants of the intestate, if more than one, in equal shares.

(2) If the intestate left more than one female spouse surviving him each living in a different locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate in their locality in accordance with this section; but such spouse and children shall have no claim to any share of the property of the intestate in the locality where another spouse lives-

Provided that this subsection shall not apply to the property of the intestate of a value exceeding a small estate or institutional money or private land.

(3) If the intestate left more than one female spouse surviving him all living in the same locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate proportionate to their contribution.

(4) Re-marriage shall not deprive a surviving spouse of property inherited under intestacy except in the case of property on customary land where title in that property shall devolve to the children of the spouse by the intestate upon the re-marriage of the surviving spouse.

The Commission referred to paragraph (b) of subsection (2) of section 17 of the Act which defines "hardship" as follows-

> ""hardship" in relation to any person means deprivation of the ordinary necessities of life according to the way of life enjoyed by that person during the lifetime of the intestate; and in the case of a minor includes deprivation of

opportunities for education which he could reasonably have expected had the intestate continued to live;".

The Commission considers transposing the definition to the interpretation section with some minor amendments to relate the necessities of life to those that were actually being provided by the intestate. The definition will now read as follows-

"hardship" in relation to any person means deprivation of the ordinary necessities of life according to the way of life enjoyed by that person during the lifetime of the intestate as provided by that intestate; and in the case of a minor includes the deprivation of opportunities for education which he or she could reasonably have expected had the intestate continued to live;

Further, the Commission observed that in the absence of the persons described in the new section on the principles on intestacy, the property comprising the estate of the intestate would become *bona vacantia* and devolve to Government as property without a claimant. The Commission recommends that before the property becomes *bona vacantia* to devolve to Government it should be considered for distribution to other classes of relations of the intestate though remote in degree of consanguinity.

The Commission therefore recommends the following new provision-

In the absence of the beneficiaries to the estate of an intestate referred to under section 17, the whole of such property comprising the estate of the intestate shall be distributed as follows –

(a) the grandchildren of the intestate shall, if they survive the intestate, be entitled in equal shares;

(b) if none of the persons referred to in paragraph (a) survive the intestate, the brothers and sisters of the whole blood of the intestate shall, if they survive the intestate, be entitled in equal shares and failing any surviving brothers and sisters of the whole blood of the intestate, the brothers and sisters of the half blood of the intestate shall, if they survive the intestate, be entitled in equal shares;

(c) if none of the persons referred to in paragraphs (a) and (b) survive the intestate, the grandparents of the intestate shall, if they survive the intestate, be entitled in equal shares;

(d) if none of the persons referred to in paragraphs (a) and (b) survive the intestate, the uncles, aunts, nephews and nieces of the intestate shall, if they survive the intestate, be entitled in equal shares;

(e) if none of the persons referred to in paragraphs (a), (b), (c) and (d) survive the intestate, other relatives who are in the nearest degree of consanguinity shall, if they survive the intestate, be entitled in equal shares; or

(f) if none of the persons referred to in paragraphs (a), (b),(c), (d) and (e) survive the intestate, the Government shall be entitled to take title in the property comprising the estate of the intestate.

PART VI

SURVIVORSHIP

SECTION 20 *[Uncertainty regarding survivorship]*

The section provides that where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of court), for all purposes affecting rights in, to or over property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

There is a proviso to the section which states that in the case of spouses who died in such circumstances neither spouse shall take any benefit as surviving spouse. The Commission does not see any justification for this exception to the rule in the case of spouses. The Commission observed that in the case of marriages in Malawi, the female spouse is invariably the younger of the two spouses and if the exception in the proviso were to apply work against the interests of female spouses.

The Commission therefore recommends deletion of the proviso to the provision.

The Commission also recommends insertion of the words "**in the age of the deceased persons,**" after "seniority" to make it clear that seniority refers to age.

The provision will now read as follows-

Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such death shall, subject to any order of a court, for all purposes affecting rights in, to or over property, be presumed to have occurred in order of seniority in the age of the deceased persons, and accordingly the younger shall be deemed to have survived the elder.

PART VII

JURISDICTION OF COURTS AND POWERS OF CONSULAR OFFICERS

SECTION 21 *[Jurisdiction of High Court and magistrates]*

Subsection (1)

In considering this provision, some Commissioners were of the view that beyond the court system some officers or institutions such as the Administrator General, the District Commissioner, banks, insurers, employers, or administrators of provident funds should be

granted the mandate to grant probate or letters of administration. The counter-view however was that the dispute settlement mechanism that is available in the court system may not be available in the other institutions. Further, the courts are the institution established by the Constitution to resolve legal disputes with finality.

Further still, the Commission observed that in light of the recommendation made regarding the new subsection (**6**) of section 4 of the Act, the jurisdiction of the court under this section should extend to magistrate's courts and traditional or local courts. However, looking at the nature of the grant of probate or letters of administration, the Commission recommends that the jurisdiction should extend to the other courts based on graduated levels of the gross value of the property of the intestate. The Commission has dealt with courts subordinate to the High Court under subsection (3).

The Commission observed that the procedure in obtaining probate or letters of administration is not efficient. The major bottleneck in the procedure is the assessment of estate duty. Presently, under the Estate Duty Act, estate duty is levied on property whose gross value is in excess of K30,000. The Commission noted that the Estate Duty Act was passed in 1946 and that the last revision of the Schedule to the Act was in 1969. In light of the depreciation in the value of the Kwacha over the years, almost every average person dying in Malawi today has property with gross value in excess of K30, 000. While the Schedule to the Estate Duty Act may have been tenable in 1969, in terms of the gross value of property requiring the levy of estate duty, it no longer is now, and persons who ordinarily would not have had to pay estate duty are having to suffer paying estate duty and, invariably, the estate duty levied is exorbitant and oppressive. The Commission has therefore reviewed the scale of estate duty set out in the Schedule to the Estate Duty Act and proposes a Bill to amend the Act accordingly.

Subsection (2)

The subsection states that the High Court shall have jurisdiction to reseal grants of probate and letters of administration made by a court of probate in any other part of the Commonwealth, in the Republic of South Africa or in any other country which the Minister may designate by notice in the *Gazette.*

The Commission recommends retention of the provision. However, the Commission was of the view that there should be no specific reference to any country or grouping of countries. Therefore any reference to a country or grouping of countries is to be deleted accordingly.

Subsection (3)

The provision states that the Minister may by order confer on any magistrate such jurisdiction as may be specified in the order relating to the estate of a deceased person which the magistrate is satisfied does not exceed K10,000 in gross value and grant probate or letters of administration in relation to such estate. Deceased estates that do not exceed this value are referred to as small estates.

While accepting the principle in the provision of extending jurisdiction of small estates to magistrates, the Commission was of the view that it would be appropriate that the Act itself should confer such jurisdiction on particular grades of subordinate courts. In this regard the

Commission recommends that courts of a resident magistrate and courts of the magistrate of the first grade should have jurisdiction in respect of small estates as defined under section 2 of the Act.

Subsection (4)

The Commission recommends retention of the provision subject to deleting “K10,000" in line 3 and substituting therefor the words “**the limit of a small estate**”.

Subsection(5)

The Commission recommends deletion of the reference to Traditional Court in the subsection.

Subsection (6)

The Commission recommends retention of the provision.

In light of the recommendations relating to this section, the provision will now read as follows-

> **(1) Subject to this section, the High Court shall have jurisdiction in all matters relating to the probate and the administration of estates of deceased persons, with power to grant probates of wills and letters of administration to the estates of deceased persons and to alter or revoke such grants.**
>
> **(2) The High Court shall have jurisdiction to reseal grants of probate and letters of administration made by a court of probate in any country.**
>
> **(3) A court of a resident magistrate or a court of a magistrate of the first grade shall exercise jurisdiction relating to the estate of a deceased person which is a small estate to grant probate and letters of administration in relation thereto.**
>
> **(4) No act of a magistrate exercising jurisdiction under subsection (3) shall be invalid because it is afterwards discovered that the gross value of the estate exceeds the limit of a small estate but the magistrate shall report to the High Court any such discovery of which he or she becomes aware.**
>
> **(5) The High Court may direct that any proceedings under this Act in a court of a resident magistrate or magistrate of the first grade are to be removed to and continued in the High Court:**
>
> **Provided that the High Court shall not give any direction under this subsection unless it considers that it is necessary in the interests of justice or for the protection of a beneficiary or creditor that the estate should be administered under the supervision of the High Court.**

(6) The High Court may authorize the payment to a personal representative of remuneration for his or her services as such, to such extent as, in all circumstances, appears reasonable:

Provided that nothing in this subsection shall be construed so as to deprive an executor of remuneration to which he or she is entitled under the provisions of a will.

SECTION 22 *[Jurisdiction of Traditional Courts]*

The Commission recommends deletion of the provision.

SECTION 23 *[Grants to consular officers]*

The Commission recommends retention of the provision except for the deletion of the anomaly of applying the provision to nationals of particular States which have not been specified.

SECTION 24 *[Probate rules and administration bonds]*

In subsection (1), the Commission recommends retention of the provision subject to textual corrections to insert **"for"** before "the procedure" in paragraph (b).

In subsection (2), the reference to the "Court" (meaning the High Court) should extend to the subordinate courts referred to in subsection (3) of section 21 of the Act.

In subsection (3), the two sentences should each constitute a separate subsection. Further, references to the "Registrar" (meaning Registrar of the High Court) in subsections (3) and (4) should extend to a resident magistrate or a magistrate of the first grade to capture the extension of jurisdiction to subordinate courts referred to under subsection (3) of section 21 of the Act.

The provision will now read as follows-

(1) The Chief Justice may make Probate Rules-

(a) regulating proceedings for the grant of probate and letters of administration and other proceedings under this Act;

(b) for the procedure to be observed in relation to wills deposited under section 8 and for the preservation, copying and inspection of wills and grants of probate and administration;

(c) prescribing fees and forms; and

(d) generally in relation to maters of probate and letters of administration.

(2) Without prejudice to the generality of subsection (1), the Probate Rules may require a person to whom a grant of letters of administration is made to give

security for the due administration of the estate by a bond with one or more sureties and for the furnishing of accounts to court.

(3) A bond for the due administration of an estate shall engage the parties thereto to make payment to the Registrar or a resident magistrate or magistrate of the first grade.

(4) Upon the application of any person beneficially interested in the estate and upon being satisfied that the engagement of any such bond has not been kept the Court may direct the Registrar to, or a resident magistrate or a magistrate of the first grade shall, assign the bond to some proper person and thereupon such person shall be entitled to sue on the bond in his or her own name as if it had originally been given to him or her and not to the Registrar or resident magistrate or magistrate of the first grade and to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach thereof.

PART VIII

PROTECTION OF ESTATES PENDING GRANT

SECTION 25 *[Receiver pending grant]*

The section provides that a person (a) claiming to be interested in the property of a person who dies leaving property in Malawi, (b) has custody or control of such property at the time of the death of the deceased, or (c) is the attorney of the deceased at the time of his or her death may apply to the court for the appointment of such person as the court shall deem fit as receiver of the property of the deceased pending a grant of probate or letters of administration if it appears to such applicant that there is danger that such property may be wasted.

The Commission was concerned that the provision is not stringent enough to protect property comprising the deceased estate and therefore liable to abuse by unscrupulous claimants or applicants. The Commission was of the view that the Act should provide for a provision that enables the Chief Justice to make rules which shall guide courts on the hearing of an application for appointment of a receiver under this provision.

Further, the Commission recommends that the jurisdiction to hear this application should extend to the court of a resident magistrate and a court of a magistrate of the first grade in line with its recommendations under section 21 of the Act.

Further still, the Commission was of the view that the basis of the application under this section should extend beyond waste. The Commission felt that the basis should also extend to cover any contravention of the Act.

In light of the Commission's recommendations, the provision will now read as follows-

Where any person dies leaving property in Malawi, the court, may appoint such person as the court thinks fit to be a receiver of probate or letters of administration, if it appears on the application of any person -

(a) claiming to be interested in such property;

(b) having custody or control thereof at the time of the death of the deceased; or

(c) being at such time an attorney of the deceased,

that there is danger that such property may be wasted or may otherwise be dealt with in contravention of this Act.

SECTION 26 *[Sale by order of court]*

The Commission recommends retention of the provision. However, in light of the recommendations in respect of section 25 of the Act, the provision will now read as follows-

The court may, on application by a receiver of property appointed under section 23, or any person interested in the estate, order the sale of the whole or any part of such property, if it appears that such sale will be beneficial to the estate.

SECTION 27 *[No suit against receiver]*

The Commission considered the section to be self contradictory in that in one breath it provides that no suits shall lie against a receiver and in the same breath it allows for a party aggrieved by actions of a receiver to apply to the court for redress which can only be by way of suits.

Further, in light of subsection (4) of section 11 of the Constitution which prohibits ousting of jurisdiction of courts, the law cannot bar the bringing of suits against any person. It is therefore the emerging practice in drafting to resort instead to indemnity clauses in appropriate cases in a legislation rather than proscribing the act of suing.

The provision should be amended to retain only the last part as follows-

A person aggrieved may bring a suit against a receiver appointed under section 23 in relation to any thing done or intended to be done by him or her in respect of the property of the deceased in the exercise or intended exercise of the powers vested in him or her.

NEW SECTION *[Chief Justice to make rules]*

The Commission recommends the following new section empowering the Chief Justice to make rules under this Part-

The Chief Justice may make rules to guide the court in hearing an application for appointment of a receiver under section 23.

PART IX

RENUNCIATION BY EXECUTORS

SECTION 28 *[Express renunciation of right of probate]*

The Commission recommends retention of the provision subject to the incorporation of its recommendations under section 21 of the Act to extend this section to the relevant subordinate courts apart from the High Court.

The provision will now read as follows-

A person who is entitled to probate may expressly renounce such right orally on the hearing of any application to the court or in writing signed by the person making the renunciation and attested by a person before whom an affidavit may be sworn.

SECTION 29 *[Citation and presumed renunciation]*

The Commission recommends retention of the provision subject to some amendments to subsection (2) first to replace the phrase "enter an appearance" with the phrase **"acknowledge service"** which is broader and reflects the actual practice and, secondly, to empower the court to appoint another executor to replace the one who has renounced his appointment.

The new subsection (**2**) is to read as follows-

(2) A person served with a citation may acknowledge service thereof, but if he or she defaults on the terms of the acknowledgement of the service, he or she shall be deemed to have renounced his or her executorship; and if, having made such acknowledgement, he or she does not proceed to apply for probate, the court may limit the time within which such application is to be made and if the application for probate is not made within the time so limited, the executor in default shall be deemed to have renounced his or her right to probate and the court may appoint another person it deems fit to be the executor of the estate.

SECTION 30 *[Effect of renunciation]*

Subject to its recommendation in relation to section 21, the Commission recommends retention of the provision.

PART X

GRANT OF PROBATE AND LETTERS OF ADMINISTRATION BY THE COURT

SECTION 31 *[Corporations]*

Subsection (1) of the section provides that a corporation or company which is not a trust corporation may be granted probate but may not be granted letters of administration.

Subsection (2) of the section provides that a trust corporation may be granted probate or letters of administration solely or jointly with another person.

Subsection (3) of the section provides that probate or letters of administration shall not be granted to a syndic or nominee on behalf of a corporation or company.

The Commission considered that there was no basis for the restrictions under subsection (1) placed on corporations and companies which are not trust corporations. On the contrary, the Commission was aware of the fact that companies and other bodies corporate are administering deceased estates effectively.

However, the Commission recommends that a new provision should be added under this Part as a separate section for safeguarding the interests of the beneficiaries by allowing them to challenge the appointment of personal representatives.

The Commission recommends that section 31 should be amended accordingly and subsection (2) of the provision should be deleted altogether. Subsection (3) is retained as the new subsection (**2**) of the provision.

The provision will now read as follows-

> **(1) A corporation or company or trust corporation may be granted probate or letters of administration either solely or jointly with another person.**
>
> **(2) Probate or letters of administration shall not be granted to a syndic or nominee on behalf of a corporation or company.**

SECTION 32 *[Number of executors and administrators]*

Subsection (1) of the provision states that probate or letters of administration shall not be granted to more than four persons in respect of the same property. Further, in the case of a minority or life interest under a will or intestacy, probate or letters of administration may be granted to –

(a) a trust corporation, severally or jointly with an individual; or

(b) a minimum of two individuals.

Subsection (2) of the provision states that the High Court may appoint one or more personal representatives in addition to an existing personal representative, who is not a trust corporation, during the minority of a beneficiary or the subsistence of a life interest.

The Commission was of the view that subsection (1) should simply set a minimum number of two persons who may be granted probate or letters of administration in the case of a minority or life interest.

The provision will now read as follows-

(1) Probate or letters of administration shall not be granted to more than four persons in respect of the same property.

(2) In the case of a minority or life interest under a will or on intestacy, probate or letters of administration shall, subject to the maximum number specified in subsection (1), be granted to not less than two persons and a court shall appoint another person to act as a personal representative in such cases if there is one person acting as such at any time.

NEW SECTION *[Beneficiary may oppose appointment of personal representative]*

The Commission recommends that beneficiaries should be empowered to oppose the appointment of any person as executor or administrator of the estate where they show cause for the unsuitability of persons to serve in such capacity.

The Commission recommends a new provision as follows-

Any beneficiary under a will or on intestacy may apply to the court opposing the appointment of a personal representative under a will or on intestacy.

SECTION 33 *[Grant of probate]*

The Commission recommends retention of the provision.

NEW SECTION *[Estate duty affidavit]*

In considering rule 8 of the Probate (Non – Contentious) Rules, the Commission was of the view that the requirement for attaching a copy of the estate duty affidavit and certificate of the Estate Duty Commissioners issued under section 33 of the Estate Duty Act to every application for a grant of probate and letters of administration is substantive in nature and should, move appropriately, be dealt with in the Act rather than in subsidiary legislation.

The Commission therefore recommends that rule 8 of the Probate (Non – Contentious) Rules should become a substantive provision in the Act and will read as follows-

Every application for a grant of probate or letters of administration shall be accompanied by a copy of the estate duty affidavit and by a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act.

SECTION 34 *[Probate of copy, drafts or contents of wills]*

The Commission recommends retention of the provision.

SECTION 35 *[Codicil propounded after probate]*

The Commission recommends retention of the provision.

SECTION 36 *[Authenticated copy of will proved abroad]*

The Commission recommends retention of the provision.

SECTION 37 *[Effect of probate]*[29]

The Commission recommends retention of the provision.

SECTION 38 *[Failure of executors]*

The Commission recommends retention of the provision subject to some modifications in the drafting of the provision.

SECTION 39 *[Attorney of absent executor]*

The Commission recommends retention of the provision.

SECTION 40 *[Attorney of person entitled to letters of administration]*

The Commission recommends retention of the provision.

SECTION 41 *[Codicil propounded after letters of administration granted]*

The Commission recommends retention of the provision.

[29] See *Mthawanji and Anor. v. Ching'amba and Ors.* [1992] 15 MLR 324 where the Court said that the power of an executor to meddle in an estate before the granting of probate does not include the power of that executor to seek relief from a court prior to the granting of such probate. See also *Chetty v. Chetty* [1916] 1 A. C. 603; *Thomson vs. Reynolds* 3 C. & P. 123; *Woolley v. Clark* 5 B. & Ald. 744; *Ingall v. Moran* [1944] 1 All E. R. 97; *Re Crowhurst vs. Park* [1974] 1 All E. R. 991.

SECTION 42 *[Letters of administration on intestacy]*[30]

The Commission recommends retention of the provision.

SECTION 43 *[Attorney of person entitled to administration]*

The Commission recommends retention of the provision.

SECTION 44 *[Until Will produced]*

The Commission recommends retention of the provision.

SECTION 45 *[Pending litigation]*

The Commission recommends retention of the provision.

SECTION 46 *[Trust property]*

The Commission recommends retention of the provision.

SECTION 47 *[Grants with exception]*

The Commission recommends retention of the provision.

SECTION 48 *[Grants of excepted part]*

The Commission recommends retention of the provision.

SECTION 49 *[Effect of grant of letters of administration or probate]*[31]

The Commission recommends retention of the provision.

SECTION 50 *[Death of one of several personal representatives]*

The Commission recommends retention of the provision in principle. However, the Commission recognized the need to link the provision to section 32 of the Act and recommends that the section should commence with the words **"Subject to section…".**

SECTION 51 *[Death of sole or surviving personal representative]*

The Commission recommends retention of the provision subject to correcting the obvious error in the spelling of the word "**original**" in line six of the provision wrongly spelt as

[30] See *Kapazira & Anor. v. Kapazira & Anor.* [1993] 16(2) MLR 200 (Mbalame, J.,) (as he then was) in which the Court exercised its discretion under subsection (4) to appoint a person to administer an estate and grant him letters of administration; see also *Kalimeje v. Kalimeje* [1993] 16(1) MLR 189 where the Court held that a person purporting to act as "administrator" to a deceased estate without a court order is a *bailiff de son tort* and is required to give full account of his or her actions and to return assets acquired in the process to (other) rightful heirs.

[31] See *Mthawanji and Anor. v. Ching'amba and Ors., supra.*

"origional" and also taking into account the recommendation under section 32 on the minimum number of executors.

SECTION 52 *[Expiry of limited grant when estate not fully administered]*

The Commission recommends retention of the provision. However, the Commission further recommends that the word "effluxion" should be substituted with the simpler word "**lapse**" in the phrase "effluxion of time".

PART XI

REVOCATION AND ALTERATION OF GRANTS AND REMOVAL OF EXECUTORS AND ADMINISTRATORS

SECTION 53 *[Rectification]*

The Commission recommends retention of the provision.

SECTION 54 *[Revocation of grants and removal of executors, etc.]*

The Commission recommends retention of the provision.

SECTION 55 *[Payments by or to representatives whose grants are revoked]*

The Commission recommends retention of the provision.

SECTION 56 *[Surrender of revoked grants]*

Subsection (1)

The Commission recommends retention of the subsection.

Subsection (2)

The Commission recommends retention of the subsection. However, the Commission recommends revision of the fine for the offence under this subsection (of wilfully failing to deliver up probate or letters of administration) to "**K50, 000**" from "K200". The maximum term of imprisonment (which is three months) remains the same.

PART XII

RE-SEALING

SECTION 57 *[Interpretation]*

First, the Commission recommends that the definitions appearing in the provision should be moved to section 2 of the Act which deals with matters of interpretation generally. The Commission considered these definitions to be of general application to the Act.

Further, the Commission recommends that the reference to Scotland in the definition of "probate" and "letters of administration" should be dispensed with. The Commission was of the view that in present day Malawi a court should be able to re-seal any instrument from any country with similar or like effect to a grant of probate or letters of administration under the Act.

Consequently, the Commission recommends that the provision should be deleted.

SECTION 58 *[Sealing of certain grants made outside Malawi]*

The Commission recommends retention of the provision.

PART XIII

SMALL ESTATES

SECTION 59 *[Application]*

The Commission recommends retention of the provision.

SECTION 60 *[How Traditional Court to exercise jurisdiction]*

The Commission recommends retention of the provision but reference to "Traditional Court" will now be reference to "**a court of a resident magistrate or a court of a magistrate of the first grade**".

SECTION 61 *[Relatives may agree between themselves]*

The section provides that where all near relatives of a deceased person who are not minors agree on the manner of distribution and administration of a small estate they may proceed in accordance with such agreement. However, the agreement shall not apply to the distribution or administration of private land or institutional money.[32] Further, the High Court still retains its jurisdiction under the Act and may override an agreement made under this section. Lastly, upon an application to the High Court, the rights of persons entitled to a share or interest in the estate shall be the rights and interests in accordance with the Act notwithstanding the agreement of the near relatives to the contrary.

[32] See *Kapazira and Anor. vs. Kapazira and Anor., supra.*

The Commission noted that the definition of "near relative" under the Act is very wide as it means a relative who would be entitled to a share in the estate of a deceased person if such person had died intestate. The Commission was of the view that the agreement envisioned under the provision should be limited to the members of the immediate family and the dependants of the deceased person more especially in light of the Commission's recommendations regarding the definition of members of the immediate family and the scope of dependants. The Commission therefore recommends that the concept of "near relative" should be dispensed with.

However, the Commission recommends that in the absence of members of the immediate family and dependants, the next degree of consanguinity of the relatives of a deceased person who are not minors may agree on the manner of distribution and administration of a small estate.

SECTION 62 *[Private land]*

The section provides that where a small estate includes private land, no dealing with such land shall, subject to Part VIII (on Protection of Estates pending Grant), be lawful until an administration grant has been made in respect of the estate under section 65 of the Act.

The Commission recommends retention of the provision.

SECTION 63 *[Institutional money]*

In subsection (1), the section makes provision as to the definition of institutional money as follows-

" (1) In this Act "institutional money" means money-

(a) in the Post Office Savings Bank;

(b) owing by a person carrying on banking business within the meaning of the Banking Act;

(c) on deposit with a Building Society;

(d) due under any policy of insurance or assurance;

(e) due under the provisions of any provident fund or similar provision for employees; or

(f) by way of gratuity, terminal benefit, leave pay or otherwise under the terms of employment of the deceased, except money by way of pension under the Malawi Public Service Regulations, or under any written law regulating any section of the public service, continuing to be payable (whether periodically or as a lump sum payment) after the death of the pensioner;

(g) received by any public officer other than the Administrator General as representing the property of a citizen of Malawi who has died outside Malawi;

but does not include money under the Workers' Compensation Act. "

The Commission observed that the concept of institutional money is one of the two exceptions under section 61 of the Act (as it stands now) where near relatives cannot reach an agreement on the manner of its distribution. The other exception is with regard to private land whose manner of dealing is provided for under section 62 of the Act.

The Commission further observed that section 63 of the Act deals with the administration of institutional money not exceeding K20, 000 which at present is the value of small estate.

Under subsection (3) of the provision therefore relatives or heirs of a deceased person or any person in possession of the passbook or other evidence that institutional money is payable may report the death to the District Commissioner of the district in which the death occurred or where the deceased ordinarily resided prior to his or her death. On making such a report the relative or heir or other person is required to deposit with the District Commissioner the passbook or other evidence that institutional money is payable together with a death certificate or other suitable evidence of the death.

The District Commissioner shall upon receipt of such money enquire as to whether the money is disposed of by a valid will or not. Where the money is disposed of by a valid will, the District Commissioner shall take no action except to advise the persons concerned to apply for an administration grant under section 65 of the Act. Where the money is not disposed of by a valid will, the District Commissioner is required to refer the matter to a traditional court for the certification of the beneficiaries and their proportions and also the certification of creditors and the extent of the deceased's liability to them.

The Commission conducted a study[33] where it was observed that most employers, insurers and administrators of provident funds do not send gratuities of their employees to the office of the District Commissioner where the value is within the ambit of small estate as is required by law and instead they pay directly to the beneficiaries of a deceased depending on the beneficiary nomination form that the deceased employee completed during his or her lifetime. Although a few of the employing organisations do send gratuities of their employees to the office of the District Commissioner, there are variations in terms of distribution formulae used. In particular, the Army Act (Cap.12:01) and Police Act (Cap. 13:01) do specify spouse(s) and children as the main beneficiaries to the property comprising the deceased estate. Therefore, when benefits from the Army and the Police respectively are being sent to the office of the District Commissioner, the beneficiaries and their appropriate shares are already specified. The office of the District Commissioner is only used as a payment office. The study also found that when the office of the District Commissioner receives money exceeding K20, 000, they usually forward it to the office of the Administrator General for its administration.

For those organisations that send benefits to the office of the District Commissioner for distribution, the study found that the processing of the payment of death gratuity to beneficiaries at that office is in most cases fraught with problems of administration causing obvious frustrations among beneficiaries. The first set of problems concern certifying the right persons entitled to the money. When property is to be distributed through the office of the District Commissioner, chiefs and *ankhoswe* (marriage advocates) may be asked to verify the legitimacy

[33] See also *Overview and Issues of Gender-Based Law Reform in Malawi* (Malawi Law Commission Publication*:* Montfort Press: 2003); Naomi Ngwira *et al, op. cit.; Women and the Administration of Justice in Malawi* (WILSA- Malawi, 2000).

of the heirs or claimants, by signing the beneficiary identification form or by accompanying the family to that office to be personal witnesses.

The main problem with chiefs and *ankhoswe* is that they may live far from the office of the District Commissioner and this often makes liaison difficult and costly. The decisions and referrals that chiefs and *ankhoswe* make at the local level may not be communicated effectively to the District Commissioner. Often, those who want to sway decisions their way go to the office of the District Commissioner ahead of the whole family to give bribes or renegotiate or influence a decision more favourable to them. Officials interviewed indicated that in some cases, the relatives of the deceased person in collusion with the chief and the clerks in the office of the District Commissioner may bring other people other than the true wife and children, and leave out the actual and needy beneficiaries. Thus the major complaint widows had against chiefs and *ankhoswe* was that they tend to be biased in favour of men and can be bought over by relatives with a promise of a "commission for assisting them win their case".

The second set of problems in the processing of gratuities are internal to the office of the District Commissioner. This office is understaffed with ill-equipped personnel, who it is observed do not undergo any training or orientation on how to administer deceased estates. Most of the staff have been promoted from very junior ranks and they do not have adequate training in matters of law under the Act and in principles of accounts or bookkeeping. For example, in Nkhata Bay, Karonga, and Thyolo districts respectively, clerks serving at erstwhile Traditional Courts were promoted to be deceased estates clerks at the office of the District Commissioner. These clerks were handling deceased estates issues without any proper orientation or training. Most of them do not have adequate information on the Wills and Inheritance Act to enable them to administer deceased estates correctly often resulting in considerable unfairness. As a result most of the decisions taken are based on their sense of justice and good conscience. In most of these offices, if not all, those who process claims are men. It has been observed that they tend to administer the estates or make judgement that fit in with their cultural biases and interpretations of gender justice. Usually, they do not see anything wrong in withholding inheritance money or property from women. Some officers reportedly take advantage of female claimants by asking for sexual favours from those women. They harass them, making them feel guilty or greedy for being tenacious in processing their inheritance claims.

Thirdly, in some districts, the handling of deceased estate money is problematic because banks or other banking facilities are located far away from the office of the District Commissioner. The accounts clerks from that office visit the banks at long intervals often once a week. Thus claimants may come to the office of the District Commissioner when there are no funds, due to logistical problems such as lack of transport, to go to the bank. This problem is partly due to lack of information and scheduling of days of the week when claimants should come to the office. The staff at the office use this to wear out the claimants by returning them home many times before they get their money. The money is diverted to other uses, some of which are personal. Many claimants come from distant parts of the districts, and have limited money for transport to frequent the office of the District Commissioner to push their cases. Once the officers have used the claimants' money for their own purposes, and are failing to pay it back, they keep telling the claimants that their payments have not yet been cleared or deliberately contribute to disputes between competing family members, until the claimants are tired of coming to the offices.

Fourthly, the office of the District Commissioner is poorly funded. The Commission was informed that there is no budget line at the district administration level for handling of deceased estates. The deceased estate clerks are considered an extra burden and parasitic on the budget for district administration. The system therefore becomes inefficient because officers cannot do many things on time. Because of the inefficiency of the system and the callous treatment beneficiaries get from clerks, beneficiaries make several trips and waste a lot of money on transport and accommodation before they get their money or get their claims settled. The net value of the payments they may finally receive becomes negligible.

Fifthly, most women are not familiar with the procedures for processing claims and offices of the District Commissioner do not seem to make efforts to make these procedures known and clear to the beneficiaries. Some of the women do not even know the value of the gratuity and they have no way of crosschecking. This lack of knowledge facilitates opportunistic and fraudulent practices by officers and relatives. Because of lack of knowledge some women depend on their brother-in-laws to help them process their benefits.

The sixth problem that was observed is poor administrative structure and corruption. For women whose benefits are sent to the Administrator General, their problems are compounded because there is only one office of the Administrator General in the whole country which is located in Blantyre and this creates a serious bottleneck.

The office of the Administrator General has been the subject of reviews and has been proposed for closure.[34] It operates with only 10% of the budget it needs because in 1998 there was a Cabinet directive that the office should be abolished. While the decision to abolish the office has been reversed, the practice of under funding has persisted.

For those whose spouses are Government employees, the process of claiming their entitlements is particularly difficult and can be costly because the form that is used to process claims goes through a number of offices. There is usually loss of case files containing information for processing claims.

Women who get their entitlements under a deceased estate directly from the employer appear to have at least more secure arrangements than those who have to go through the offices of the District Commissioner or the Administrator General because processing time is short, they are able to know the value of the actual inheritance and it is usually straightforward. It does not facilitate invitation of feuding members of the extended family because payment is made based on the beneficiaries' nomination form that was completed by the spouse while alive. Problems do arise in cases where the employee did not complete or update the record. In such cases, the employer uses their discretion and in most cases the wife and children are given priority. In some cases relatives may come forward to contest the validity of the shares based on the beneficiaries' nomination form.

It is against this background therefore that the Commission recommends a new definition of "institutional money" that will cater for all moneys under the concept in the present commercial world as has been incorporated under section 2 of the Act.

[34] Cf. *In the Estate of Dyson Peresi Ngalawesa (Deceased)* [1991] 14 MLR 379, where the Court (Tambala, J.,) (as he then was) commented that the Administrator General's office has a "commendable" reputation in the administration of deceased estates.

The Commission therefore recommends that as a matter of law employers, insurers and administrators of provident funds should administer institutional money that does not exceed the value of small estates as recommended elsewhere in this Report, being K1 million.

The Commission also recommends the introduction of a time limit within which the District Commissioner shall be required to pay the beneficiaries their entitlements as regards the institutional money.

Finally, the Commission recommends deletion of subsection (7) of section 63 as it does not make operational sense and is somewhat self contradictory by stopping the District Commissioner from administering large estates yet validating all his or her actions in having administered the estate.

The Commission therefore recommends a redrafted provision on administration of institutional money to replace section 63 as follows-

(1) Where upon the death of a person, institutional money is payable to the personal representative or to a member of the immediate family or to a dependant of that person or to any person, such institutional money shall be dealt with in accordance with this section.

(2) Where subsection (1) applies –

(a) the personal representatives or member of the immediate family or dependant of the deceased or any person in possession of evidence that institutional money is payable may report the death to the District Commissioner of the district which the deceased claimed to be or which was known to be the deceased's district of origin or where the deceased ordinarily resided prior to his or her death, and on making such report, shall deposit with the District Commissioner the evidence that institutional money is payable together with a death certificate or other suitable evidence of the death;

(b) in the event that there is more than one District Commissioner as the deceased referred to in paragraph (a) and they both receive a report of the death of, the District Commissioners shall decide, giving due weight to the wishes of the members of the immediate family or, failing agreement among such members, of the most senior member of the immediate family, which of the District Commissioners shall proceed under this section and if the District Commissioners fail so to decide, the District Commissioner preferred by the members of the immediate family, where applicable, or by the most senior member of the immediate family, shall have the authority to proceed under this section;

(c) the District Commissioner shall thereupon verify the amount of the institutional money and shall cause enquiries to be made whether or not such money is disposed of by any will made by the deceased;

(d) where it appears to the District Commissioner that the institutional money may have been disposed of by a valid will he or she shall take no further action except to advise the persons concerned to apply for an administration grant under section 65;

(e) where it appears to the District Commissioner that the institutional money is not disposed of by a valid will, he or she shall refer the matter to the court and shall request the court to certify the beneficiaries of the institutional money and their shares, and the creditors of the deceased;

(f) in the reference under paragraph (e) the District Commissioner shall set out the facts of the case to the best of his or her knowledge or information;

(g) upon receipt of the reference under paragraph (e), the court shall certify who are the beneficiaries or creditors of the deceased and their shares and shall forward the certificate to the District Commissioner who made the reference;

(h) upon receipt of a certificate issued under paragraph (g) and a request for payment by a District Commissioner, the holder of, or a person liable to pay the institutional money shall, within ninety days from the date of the request, send to the District Commissioner a separate cheque payable to each of the persons shown in the certificate for the amount shown therein to be payable to him or her:

Provided that in the case of any person shown to be a minor the cheque shall be made payable to the Government of Malawi and the District Commissioner shall open a separate deposit account for every such minor and shall deposit therein the amount due to the minor.

(3) The receipt of a District Commissioner for a sum paid to the District Commissioner under subsection (2) by the holder of or person liable to pay institutional money shall be a good discharge to the person paying the money for the sum so paid.

(4) Money held by a District Commissioner under a deposit account on behalf of a minor under subsection (2) may be applied for the benefit of such minor by the District Commissioner as the District Commissioner deems fit.

(5) Where subsection (1) applies and institutional money is disposed of by will, payment may be made to the personal representative of the deceased.

(6) Where institutional money is due under a contract of employment, a policy of insurance or assurance, or a provident fund, the employer, insurer or administrator of a provident fund shall, if it appears that the institutional money is not disposed of by a valid will, refer the matter to court, setting out the facts as known according to available information, and shall request the court to certify the beneficiaries and their shares, and the creditors of the deceased, and the certificate of the court shall be authority for the employer, insurer or administrator of a provident fund to make payments to the beneficiaries and the creditors.

Finally, the Commission makes a general recommendation that there is need for capacity building at the offices of District Commissioners both in terms of increased human resource and training for greater efficiency and delivery of service in the administration of deceased estates generally, in particular, and specifically institutional money.

SECTION 64 *[Production to Court of a will or certified copy and Court to which application may be made for a grant]*

Subject to its recommendation under section 21 of the Act, the Commission recommends retention of the provision.

SECTION 65 *[Making administration grant]*

Subsection (1)

The Commission recommends retention of the provision subject to deletion of the second sentence which refers to the authority of the erstwhile Chief Traditional Courts Commissioner.

Subsection (2)

The Commission recommends retention of the provision subject to redrafting it by deleting the reference to near relatives and to take into account the recommendations regarding members of the immediate family under section 2 of the Act.

The provision will now read as follows-

(2) Before hearing any application under subsection (1), the court shall, by notice, require the members of the immediate family and the persons, if any, named in the will, if any, as executors to attend before the court for the hearing of the application on a date and at a time specified in the notice, which date shall not be less than thirty days and not more than sixty days from the date of service of the notice.

Subsections (3), (4), (5) and (6)

The Commission recommends retention of the provisions subject to deleting references to the Chief Traditional Courts Commissioner.

SECTION 66 *[Effect of administration grant]*

The Commission recommends retention of the provision.

SECTION 67 *[Death or disability of personal representative]*

The Commission recommends retention of the provision.

SECTION 68 *[Guardians]*

The Commission recommends retention of the provision.

SECTION 69 *[Duties and powers of administrators]*

The Commission recommends retention of the provision.

SECTION 70 *[Expenditure of care and management]*

The Commission recommends retention of the provision.

SECTION 71 *[Administrator or guardian not to derive benefit]*

The Commission recommends retention of the provision.

SECTION 72 *[How powers of administrator exercised]*

The section provides that when there are several administrators, the powers of all may be exercised by the majority of them, unless the will or administration grant provides otherwise. It further states that the majority decision shall not apply to any dealing with private land.

The Commission noted that there is an anomaly where there are two administrators. It would be difficult to yield a majority in such a situation. As a way of correcting the problem, the Commission recommends empowering the court to appoint a third person where the will appointed two persons as administrators.

The Commission further observed that subsection (2) seems to suggest that the requirement for a majority decision where there are several executors is not to apply where the decision concerns private land, but does not specify what rule will then apply. The Commission did not see any justification or basis for such an exception. The Commission therefore recommends that subsection (2) should be deleted.

The whole provision is to be redrafted as follows-

(1) Where there are several administrators, the powers of all may, in the absence of any direction to the contrary in the will or administration grant, be exercised by the majority of them.

(2) Where there are only two administrators, the court shall have power, on the application of either or both of the two administrators, to appoint one more administrator to act generally or in respect of a particular matter.

SECTION 73 *[Dispute]*

The provision states that on application by an interested person a court shall have jurisdiction to decide on several matters. Such matters have been outlined in the provision. In its discussion, the Commission observed that the language does not bring in the element of dispute. It was of essence that the provision underscores the element of dispute. The Commission therefore resolved that the phrase "**,where there is a dispute,**" be inserted between the words "jurisdiction" and "in".

The Commission also noted that there was need to open up on the heads of dispute in addition to the ones provided for. To this end, the Commission recommends that a new paragraph (**c**) should be introduced on whether a person is or is not a beneficiary of an estate which will result into a rearrangement of the provision.

Further, the Commission recommends that the proviso to paragraph (e) of section 73 be made a subsection (2) and that paragraphs (i) and (ii) of the proviso become paragraphs (a) and (b) and what are paragraphs (A) and (B) of the provision become subparagraphs **(i)** and (**ii).**

The provision will now read as follows-

(1) On the application in the prescribed manner by an interested person, a court shall have jurisdiction, where there is a dispute, in relation to a deceased person's estate –

(a) to decide whether a document purporting to be a will is a valid will and whether the deceased person died testate or intestate;

(b) to decide what is the property to which the deceased person was entitled at the date of his or her death;

(c) to decide if any person is or is not entitled as a beneficiary of the estate;

(d) to decide how the distribution of the property forming part of the deceased person's estate should be carried out;

(e) to order the sale or other disposition of property belonging to a deceased person's estate for the purpose of paying the debts of the deceased or for the purposes of distribution;

(f) to appoint a guardian in place of a guardian who has acted improperly;

(g) to decide whether an administrator or the person administering the property of a deceased person by agreement under section 61 has failed to carry out any of his or her duties and to order payment of

compensation by such administrator or other person to a person who has suffered injury as a result of such failure; and

(h) to decide any other matter in dispute which the court considers to be competent for its jurisdiction.

(2) In the determination of a dispute under subsection 1 (g), the court shall be guided by the following principles:

(a) that no order for compensation shall be made if the injury had come to the knowledge of the injured person, not being a minor, more than two years before the application relating thereto was made to the court;

(b) that in case the injured person was a minor an application for compensation for injury suffered may be made within two years after –

(i) he or she ceased to be a minor; or

(ii) the date when the injury came to his or her knowledge, whichever is later in time.

SECTION 74 *[Offences by administrators and guardians]*

The section creates an offence in cases where the administrator or guardian benefits himself or herself in the share of the deceased person's property to which a minor is entitled. Further, the provision confers jurisdiction on the High Court to try an offence despite having already dealt with an application relating to the property in question.

The Commission observed that the provision is intended to protect the welfare of minors from unscrupulous administrators or guardians. This is an offence of breach of trust and should be viewed as a grave offence such that the punishment should reflect such gravity. The Commission was of the view that the punishment both as to the maximum fine that may levied by a court and the period of imprisonment are on the lower side. The Commission recommends raising the fine from "K100" to **"K100, 000"** and the prison term from "1 year" to **"three years"**. The Commission took account of the fact that some property wrongfully dealt with could be of very high monetary value such as houses.

The Commission observed that subsection (2) confers criminal jurisdiction on a court to try the offence under the section even if it previously dealt with an application under the Act in relation to the property in question. The Commission confirmed the usefulness of the subsection in placing it beyond question that the hearing of such civil application does not affect the courts criminal competence to hear a related offence.

Further, the Commission recommends that the section should also provide that the wrongful administrator or guardian, if found guilty, should be ordered to compensate the minor besides suffering the punishment as provided for under the section. The compensation would be meant to put the minor in the position he or she would have been, had the administrator or guardian not benefited himself or herself.

The Commission therefore recommends retention of the provision subject to the amendments as proposed. The provision will read as follows-

(1) An administrator or guardian who wrongfully deprives a minor of property or a share in property to which the minor is entitled intending thereby to benefit such administrator or guardian or any other person shall be guilty of an offence and liable to a fine of K100, 000 and to imprisonment for three years.

(2) A court shall have jurisdiction to try an offence under this section notwithstanding that it has previously dealt with an application in relation to the property in question.

(3) A court shall order restitution of property or the value thereof in favour of the minor against the administrator or guardian found guilty under this section.

SECTION 75 *[Application of Traditional Courts Act Cap. 3:03]*

The provision confers powers on the Chief Traditional Courts Commissioner in respect of matters under this Act. These powers have no application at present with the abolition of traditional courts as envisioned under the Traditional Courts Act and the abolition of the office of the Chief Traditional Courts Commissioner.

For ease of reference, the Commission highlights some of such powers under subsection (1) of section 32 of the Traditional Courts Act to be as follows-

(a) order any case to be retried either before the same traditional court or before any other traditional court;

(b) order the transfer of any cause or matter, either before trial or at any stage of the proceedings, whether before or after sentence is passed or judgment given, to a subordinate court having jurisdiction within the area concerned;

(c) subject to such conditions as to costs, security or otherwise as to him appear just, direct a Traditional Appeal Court to extend the time for appeal in any case to which the provision of subsection (1) of section 34 of the Traditional Courts Act do not apply;

(d) vary the judgment of a traditional court directing the payment of money by providing for payment by instalments or by reducing the instalments and extending the period for payment;

Further, subsection (2) of section 32 of the Traditional Courts Act provides-

(2) In the case of any cause or matter involving an issue of customary law the Chief Traditional Court Commissioner may order that either before trial or at any stage of the proceedings before judgment is given such cause or matter may either –

(a) be transferred to another traditional court for the purposes of taking evidence relating to any issue specified in the order of transfer and of determining such issue; or

(b) be transferred to such other traditional court for hearing and trial determination of the cause or matter concerned.

The Commission noted these are powers inherent in the Judiciary and only the courts should exercise them.

The Commission therefore recommends deletion of the provision for being of no application under the Constitution.

SECTION 76 *[Subsequent discovery that estate dealt with as small estate exceeds K20, 000 in value]*

The provision validates the act of any court exercising jurisdiction or of an administrator to whom administration grant is made, if it is afterwards discovered that the gross value of the estate exceeds K20,000. It further provides for what steps should be taken in order to remedy the situation. The Commission noted and affirmed the distinction between small estates and large estates in terms of value. In view of this, the Commission recommends that words "K20, 000" be replaced with the words **"the value of a small estate."**

In relation to subsection (3), the Commission recommends that it should be amended by replacing "Chairman", referring to a chairman of a traditional court, with "**presiding officer**" and that the last sentence in the provision should become a new subsection (4). The Commission further recommends that subsection (4) of section 76 be deleted in view of the earlier recommendation for deletion of section 75.

The provision will now read as follows-

(1) No act of a court exercising jurisdiction under this Part or of an administrator to whom an administration grant has been made shall be invalid because it is afterwards discovered that the gross value of the estate in relation to which the act was done exceeds the value of a small estate.

(2) Every administrator of an estate appointed under this Part who discovers that the gross value of the estate exceeds the value of a small estate shall immediately report the discovery to the court by which he or she was appointed and to the Secretary to the Commissioners of Estate Duty, stating what he or she now considers the gross value of the estate to have been at the death of the deceased and the reason for the lateness of the discovery.

(3) The presiding officer of a court who discovers that the gross value of an estate, which has been the subject of the proceedings in the court, is believed to exceed the value of a small estate or who receives a report under subsection (2) shall, after such further inquiry, if any, as he or she deems appropriate, report the matter to the High Court and to the Secretary to the Commissioners of Estate Duty; and

such report shall set out briefly the circumstances of the estate and shall contain a recommendation whether further proceedings in court relating to the estate should be continued in the High Court or the original court.

(4) After making a report under subsection (3) the presiding officer of the court shall not exercise jurisdiction under this Part without the directions of the High Court and shall do so subject to such directions as the High Court may consider it appropriate.

SECTION 77 *[Small estate procedure rules]*

The section gives power to the Minister to make rules outlining the procedure to be observed in respect of applications relating to small estates, the forms to be used and the fees to be paid and all other matters arising. The Commission noted that this scenario was as a result of the traditional courts being under the executive branch of Government controlled by the Minister of Justice. In view of the current constitutional order, the Commission recommends that the authority for promulgating rules for court procedures and forms should be vested in the Chief Justice. Therefore, the section will read as follows-

The Chief Justice may make rules prescribing the procedure to be observed in respect of applications relating to small estates, the forms to be used and the fees to be paid and all other matters arising under this Part.

PART XIV

GENERAL

SECTION 78 *[Registrar to preserve certain wills and maintain register]*

With the Commission's recommendation to decentralise the handling of probate matters to subordinate courts, the Commission recommends that in the interest of the preservation of the original copy of a will such original copy should be deposited with the registry of the court that made the grant of probate or letters of administration as the case may be. At present, the provision assigns the repository functions over wills only to the registry of the High Court (meaning the Principal Registry).

The provision will now read as follows-

(1) The original of every will of which probate is granted or in respect of which a grant of letters of administration with a certified copy of the will annexed or an administration grant with a certified copy of the will annexed is made under this Act shall be deposited and preserved in the registry of the court that made the grant, but it may, if the court so determines, be transmitted for such preservation to a registry of the High Court.

(2) A court shall maintain a register of all wills deposited with it and may at any time furnish a certified copy thereof to any person.

(3) Subject to the control of the court and to the provisions of the Deceased Estates (Wills, Inheritance and Protection) (Deposit of Wills) Rules, a will deposited with a court shall be open to inspection.

SECTION 79 *[Discretion of Court]*

The section provides that the Court (meaning the High Court) shall not be bound to grant any application under the Act. However, the Court may exercise its discretion in relation thereto. Further, under the provisions of this section, if an application is refused the court is mandated to state the reason for such refusal, of course on request being made.

The Commission considered the import of the provision and proposed that it should be broken into two subsections. This was considered necessary for reasons of making provision for time within which the reasons for refusal by the Court should be given. Failure by the Court to do so within the given period, then by operation of law, the application should be deemed granted unless the interests of justice require otherwise.

The Commission also recommends that the provision should extend to subordinate courts as recommended under section 21.

The provision will now read as follows-

(1) A court shall not be bound to grant any application under this Act but may exercise its discretion in relation thereto.

(2) If such an application is refused the court shall state the reason for refusal within a reasonable time not being more than a period of thirty days failing which the application shall be deemed granted by that court and the court shall proceed to effect the grant unless the interests of justice require otherwise.

SECTION 80 *[Salary or wages]*

The section states that in spite of any other provision of the Act the employer is to immediately pay to the widow of the deceased employee or the senior member of his family living with him the amount due to the estate in respect of salary, wages or allowances. Such receipt by the widow or senior member of the deceased's family shall be a good discharge to the employer for the amount paid.

Further in subsection (2) the person in receipt of the money may apply the money for the purpose of paying normal household expenses of the deceased's family or family expenses in relation to his funeral.

The Commission observed that there is a need to use gender-neutral terms in place of widow to include the male spouse where applicable. The other observation was the need to open up the application of the provision to include arrears and also that the payment of the salary, wages, allowances and arrears be paid immediately, not depending on the discretion of the employer. The Commission also recommends that the payment under the provision should

be made to a senior and responsible member of the deceased person's family in the absence of a surviving spouse.

The Commission therefore recommends retention of the section subject to the some proposed amendments to incorporate those concerns. The amended section shall read as follows-

> **(1) Notwithstanding any of the other provisions of this Act, where a person was employed at the date of his or her death, his or her employer shall immediately pay directly to the surviving spouse or in the absence of a surviving spouse to the senior and responsible member of the deceased person's family known to be living with him or her, the amount due to his or her estate in respect of salary, wages, allowances or arrears for the pay period interrupted by his or her death and, if still unpaid, the immediately prior pay period and the payment to such surviving spouse or other member of his or her family shall be a good discharge to the employer for the amount so paid and the recipient of the amount shall, if required, account to the personal representative of the deceased for the expenditure thereof.**
>
> **(2) The person to whom money is paid under subsection (1) may apply the money for the purpose of paying normal household expenses of the family of the deceased or family expenses in relation to his or her funeral.**

SECTION 81 *[Sane murderer not to share in victims estate]*

Subsection (1)

The Commission understood the provision to mean that if a person who is sane murders another, he or she shall not benefit, directly or indirectly, from the estate of the murdered person and that persons beneficially entitled to shares in the estate of the murdered person shall be ascertained as if such murderer had never been born.

The Commission affirms this principle and recommends retention of the provision.

Subsection (2)

The subsection (2) of the provision states that the conviction of the person in criminal proceedings of the crime of murder shall be sufficient evidence that the person convicted committed the murder. The Commission considered the phrase "in criminal proceedings" and felt that nothing would be lost by dropping the phrase altogether.

The Commission nonetheless recommends retention of the provision.

New subsection **(3)**

Considering that suspects of murder take time to be tried and that the estate may be distributed before the suspect is tried and also the person suspected of murder may be acquitted, the Commission recommends the introduction of a new subsection (**3**) to take care of such

situations by requiring that the benefit to such person shall be held on trust to be directed by the court.

The Commission recommends redrafting the section as follows-

(1) Notwithstanding any of the other provisions of this Act, a person who, while sane, murders another person, shall not be entitled, directly or indirectly, to any share in the estate of the murdered person and the beneficiaries to the estate of the murdered person shall be ascertained as though the person who murdered the other had never been born.

(2) For the purposes of this section, the conviction of a person of a crime of murder shall be sufficient evidence of the fact that the person convicted committed the murder unless the contrary is proved.

(3) Subject to subsections (1) and (2), the benefit under a will or on intestacy accruing to a person charged with the murder of the testator or intestate shall be held upon trust as directed by the court and upon his or her conviction the proceeds from the trust shall be applied as the court may deem appropriate.

SECTION 82 *[Trustee Act to apply Cap.5:02]*

The Commission recommended retention of this provision.

SECTION 83 *[Proof of claims may be required]*

The Commission recommends retention of the provision. However, for better comprehension, the Commission further recommends that the provision should be broken into several subsections as follows-

(1) When a personal representative has received a notice from a claimant in respect of an estate or property which he or she wishes to distribute, he or she may, by a notice in writing served personally or by post, require the claimant prior to a date to be named in such notice, which shall not be less than sixty days from the service of such notice, either to institute proceedings to establish the claim or otherwise to satisfy the personal representative of the validity of the claim by affidavit.

(2) At the expiry of the time mentioned in the notice, the personal representative shall be at liberty to distribute the estate or property to which the notice relates amongst the parties entitled thereto without having regard to the claims of persons who shall have been served with such notice but shall have failed to comply with the requirements thereof and the personal representative shall not be liable to any such person for the estate or property so distributed.

(3) Nothing in this section shall prejudice the right of any claimant to trace the property or any property representing the property being claimed into the hands of any person, other than a *bona fide* purchaser of the legal estate in the property for value without notice, who may have received it.

SECTION 84 *[Payments to representatives in country of domicile]*

The Commission recommends retention of the provision.

SECTION 84A *[Unlawful possession, etc., of deceased estate]*

The provision deals with the phenomenon that has come to be known as "property grabbing" in the Malawian society.

The provision was introduced by the Wills and Inheritance (Amendment) Act[35], following the recommendations of the Law Commission in its Report on the Review of Certain Laws of Malawi[36]. The review exercise was prompted by a submission the Law Commission received from the Parliamentary Women Caucus who observed, at that time, that there was no provision for the punishment of persons who grab property of a deceased person in contravention of the will left by a deceased person or in contravention of the Act in the case of an intestacy.

The Commission was privileged to hear the views of the Director of Public Prosecutions on the application of the provision since its enactment in 1998. The Commission learnt from the Director of Public Prosecutions that his office has not used the provision at all, as often and in his interpretation, the "property grabber" is a person who is ordinarily entitled to the property and the section seems to target persons who are not ordinarily entitled to the property under a will or the Act. Further, the Commission also heard views from the Administrator General who observed that of the cases of property grabbing he has referred to the police for their action none has been prosecuted as the police are reluctant to investigate let alone prosecute cases of property grabbing treating them as family matters.

The Commission also sought the views of the Police on this matter. The Police confirmed that despite receiving a lot of complaints of property grabbing (most complainants being women), there has been no prosecution of such cases as they have tended to treat them as family matters.

While the Police confirmed that police prosecutors are aware of the existence of the offence under this section, it was not clear whether the same could be said of the general rank and file in the Service.

The Commission therefore recommends the introduction of the law of succession in Malawi in the curriculum of police recruits and cadets during their training. Further, the Commission recommends a massive civic education campaign targeted at the Police on the law of succession in Malawi. The Commission is convinced that such initiatives would change the attitude and perception of the Police towards cases of property grabbing.

[35] No. 22 of 1998
[36] Law Commission Report Number 1, *Malawi Government Gazette Extraordinary, 29th November, 1996.*

As regards the interpretation of the provision itself, the Commission is of the view that the provision catches a person who takes property which he or she is not entitled to or takes more property than he or she is entitled to and did not agree with the interpretation advanced by the Director of Prosecutions.

The Commission therefore recommends retention of the provision subject to enhancing the fine for the offence from "K20, 000" to "**K1, 000, 000**" having been satisfied that in some instances the illicit gains could be in millions of Kwacha if involving property of high value such as a house or a motor vehicle. The new fine, as with all fines, will be a maximum with a court having judicial discretion to impose a lesser amount appropriate to the circumstances of the case.

As the offence under this section is a form of theft of an aggravated nature akin to the forms of theft provided for under sections 279[37], 280[38], 281[39] and 282[40] of the Penal Code (Cap. 7:01), the Commission recommends that the term of imprisonment should be enhanced to ten years to bring it in line with the punishment for the offences under the Penal Code.

Further, the Commission recommends the introduction of a new subsection (**2**) which shall cater for the disqualification of any person found guilty under the provision from becoming a personal representative or guardian in relation to any deceased estate subject only to provisions on spent convictions as recommended by the special Law Commission on Criminal Justice Reforms in its Report on the Review of the Criminal Procedure and Evidence Code (Cap. 8:01)[41].

The provision will now read as follows-

> **(1) Any person not being entitled thereto under a will or upon any intestacy who, in contravention of the will or of this Act, takes possession of, grabs, seizes, diverts or in any manner deals in, or disposes of, any property forming part of the estate of a deceased person, or does anything, in relation to such property, which occasions or causes or is likely to occasion or cause deprivation or any form of hardship to a person who is entitled thereto under the will or upon the intestacy, shall be guilty of an offence and liable to a fine of K1, 000, 000 and to imprisonment for ten years and in addition to such sentence, the court shall make an order directing that-**
>
> **(a) the property or the monetary value thereof be immediately restored to the person or persons lawfully entitled thereto or to the estate of the deceased person; and**
>
> **(b) the whole, or such part as the court shall specify in the order, of the fine imposed be paid to the person or persons entitled or into the estate of the deceased person.**

[37] The section provides for the offence of stealing wills.
[38] The section provides for the offences of stealing postal matter etc.
[39] The section provides for the offence of stealing cattle.
[40] The section provides for the offences of stealing from the person; stealing from a dwelling house; stealing goods in transit, etc.
[41] Law Commission Report Number 10, *Malawi Government Gazette Extraordinary*, 18th December, 2003.

(2) Subject to any other written law in relation to spent convictions a person found guilty under this section shall not qualify as an administrator or guardian in relation to an estate of a deceased person in Malawi.

SECTION 84B *[special public prosecutors]*

The Commission was again privileged to hear from the Director of Public Prosecutions on the application of this provision. The Commission learnt from him that special public prosecutors, as required by this section, have not been appointed across the country.

However, the Commission did not find cause for a review to this provision. The Commission endorses the principle of special public prosecutors for the purposes of prosecution of the offence of property grabbing under section 84A of the Act.

Nonetheless, the Commission recommends retention of the provision subject to substitution of "reasonable" in paragraph (ii) of subsection (2) with "**reasonably",** "precedures" in subsection (6) with "**procedures**", "Presecutions" in paragraph (e) of subsection (6) with "**Prosecutions**" to correct obvious errors.

Further, in stating the obvious under subsection (10), the Commission recommends that the provision should state that the Police also have powers, as subordinates of the Director of Public Prosecutions, to prosecute the offence under section 84A.

SECTION 84C *[Civic awareness]*

The Commission recommends retention of the provision.

PART XV

TRANSITIONAL AND SAVING

SECTION 85 *[Transitional (misspelt "Traditional")]*

The Commission recommends retention of the provision as it has relevance under the new scheme of the law of succession to ensure continuity from the old law to the new law. Further, the Commission recommends the correction of the obvious error in the marginal note which presently reads as "Traditional" and replacing it with "**Transitional**" and also subject to the incorporation of the recommendation made under section 21 of the Act.

The provision will now read as follows-

An application to the court for probate, letters of administration or re–sealing made before the coming into operation of this Act may be continued as though the application had been made under this Act.

SECTION 86 *[Saving]*

The Commission recommends retention of the provision.

SCHEDULE

In light of the recommendation made regarding Part V of the Act, the Commission recommends the repeal of the Schedule.

SUBSIDIARY LEGISLATION

WILLS AND INHERITANCE (RESEALING OF GRANTS) NOTICE

under s. 21

The Commission observed that the Notice is in respect of subsection (2) of section 21 of the Act. The Commission has recommended that the jurisdiction of the High Court on resealing grants of probate and letters of administration should be extended to a grant from any country. The Notice therefore becomes superfluous and the Commission recommends its deletion.

PROBATE (DEPOSIT OF WILLS) RULES

under s. 22

The Commission recommends that the heading of the Rules should read **Deceased Estates (Wills, Inheritance and Protection) (Deposit of Wills) Rules** in line with the recommendation to change the title of the Act.

RULE 1 *[Citation]*

In line with the recommendation regarding the heading of the Rules, the provision will now read as follows-

> **1. These Rules may be cited as the Deceased Estates (Wills, Inheritance and Protection) (Deposit of Wills) Rules.**

RULE 2 *[Deposit of wills for safe custody]*

Subrule (1)

The Commission recommends retention of the provision subject to correction of the word "testor" and replacing with "**testator**" deletion of the full stop in line five immediately after the word "fee" and substitution therefore the word "**and**" and inclusion of the reference to magistrates' courts.

(1) A testator who wishes to deposit his or her will for custody under section 7 of the Act with the Registrar or a District Commissioner or a subordinate court, shall deliver it to the Registrar or District Commissioner or a magistrate of a particular subordinate court in a sealed envelope bearing on the outside all the known names of the testator, together with the prescribed fee and the Registrar or District Commissioner or magistrate shall assign to each will and mark on the envelope a serial number and shall give the depositor a receipt bearing the serial number assigned to the will in Form I in the Schedule.

Subrule (2)

The Commission recommends retention of the provision subject to incorporation of its recommendation under section 7 of the Act.

The provision will now read as follows-

(2) The Registrar, every District Commissioner and every magistrate shall maintain an index of all known names of the testators whose wills are deposited with him or her and the date on which each will was so deposited and the serial number of the will and the index shall be in Form I in the Schedule and the serial numbers used by a District Commissioner or magistrate shall be such as are assigned by the Registrar.

Subrule (3)

The Commission recommends retention of the provision subject to incorporation of its recommendations under section 7 of the Act.

The provision will now read as follows-

(3) All wills so deposited shall be kept by the Registrar or District Commissioner or magistrate in a safe place until the death of the maker thereof, unless re-delivery is demanded and the receipt issued under subrule (1) is produced by the testator in person in his or her lifetime, or if he or she should be unable to attend in person, by his or her agent specifically authorised for that purpose.

Subrule (4)

The Commission recommends retention of the provision.

Subrule (5)

The Commission recommends retention of the provision subject to inclusion of its recommendation under section 7 of the Act.

The provision will now read as follows-

(5) The Registrar or District Commissioner or magistrate may require such proof of the authority of any person claiming to be the agent of a testator as he or she shall deem appropriate, and may dispense with the production of his or her receipt for the will if he or she is satisfied that there is good reason for its non-production and that the application is genuine.

RULE 3 *[Monthly circular]*

The Commission recommends retention of the provision subject to the inclusion of its recommendation under section 7 of the Act and further to the breakdown of subsection (1) into several subsections.

The provision will now read as follows-

(1) The Registrar or District Commissioner or magistrate shall, within fourteen days after any month during which a will was deposited with him or her or withdrawn from him or her, prepare a circular in Form II in the Schedule indicating the wills deposited and withdrawn during that month.

(2) The circular will indicate the serial number of the will, whether the will was deposited or withdrawn, the name of the testator, his or her village, his or her chief and his or her home District Commissioner.

(3) Upon receipt of each circular, each District Commissioner shall note in his or her index the deposit or withdrawal of a will by a resident of his or her District, and, in the case of a deposit, the place where it is deposited.

(4) The information contained in such monthly circulars may not be disclosed to any person except for the purposes of these Rules.

RULE 4 *[Action to be taken on notification of testator's death]*

The Commission recommends retention of the provision subject to inclusion of the recommendations made in relation to sections 7 and 21 of the Act.

The provision will now read as follows-

(1) Where an application for probate or letters of administration with will annexed is made to the Registrar or resident magistrate or magistrate of the first grade and he or she is informed that the original of the testator's will is deposited with a District Commissioner or magistrate, the Registrar or resident magistrate or magistrate of the first grade shall, on being satisfied of the death of the deceased, request the District Commissioner or magistrate with whom the will is deposited to forward the original will to him or her.

(2) If a District Commissioner with whom a testator's will is deposited is informed by a court that the court is satisfied of the death of the testator, the District Commissioner shall forward the original of the testator's will in its sealed envelope to the Registrar or resident magistrate or magistrate of the first grade.

(3) On receipt of the original will, the Registrar or resident magistrate or magistrate of the first grade shall break the seal on the envelope and if the estate appears to be a small estate, shall cause two photostat copies of the will to be made and shall send such copies to the District Commissioner, who shall forward them to the court of the resident magistrate or magistrate of the first grade concerned, with a note of the amount of the fees due in respect of the making of such copies.

RULE 5 *[Secrecy]*

Subrule (1)

The Commission recommends retention of the provision subject to incorporation of the recommendations made under sections 7 and 21 of the Act respectively.

The provision will now read as follows-

(1) No information concerning a will deposited for custody may be given to any person except to the Registrar, another District Commissioner, resident magistrate or a magistrate of the first grade in accordance with these Rules or the Deceased Estates (Wills, Inheritance and Protection) (Small Estates) Rules and the envelope containing the original will may not, so long as the will is in custody, be opened by any person except by the Registrar or resident magistrate or magistrate of the first grade when informed of the death of the testator.

Subrule (2)

The Commission recommends retention of the provision subject to incorporation of the option of a fine available to an offender. The Commission therefore recommends a fine of **K2, 000** to be open as a sentence to offenders.

The provision will now read as follows-

(2) Any person who discloses any information relating to the will otherwise than in accordance with these Rules or the Deceased Estates (Wills, Inheritance and Protection) (Small Estates) Rules shall be liable guilty of an offence and to a fine of K2, 000 and imprisonment for three months.

RULE 6 *[Fee]*

The Commission recommends retention of the provision subject to increasing the fee to **K200**.

6. − (1) The fee payable on the deposit of a will under rule 2 shall be K200 and such fee shall not, under any circumstances, be refunded.

(2) When any will is withdrawn pursuant to rule 2 (3) and the same or another will is re-deposited by the same testator, a fresh fee of K200 shall be paid.

SCHEDULE

rr. 2 and 3

FORM I

WILLS DEPOSITED FOR CUSTODY

Index		*Receipt*
Name of Maker and Serial Number …….	Address	000001 ……
000001 ……	Village*……	A packet said to contain the will of
Names in full ……..	Chief* …….....	……
……..	District …….. ..	……
Other names (if any) ……	Other address (business, etc.) ……	received for safe custody
……..	……..	the …… day of
Date: ……	……..	……..., 20….
Fee: ……	……..	Fee: ……..
		…….. *District Commissioner/ Registrar/Magistrate*

* The name of the Depositor's Village and Chief need not be given if these are not applicable, in which case the Depositor's home address should be given.

FORM II

To: The Registrar of the High Court;
All District Commissioners.

CUSTODY OF WILLS

The following wills were deposited for safe custody or withdrawn at ……by the under-named during the month of ……..., 20……

DEPOSITS

Register No.	*Date*	*Depositor*	*Village*	*Chief*	*District*
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……

WITHDRAWALS

Register No.	*Date*	*Depositor*	*Village*	*Chief*	*District*
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……

……..……..……
District Commissioner/Registrar/Magistrate
Date...……..……..

PROBATE (NON-CONTENTIOUS) RULES

under s. 22

The Commission recommends that the heading to the Rules should read **Deceased Estates (Wills, Inheritance and Protection) (Non – Contentious Probate) Rules** in line with the recommendation to change the title to the Act.

RULE 1 *[Citation]*

In the light of the change in the heading to the Rules, the provision will now read as follows–

1. These Rules may be cited as the Deceased Estates (Wills, Inheritance and Protection) (Non – Contentious Probate) Rules.

RULE 2 *[Interpretation]*

The Commission recommends retention of the provision subject to incorporation of the recommendations made under section 21 of the Act.

The provision will now read as follows-

2. In these Rules unless the context otherwise requires–

(a) "grant" means a grant, made by the High Court or a court of a resident magistrate or a magistrate of the first grade of probate of a will or of letters of administration with or without a will annexed, and the resealing by the High Court in Malawi of probate or letters of administration issued by a court of probate outside Malawi;

(b) "gross value" in relation to an estate means the value of the estate without deduction for debts, encumbrances, funeral expenses or estate duty;

RULE 3 *[How applications to be made]*

The Commission recommends retention of the provision subject to incorporation of the recommendations made under section 21 of the Act. Further, the Commission considers it desirable that an application under this rule may be made by an applicant in person and not necessarily by a legal practitioner on his or her behalf. However, the Commission recommends that the provision should be redrafted for better comprehension.

The provision will now read as follows-

3. − (1) An application for a grant may be made in person or in writing to the Registrar or a resident magistrate or a magistrate of the first grade.

(2) An application for a grant made by a legal practitioner for and on behalf of an applicant shall be in writing.

(3) Every application for a grant, except an application for probate or by a trust corporation, shall state the names, addresses and descriptions of the proposed sureties.

(4) Every application for a grant shall state the address for service of the applicant.

(5) An applicant for a grant making the application in person shall supply all information necessary to enable the court to which the application is made prepare the documents leading to the grant and where the applicant prepares the documents himself or herself, he or she shall lodge such documents unsworn.

RULE 4*[Contents of oath]*

Subrule (1)

The Commission recommends the retention of the provision subject to deletion of the word "Judge" and replacement with the word "**court**" in the last line of the provision.

The provision will now read as follows–

(1) Every application for a grant shall be supported by an oath in the form applicable to the circumstances of the case which shall be contained in an affidavit sworn by the applicant and by such other documents as these Rules or the court may require.

Subrule (2)

The Commission recommends retention of the provision.

Subrule (3)

The Commission recommends retention of the provision.

Sub-rule (4)

The Commission recommends retention of the provision.

Subrule (5)

The Commission recommends retention of the provision.

RULE 5 *[Jurisdiction exercised by single Judge]*

The Commission recommends retention of the provision subject to substitution of "Judge" wherever it appears for "**court**".

The provision will now read as follows-

(1) All matters relating to grants may be disposed of by a court sitting in chambers:

Provided that the court may adjourn any matter for determination in open court and give such directions regarding the attendance of any person in court in relation to the matter as it may deem appropriate.

(2) A court may refuse to make an order for any grant to be issued until all inquiries which it sees fit to make have been answered to its satisfaction and may require proof of the identity of the deceased or of the applicant beyond that contained in the oath.

RULE 6 *[Proof of death]*

The Commission recommends that a death certificate should be allowed as proof of death. Further, the Commission recommends substitution of "Judge" in the last line of the provision with "**court**".

The provision will now read as follows-

Every application for a grant other than an application for resealing shall be accompanied by the death certificate of the deceased or the affidavit of a person who knew the deceased in his or her lifetime certifying of his or her personal knowledge the fact of the death of the deceased or by such other evidence of the death of the deceased as the court may approve.

RULE 7 *[Administration bonds]*

Subrule (1)

The Commission recommends deletion of the provision in light of the recommendation under section 31 to remove the different treatment of "trust corporations".

Subrule (2)

The Commission recommends retention of the provision subject to substitution of "Registrar" in line two and "Judge" in line four of the provision with "**court**" respectively.

The provision will now become subrule (**1**) and will read as follows-

(1) Every applicant for a grant of letters of administration shall furnish to the court an administration bond in Form II in the First Schedule with sureties to the satisfaction of the court and the amount of the bond shall be the gross value of the estate.

Subrule (3)

The Commission recommends retention of the provision subject to deleting the phrase "or the value of the estate does not exceed $100" in line two of the provision and also deletion of the full stop in the third line and replacing with the conjunction "**and**" so as to combine the two sentences.

The provision will now become subrule (**2**) and will read as follows-

(2) Except where the sole surety is a bank or an insurance company, there shall be two sureties to every administration bond and a reasonable premium paid to the bank or an insurance company in respect of the issue of such a bond shall be a proper expense of administration.

Subrule (4)

The Commission recommends retention of the provision subject to substitution of "Judge" with "**court**".

The provision will now become subrule (**3**) and will read as follows-

(3) The court shall so far as is reasonably possible satisfy itself that every surety is a responsible person.

RULE 8 *[Estate Duty affidavit]*

The Commission observed that Part X of the Act does not make it a requirement that an application for a grant of probate or letters of administration should be accompanied with an estate duty affidavit and a certificate of Estate Duty Commissioners under section 33 of the Estate Duty Act. The Commission therefore was of the view that the rule deals with a substantive matter in the manner of a grant of probate or letters of administration and therefore the principle in the rule needs to be provided for in the principal Act under Part X.

RULE 9 *[Additional name]*

The Commission recommends retention of the provision.

RULE 10 *[Marking of wills]*

The Commission recommends retention of the provision subject to the substitution of "Judge" in the proviso with "**court**".

The provision will now read as follows-

10. Every will in respect of which an application for a grant is made shall be marked by the signature of the applicant and the person before whom the oath is sworn, and shall be exhibited to the affidavit required under these Rules:

Provided that where the court is satisfied that compliance with this rule might result in the loss of the will, it may allow a photographic copy thereof to be marked or exhibited in place of the original document.

RULE 11 *[Engrossments for purposes of record]*

Subrule (1)

The Commission recommends retention of the provision subject to substitution of "Judge" with "**court**".

The provision will now read as follows-

(1) Where the court considers that in any particular case a photographic copy of the original will would not be satisfactory for purposes of record, it may require an engrossment suitable for photographic purposes to be lodged.

Subrules (2), (3), (4) and (5)

The Commission recommends retention of the provisions.

RULE 12 *[Evidence as to due execution of will]*

The Commission recommends retention of the provision subject to insertion of the phrase "**about**" immediately after the "doubt" in line three of subrule (1), replacing "Judge" with "**court**" in line two of sub rule (2) and in the first line of subrule (3) and replacing "executive" with "**execution**" in the last line of sub rule (2).

The provision will now read as follows-

12. – (1) Where a will contains no attestation clause or the attestation clause is insufficient or where it appears to the court that there is some doubt about the due execution of the will, the court shall, before admitting it to proof, require an affidavit as to due execution in Form XI in the First Schedule from one or more of the attesting witnesses, or, if no attesting witness is conveniently available, from any other person who was present at the time the will was executed.

(2) If no affidavit can be obtained in accordance with subrule (1) the court may, if it thinks fit, having regard to the desirability of protecting the interests of any person who may be prejudiced by the will, accept evidence on affidavit from any person it may think fit to show that the signature on the will is in the

handwriting of the deceased or of any other matter which may raise a presumption in favour of the due execution of the will.

(3) If the court is not satisfied that the will was duly executed, it may refer the matter into open court.

RULE 13 *[Execution of will of blind or illiterate testator]*

The Commission recommends retention of the provision subject to replacing "Judge" with "**court**".

RULE 14 *[Alteration of wills]*

The Commission recommends retention of the provision to replacing "Judge" wherever it appears with "**court**".

The provision will now read as follows-

14. – (1) Where there appears in a will any obliteration, interlineation or other alteration which is not authenticated by the signature of the attesting witnesses or by the re-execution of the will or by the execution of a codicil, the court shall require evidence to show whether the alteration was present at the time when the will was executed and shall give directions as to the form in which the will shall be proved.

(2) If from any mark on the will it appears to the court that some other document has been attached to the will, or if a will contains any reference to another document in such terms as to suggest that it ought to be incorporated in the will, the court may require the document to be produced and may call for such evidence in regard to the attaching or incorporation of the document as it may think fit.

(3) Where there is doubt as to the date on which a will was executed, the court may require such evidence as it thinks necessary to establish the date.

RULE 15 *[Attempted revocation of will]*

The Commission recommends retention of the provision subject to replacing "Judge" with "**court**".

The provision will now read as follows-

15. Any appearance of attempted revocation of a will by burning, tearing or otherwise and every other circumstances leading to a presumption of revocation by the testator, shall be accounted for to the satisfaction of the court.

RULE 16 *[Additional affidavit or other evidence may be required]*

The Commission recommends retention subject to replacing "Judge" with "**court**".

The provision will now read as follows-

16. The court may require an affidavit from or the personal attendance of any person it may think fit for the purpose of satisfying itself as to any of the matters referred to in rule 12, 13, 14 or 15.

RULE 17 *[Soldiers' wills]*

The Commission recommends retention of the provision subject to replacing "Judge" with "**court**".

The provision will now read as follows-

17. If it appears to the court that there is *prima facie* evidence that a will is one to which section 5 (4) of the Act applies, the will may be admitted to proof if the court is satisfied that it was made in compliance with the provisions of that subsection.

RULE 18 *[Making and issue of grant]*

The Commission recommends retention of the provision subject to replacing "Judge" with "**court**" in the first line of the provision and the incorporation of the recommendation made under section 21 of the Act.

The provision will now read as follows-

18. − (1) When a court has directed that a grant shall be made, and, in cases where an administration bond is required, has approved the sureties, the Registrar or a resident magistrate or a magistrate of the first grade, shall prepare a grant in the appropriate form.

(2) One of the forms in Forms VIII and IX in the First Schedule shall be made with such variations, limitations and exceptions as the court may direct.

(3) Every grant shall be signed by the Registrar or a resident magistrate or a magistrate of the first grade and shall be sealed with the seal of the court.

(4) When an administration bond is required, the grant shall not issue until such a bond has been executed by the approved sureties.

RULE 19 *[Sealing of foreign grants]*

The Commission recommends retention of the provision.

RULE 20 *[Citations]*

The Commission recommends retention of the provision subject to replacing "Judge" with "**court**" wherever it appears and also to the redrafting of the provision for better comprehension.

The provision will now read as follows-

20. – (1) Every citation shall issue from the registry of the court and shall be settled by the Registrar or a resident magistrate or a magistrate of the first grade before being issued.

(2) Every averment in a citation, and such other information as the Registrar or a resident magistrate or a magistrate of the first grade may require shall be verified by an affidavit sworn by the citor, if there are two or more citors, by one of them:

Provided that the Registrar or resident magistrate or magistrate of the first grade may, in special circumstances, accept an affidavit sworn by the citor's legal practitioner.

(3) The citor shall enter a caveat in Form IV before issuing a citation.

(4) Every citation shall be served personally on the person cited unless the court, on cause shown by affidavit, directs some other mode of service, which may include notice by advertisement.

(5) Every will referred to in a citation shall be lodged in the registry of the court before the citation is issued, except where the will is not in the possession of the citor and the Registrar or resident magistrate or magistrate of the first grade is satisfied that it is impracticable to require it to be lodged.

(6) A person who has been cited to appear may, within eight days of service of the citation upon him or her, inclusive of the day of such service, or at any time thereafter if no application has been made by the citor under rule 22 (5) or rule 23 (2), enter an appearance in the registry by filing a duly completed document in Form VI and shall forthwith thereafter serve on the citor a copy of Form VI sealed with the seal of the court.

RULE 21 *[Caveats]*

The Commission recommends retention of the provision subject to incorporation of the recommendation made under section 21 of the Act.

The provision will now read as follows-

21. − (1) Any person who wishes to ensure that no grant is sealed without notice to himself or herself may enter a caveat at the court.

(2) Any person who wishes to enter a caveat under this rule (hereafter referred to as the "caveator") may do so by completing Form VI and filing it with the Registrar or a resident magistrate or a magistrate of the first grade.

(3) Where the caveat is filed by a legal practitioner the name of the caveator shall be stated in Form IV.

(4) Except as otherwise provided by this rule, a caveat shall remain in force for six months from the date on which it is entered and shall then cease further to have effect, without prejudice to the entry of a further caveat or caveats.

(5) The Registrar or a resident magistrate or a magistrate of the first grade shall maintain an index of caveats and on receiving an application for a grant he or she shall cause the index to be searched and he or she shall not consider an application for a grant with knowledge of a caveat in respect thereof.

(6) A caveator may be warned by the issue from the registry of the court of a warning in Form VI at the instance of a person with sufficient interest in the estate and such warning shall state his or her interest, and, if he or she claims under a will, the date of the will and shall require the caveator to give particulars of any contrary interest which he or she may have in the estate of the deceased; and every warning shall be served on the caveator.

(7) A caveator who has not been warned may at any time during which the caveat is in force withdraw his or her caveat by giving notice of such intention in writing to the Registrar or resident magistrate or magistrate of the first grade and if the caveator has been warned and the caveator has not acknowledged service of the warning and has not indicated his or her intention to contest the warning, he or she may withdraw his or her caveat by giving notice of withdrawal in writing to the person who issued the warning and to the Registrar or resident magistrate or magistrate of the first grade.

(8) A caveator having an interest contrary to that of the person who issued a warning may, within eight days of the service of the warning on him or her, inclusive of the day of service, or at any time thereafter if no affidavit has been filed under subrule (10), acknowledge service of the warning and indicate his or her intention to contest the warning by filing Form VI at the registry of the court and shall forthwith thereafter serve on the person who issued the warning a copy of Form VI sealed with the seal of the court.

(9) A caveator having no interest contrary to that of the person who issued the warning but wishing to show cause against the issue of a grant to that person may, within eight days of service of the warning on him or her, inclusive of the day of service, or ay time thereafter if no affidavit has been filed under subrule (10), issue and serve a summons for directions.

(10) If the time limited for acknowledgement of service has expired and the caveator has not acknowledged nor given his or her intention to contest the warning, the person who issued the warning may file in the registry of the court an affidavit showing that the warning was duly served and that he or she has not received a summons for directions under rule (9), and thereupon the caveat shall cease to have effect.

(11) Unless a court by order made on summons otherwise directs-

(a) a caveat in respect of which an acknowledgement of service of a warning is duly filed with the registry of the court shall remain in force until the commencement of a probate action, or until it has been disposed of under the rules relating to probate actions;

(b) any caveat in force at the beginning of a probate action or proceedings by way of citation or motion shall, subject to subrule (7), remain in force until an application for a grant is made by the person shown to be entitled thereto by the decision of the court in such action or proceedings, and upon such application any caveat entered by a party who had notice of the action or proceedings shall cease to have effect;

(c) if no caveat is in force at the commencement of a probate action, the commencement of the action shall operate to prevent the issue of a grant as if a caveat had been entered immediately before such commencement.

RULE 22 *[Citation to accept or refuse grant]*

The Commission recommends retention of the provision subject to replacing "Judge" in subrule (4) with "**court**" and redrafting paragraph (a) of sub rule (5).

The provision will now read as follows-

22. − (1) A citation may be issued under section 28 of the Act or under subrules (2) or (3).

(2) Where power to make a grant to an executor has been reserved, a citation calling on the executor to accept or refuse a grant may be issued at the instance of the executors who have proved the will or of the executor of the last survivor of deceased executors who have proved the will.

(3) A citation calling on an executor who has inter-meddled in the estate of the deceased to show cause why he or she should not be ordered to take a grant may be issued at the instance of any person interested in the estate at any time after the expiry of six months from the death of the deceased:

Provided that no citation to take a grant shall issue while proceedings as to the validity of the will are pending.

(4) A person cited who is willing to accept or take a grant may apply *ex parte* to a court for an order for a grant on filing an affidavit showing that he or she has acknowledged service of the citation and has indicated his or her intention to contest the citation and that he or she has not been served by the citor with notice of any application for a grant to himself or herself.

(5) If the time limited for acknowledgement of service of the citation has expired and the person cited has not made the acknowledgement, the citor may-

(a) in the case of a citation under section 28 of the Act apply by summons to the court for an order for a grant to himself or herself;

(b) in the case of a citation under subrule (2), apply by summons for an order striking out the acknowledgement and for the endorsement on the grant of a note that the executor in respect of whom power was reserved has been duly cited and has not made the acknowledgement and that all his or her rights in respect of the executorship have wholly ceased;

(c) in the case of a citation under subrule (3), apply by summons to the court for an order requiring the person cited to take a grant within a specified time;

and the summons shall be served on the person cited.

RULE 23 *[Citation to propound a will]*

The Commission recommends retention of the provision.

RULE 24 *[Address for service]*

The Commission recommends retention of the provision.

RULE 25 *[Limited grants]*

The Commission recommends retention of the provision.

RULE 26 *[Inspection of deceased's wills]*

The Commission recommends retention of the provision subject to incorporation and reflection in the provision of the recommendations under sections 21 and 78 of the Act.

The provision will now read as follows-

26. Every will preserved in accordance with section 77 of the Act shall be open to inspection on payment of the prescribed fee.

RULE 27 *[Application by dependants]*

The Commission recommends the redrafting of the provision to reflect its recommendation made under section 14 of the Act.

The provision will now read as follows-

27. − (1) An application by a member of the immediate family under section 15 of the Act shall be made by petition to which the executors of the will shall be the sole respondents.

(2) Such application shall be in accordance with Form VII in the First Schedule and shall be made within six months of the death of the testator and shall be verified by the affidavit of the applicant to which the respondents to the application shall file affidavits in reply.

(3) A petition under subrule (1) shall be heard in open court and the court may require the attendance in court of any of the persons having an interest in the matter.

RULE 28 *[Fees]*

The Commission recommends retention of the provision subject to incorporation of the recommendation under section 21 of the Act.

The provision will now read as follows-

28. The fees set out in the Second Schedule shall be payable in respect of the proceedings and matters therein mentioned:

Provided that if the Registrar or a resident magistrate or a magistrate of the first grade is satisfied that any applicant is unable to pay any of the prescribed fees he or she may waive or postpone payment thereof.

FIRST SCHEDULE

r. 4

FORM I

OATHS FOR EXECUTORS

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

In the Estate of ……..……... (deceased).

WE, A.B. and D.C., make oath and say (or solemnly, sincerely and truly declare and affirm) that we believe the paper writing hereto annexed, and marked by us, to contain the true and original last will and testament (with a codicil(s) thereto) of ……., deceased, who died on the ……. day of ……., 20 ……. at …….. aforesaid, domiciled in ……., that we are respectively …….. of the said deceased, and two of the executors named in the said will and will administer according to law all the estate which by law devolves to and vests in the personal representatives of the said deceased and will

exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of K…… and no more, to the best of our knowledge, information and belief.

Signatures …….
of
Deponents ……

Sworn/Affirmed by both the above-named

deponents at ……..

this …… day of ……., 20 ……..

Before me, ……..
A Commissioner for Oaths

* Delete whichever is inapplicable

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r. 4

FORM IIA

OATH – ADMINISTRATION WITH WILL ANNEXED

In the High Court of Malawi

In the ……... Magistrate Court sitting at …… *

In the Estate of ……..…… (deceased).
WE, A.B. and D.C, of ……...
make oath and say (or solemnly, sincerely and truly declare and affirm) that we believe the paper writing hereto annexed and marked by us, to contain the true and original last will and testament (with codicil(s) thereto) of ……., of ……, formerly of ……, deceased, who died on the …….. day of ……, 20 …… at ……..., domiciled in ……...; that…… and ……..
the executors named in the said will (or codicil) died in the lifetime of the said deceased; that no life interest arises in his estate and that no beneficiary is a minor; that we are respectively the …… of the said deceased and the residuary legatees and devisees named in the said will (or codicil) of the said deceased**, and will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, and will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of K …….. and no more, to the best of my knowledge, information and belief.

Signatures …….
of
Deponents ……

Sworn/Affirmed by both the above-named

deponents at ……..

this …… day of ……., 20 ……..

Before me, …….

A Commissioner for Oaths

---

* Delete whichever is inapplicable

** If not applicable, set out the entitlement of the applicants for grant and state who has a prior right and how they are cleared off.

FORM IIB r. 4

OATH FOR ADMINISTRATOR (INTESTACY)

In the High Court of Malawi

In the ……... Magistrate Court sitting at ……... *

In the Estate of …….……. (deceased).

I, A.B., of …….. make oath and say (or solemnly, sincerely and truly declare and affirm) that ……, of …….. died on the ……. day of ……., 20 …… at ……., domiciled in Malawi, and intestate; that I am the …….** of the said deceased and entitled to a part of the estate of the said deceased and am not aware of any person who has a greater or more immediate interest in such estate except …… that no minority or life interest arises out of the intestacy; and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, and will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of K …….. and no more, to the best of my knowledge, information and belief.

Signatures …….
of
Deponents ……

Sworn/Affirmed by both the above-named

deponents at ……..

this …… day of ……., 20 ……..

Before me, ……..

A Commissioner for Oaths

---

* Delete whichever is inapplicable

** Set out the relationship of the deponent to the deceased.

---

r. 7

FORM IIIA

ADMINISTRATION BOND

In the High Court of Malawi

In the ……... Magistrate Court sitting at …… *

In the Estate of ..…….…….…. (deceased).

WE, (1) …… are jointly and severally bound unto the court in the sum of (2) …… pounds, for the payment of which to the said court we bind ourselves and each of us and our (3) ……

Sealed with our Seal(s)

Dated the …….. day of ……..., 20……...

The condition of this obligation is such that if the above-named (4) ……..., the (5) ……, of (6) ……..., deceased, who died on the ……..…. day of …….……..., and

the intended administrator (with the will (7) annexed) (8) of all the estate which by law devolves to and vests in the personal representative of the said (9) deceased ……. do, when lawfully called on in that behalf, make or cause to b e made a true and perfect inventory of the said estate which has or shall come to he hands, possession or knowledge of the said intended administrator, and do exhibit the said inventory or cause it o be exhibited in court whenever required by law so to do; and do well and truly administer the said estate according to law (10); and further do make or cause to be made a true and just account of the administration of the said estate whenever required by law so to do; and further do, if so required, render and deliver up the letters of administration of the said estate whenever required by law so to do; and further do, if so required, render and deliver up the letters of administration in the court if it shall hereafter appear that any will was made by the said deceased which is exhibited in the said court with a request that it be allowed and approved accordingly (11); then this obligation shall be void and of no effect, but shall otherwise remain in full force and effect.

Signed, sealed and delivered by the within-named in the presence of ……...
A Commissioner for Oaths (or other person) authorized by law to administer an oath). (12)
The Common Seal of ……. was made hereunto affixed in the presence of ……

---

* Delete whichever is inapplicable

(1) Insert full names, addresses and descriptions of principals and sureties.

(2) Unless otherwise directed, the sum to be inserted should be the gross value of the estate.

(3) Individuals bind themselves, their executors and administrators.
Trust and other Corporations bind themselves and their successors.

(4) Insert full name of principals.

(5) Set out the capacity in which application for the grant is made (which must agree with that stated in the oath).

(6) Full name and address of the deceased.

(7) "and codicils" if any.

(8) Delete if deceased died intestate.

(9) Insert any limitation on the estate to be administered, or any extension to include settled land. On an application for a second or subsequent grant, insert "left unadministered by" (previous grantee). If the grant is to be a limited one, give particulars.

(10) On a creditor's application insert here: "paying all and singular the debts owed by the said deceased at his death in due course of administration, rateably and proportionately and according to the priority required by law, not however, preferring his own debt by reason of his being administrator nor the debt of any other person".

(11) If the deceased died intestate, this paragraph should be deleted.

(12) In the case of the intended administrator, the bond must, unless attested by an authorized officer of the registry, be attested by the person before whom the oath was sworn. Attestation is not required in the case of a corporation.

FORM IIIB r. 19

In the High Court of Malawi

ADMINISTRATION BOND ON APPLICATION FOR SEALING A FOREIGN GRANT

under s. 58

In the Estate of ……..……... (deceased).
WE, (1) …… are jointly and severally bound unto the Registrar of the High Court in the sum of (2) …… pounds, for the payment of which to the said Registrar we bind ourselves and each of us and our (3).
Sealed with our Seal(s)

Dated the …….. day of ……..., 20 ……..

Signed, sealed and delivered by the within-named in the presence of …… A Commissioner for Oaths (or other person authorized by law to administer an oath. (9) The Common Seal of …… was hereunto affixed in the presence of ……...

---

(1) Insert full names, addresses and descriptions of principals and sureties.

(2) Unless otherwise directed, the sum to be inserted should be the gross value of the estate.

(3) Individuals bind themselves, their executors and administrators.
Trust and other Corporations bind themselves and their successors.

(4) Insert full name(s), address(es) and description(s) of person(s) to whom the grant is made.

(5) "and codicils", if any.

(6) Delete if deceased died intestate.

(7) Description of Court by which grant was issued.

(8) Full name and address of the deceased.

(9) Where the application required to be supported by an oath sworn by the applicant, his signature must, unless attested by an authorized officer of a registry, be attested by the person before whom the oath was sworn. Attestation is not required in the case of a corporation.

---

r. 19

FORM IIIC

FORM OF RESEAL IN MALAWI OF A FOREIGN GRANT

In the High Court of Malawi

CIVIL CAUSE NO.: …… of 20 ……

RESEALED by this High Court of Malawi under section 58 of the Deceased Estate (Wills, Inheritance and Protection) Act.

This …… day of ……., 20……..
SEAL
of the
HIGH COURT

……
Registrar of the High Court

NOTE: The above form should be endorsed on the foreign grant which is being resealed.

FORM IV

rr. 20, 21

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

CAVEAT

In the Estate of …….. deceased.

LET no grant be sealed in the estate of ……., late of ……, deceased, who died on the ……..day of ……., 20 ……, at ……without notice to (1) …….. dated this …… day of ……, 20 ……..
Signed (2) ……..
Legal Practitioners for the said (3) ……

---

* Delete whichever is inapplicable

(1) Name and address within the jurisdiction for service of party by whom the caveat is entered.

(2) To be signed by the caveator's legal practitioner or by the caveator if acting in person.

(3) If the caveator is acting in person, substitute "in person".

FORM V r. 21

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

WARNING TO CAVEATOR

To …… of ……,
a party who has entered a caveat in the estate of……., deceased.

You are hereby warned within eight days after service hereof upon you, inclusive of the day of such service:

(1) to enter an appearance either in person or by your legal practitioner, at the Registry, setting forth what interest you have in the estate of the above-named ……. deceased, contrary to that of the party at whose instance this warning is issued;
or

(2) if you have no contrary interest but wish to show cause against the sealing of a grant to such party, to issue and serve a summons for directions by Registrar.

And take notice that in default of your so doing, the Court may proceed to issue a grant of probate or administration in the said estate notwithstanding your caveat.
Dated the …….. day of …….. . 20 ……..

…….
Registrar/Magistrate

---

* Delete whichever is inapplicable

Issued at the instance of [(set out the name and interest (including the date of the will, if any, under which the interest arises) of the party warning, the name of his legal practitioner and the address for service. If the party warning is acting in person, this must be stated].

---

r. 21 FORM VI

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

APPEARANCE TO WARNING OR CITATION

Caveat No.: ……. dated the …….. day of …….., 20 ……, (1)
Citation dated the …… day of …… 20 ……., (1)
Full name and address of the Deceased:

……
……
……

Full name and address of person warning (or citor):-
(2)

……

……
……

Full name and address of person warning (or citor):-
(3)
……
……
……

Enter an appearance for the above-named caveator (or person cited) in this manner.

Dated the …… day of …….. 20……...

(*Signed)* …….

whose address for service is:-

Legal Practitioner (or "In Person")

……

---

* Delete whichever is inapplicable
(1) Delete whichever is inapplicable.
(2) Here set out the interest of the person warning, or citor, as shown in warning or citation.
(3) Here set out the interest of the caveator or person cited, stating date of the will, if any, under which such interest arises.

FORM VII

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

PETITION No.: …….. of 20 ……

In the matter of section 15 of the Deceased Estates (Wills, Inheritance and Protection) Act, and
In the matter of the estate of …….. deceased.

1. …….

2. ……. Applicants

vs

1. …….

2. ……. Respondents

To: The High Court of Malawi/
To: The ……... Magistrate Court sitting at …… *

The Humble Petition of …… shows as follows:

(1) Probate of the will of the above-named deceased was granted to the Respondents by the High Court of Malawi/ ……Magistrate Court sitting at …… on the …… day of ……20 …..

(2) The first applicant, ……. resides at …… and is related to the said deceased (hereinafter referred to as "the Testator") as his ……

(3) Immediately prior to the death of the Testator the first applicant was dependent on the Testator as follows:

(set out nature and degree of dependency)

(4) Under the Testator's said will, the first applicant is entitled to no benefit (or as the case may be)

(5)

(6) Set out similar information regarding the second applicant (if there is one).

(7)

(8) The nature and extent of the Testator's estate is set out in the Estate Duty affidavit filed by the Respondents is as follows:

(set out the particulars of the estate)

(9) The first applicant has or had the following capital and income:

(set out past, present and future capital and income)

and no other past, present or future capital from any source)

(10) Set out similar information relating to the second applicant, if there is one.

(11) The circumstances of the other dependants, wives, children and relatives of the Testator and the beneficiaries under the Testator's will, so far as such circumstances are known to the applicants, are as follows:

(set out full details)

(12) Reasonable provision for the applicants would be:

(set out amount claimed by each applicant)

And your Petitioner(s) will

Affidavit:

We, …… and ……,

---

* Delete whichever is inapplicable

---

r. 18

FORM VIII

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

GRANT OF PROBATE

In the Estate of ……..……..., deceased.

PROBATE

This grant certifies that …… have been duly appointed Executors of the Will of the late ……, who died at …… on the …….. day of ……, 20 ……. and hereby authorized as such to administer the estate of the said deceased in accordance with the terms of his will, a copy of which is attached to this grant.

SEAL ……

Registrar/Magistrate

At ……..

This …… day of …… 20……..

---

* Delete whichever is inapplicable.

---

r. 18

FORM VIII A

GRANT OF PROBATE (LIMITED)

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

In the Estate of ……..……..…….. deceased.

PROBATE (LIMITED)

This grant certifies that ……. and …….. were duly appointed Executors of the will of the late …….. who died at …… on the ……. day of ……, 20……; that the said …….. is hereby duly authorized as Executor to administer the estate of the said deceased in accordance with the terms of his will, a copy of which is attached to this grant, and that the rights of ……. the other executor named in the said will are hereby reserved.

SEAL ……

Registrar/Magistrate

At ……..
This …….. day of …….. 20……..

---

* Delete whichever is inapplicable.

---

r. 18

FORM IX

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

In the Estate of ……..……..…….., deceased.

LETTERS OF ADMINISTRATION

These are to certify that …… and …….. have been duly appointed administrators of the estate of the late ……. who died at …… on the ……. day of ……., 20……., and are hereby authorized as such to administer his estate (according to law)* *(in accordance with the terms of his will, a copy of which is attached hereto) (1).

……

Registrar/Magistrate

At …….
This …….. day of …… 20……..

---

* Delete whichever is inapplicable.

**(1) Delete whichever is not applicable.

FORM IX A r. 18

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

In the Estate of ……..……..……., deceased.

LETTERS OF ADMINISTRATION TO UNADMINISTERED ESTATE

These are to certify that …… and …….. have been duly appointed administrators of the estate of the late ……. who died at …… on the ……. day of ……, 20……., as still remains unadministered, and are hereby authorized as such to administer such part of his estate as remains unadministered (according to law) *(in accordance with the terms of his will, a copy of which is attached hereto)**.

SEAL ……
Registrar/Magistrate

At …….
This …….. day of ……. 20……

* Delete whichever is inapplicable.
** Delete whichever is inapplicable.

FORM X

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

RENUNCIATION OF PROBATE

In the Estate of ……..……..…….. deceased.

Whereas ……, of …….. deceased, died on the …….. day of ……., 20……., at …… having made and duly executed his last will and testament bearing date the ……. day of ……., 20……, and thereof appointed ……. his sole executor; now I, the said …….. do hereby declare that I have not inter-meddled in the estate of the said deceased and will not hereafter inter-meddle therein with intent to defraud creditors, and I hereby renounce all my right and title to the probate and execution of the said will.

(*Signature*) ……

Sworn by the said ……..……..
this …… day of ……. 20..…..,

in the presence of ……
Signature of Witness: …….
Address: …….
……..

* Delete whichever is inapplicable.

FORM X A

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

RENUNCIATION OF ADMINISTRATION

In the Estate of ……..…….…….. deceased.

Whereas ……, of …….. deceased, died on the …….. day of ……., 20……., intestate, a spinster,* leaving …… widow, her mother** and the only person entitled to the estate of the said ……. deceased.

Now I, ……., the said ……, do hereby renounce all my right and title to letters of administration of the estate of the said deceased (and I further consent to the same being granted to ……, my lawful ……..).

(*Signature*) ……

Sworn by the said ……..……..
this …… day of ……. 20……,
in the presence of ……
Signature of Witness: …….
Address: …….
……..

* Delete whichever is inapplicable.
** Amend as necessary.

r. 12

FORM XI

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

AFFIDAVIT BY ATTESTING WITNESS OF DUE EXECUTION OF A WILL

In the Estate of ……..…….…….. deceased.

I, ……, of …….. (description) make oath and say (or solemnly, sincerely, truly declare and affirm) that I am one of the subscribing witnesses to the last will and testament of the said ……., of ……., the said will now being hereunto annexed bearing date ……, and that the said testator executed the said will on the day of the ……, and that the said testator executed the said will on the day of the date thereof by signing his name at the foot or end thereof as the same now appears thereon, in the presence of me and of ……. the other subscribed witness thereto, both of us

being present at the same time, and we thereupon attested and subscribed the said will in the presence of the said testator.

……
(*Signature of Deponent*)

Sworn by the above-named deponent
at ……..
this …… day of …… 20……,
Before me, ……..
A Commissioner for Oaths

SECOND SCHEDULE r. 28

FEES

		K
1.	On application for a grant of probate or letters of administration	400
2.	On deposit of a will under section 7	200
3.	On search for a will deposited under section 78	100
4.	(a) Photostat copy of a will relating to an estate other than a small estate under section 78 – per sheet	10
	(b) Photostat copy of a will relating to a small estate – per sheet of will supplied to a court	20
5.	Typed copy of a will deposited under section 78 .. .. per 100 words or part thereof	50
6.	Inspection of any will, in addition to the search fee – per hour or part thereof	50

TRADITIONAL COURTS (SMALL ESTATES) RULES

under s. 76

In line with the recommendation to change the title of the Act, the heading will now read as follows-

Deceased Estates (Wills, Inheritance and Protection) (Small Estates) Rules.

RULE 1 *[Citation]*

In the light of the recommendation made regarding the heading, the provision will now read as follows-

1. These Rules may be cited as the Deceased Estates (Wills, Inheritance and Protection) (Small Estates) Rules.

RULE 2 *[Interpretation]*

The Commission recommends retention of the provision subject to deletion of the definition of "near relative" as the concept has been dispensed with in the main Act and the deletion of the definition of "Registrar".

The provision will now read as follows-

2. In these Rules, unless the context otherwise requires-

"gross value" in relation to any estate means the value of the estate without deduction for debts, encumbrances, funeral expenses or estate duty.

RULE 3 *[How application for administration grant is to be made]*

The Commission recommends retention of the provision subject to deletion of any reference to the Traditional Courts Act or subsidiary legislation thereunder. Further, the Commission was of the view that the reference in the provision should be made to the Courts Act in relation to magistrates' courts. Finally, the provision should reflect the recommendation under section 21 of the Act.

The provision will now read as follows-

3. − (1) An application under section 65 of the Act may be made by the persons appointed by a will to administer the estate or by not less than two nor more than four other persons.

(2) After recording a complaint the clerk shall inquire whether or not the deceased left a will, whether or not the gross value of the estate does not exceed the limit of a small estate and where the deceased ordinarily resided prior to his or her death.

(3) If the applicants state that the deceased left no will and if the clerk is satisfied-

(a) by evidence on oath of the alleged death; and

(b) that the court appears to have jurisdiction in case of intestacy,

he or she shall notify the District Commissioner of the district in which the court is situate of the death and shall inquire whether the deposit of a will of the deceased person is recorded and if the District Commissioner informs the clerk that no such will is recorded, the clerk shall immediately prepare a notice in Form I in the First Schedule in accordance with rule 5.

(4) In cases where the applicants state that the deceased left no will, the application under section 65 shall be made to the court having jurisdiction and in the area in which the deceased ordinarily resided prior to his or her death for the administration grant.

RULE 4 *[Procedure in case of will]*

The Commission recommends retention of the provision subject to the incorporation of the recommendation under section 21 of the Act.

The provision will now read as follows-

4. − (1) If, on an application under section 65 of the Act, the applicants state that the deceased left a will, the clerk shall require the will to be produced to him or her or information to be given regarding the office where the will has been deposited under section 7 of the Act and if the applicants are unable either to produce the will or to state where the will is deposited, the clerk shall advise the applicants to apply to the court for a grant in respect of a lost will or to proceed as though the will has been revoked and the deceased had died intestate.

(2) If the applicants, by evidence on oath, satisfy the clerk of the death of the deceased and state that the will of the deceased is deposited for safe custody with a person under section 7 of the Act, and if it appears to the clerk that the court may have jurisdiction under section 64 of the Act, the clerk shall write to that person informing them of the death and in the case of a person other than the Registrar requesting them to forward the original will to the Registrar or resident magistrate of magistrate of the first grade.

(3) If the applicants produce to the clerk a document which they claim to be the will of the deceased, the clerk shall forthwith make a copy thereof and act in accordance with section 64 (3) of the Act.

(4) In cases where subrule (2) or subrule (3) applies, the clerk shall obtain from the applicants all information required for the purpose of preparing a notice in Form II in the First Schedule and on receipt from the person requested under subrule (2) of the original will of the deceased, the clerk shall, unless it appears that some other court has been nominated in the will, proceed in accordance with rule 5 (4) and if the person to whom a request has been made under subrule (2) states that he or she has not and cannot trace the original will, the clerk shall inform the applicants accordingly and advise them in accordance with subrule (1).

(5) If, on receipt of the original will, it appears that some other court has been nominated, the clerk shall apply for the transfer of the application to the nominated court in the same way as for the transfer of a normal court case.

RULE 5 *[Notice to near relatives and others]*

The Commission recommends that the notice should be made to members of the immediate family of the deceased and not to the near relatives as the latter concept has been dispensed with under the Act.

The provision will now read as follows-

5. − (1) For the purpose of preparing a notice under rule 3 or rule 4, the clerk shall inquire of the applicants the names of the members of immediate family of the deceased and where they live, and the applicants shall truthfully and fully inform the clerk accordingly.

(2) When the clerk is satisfied that he or she has been fully informed about the members of the immediate family of the deceased and their addresses, he or she shall include the names and addresses of all members of the immediate family in the notice and shall make sufficient copies for service on each of them.

(3) If the applicants state, or the clerk is satisfied by inspection of the will or certified copy thereof that there is a person named in the will as executor who is not among the applicants, the clerk shall cause such person to be included in the list of persons to be served with a notice.

(4) The clerk shall thereupon request the court to fix the date of hearing of the application.

(5) The clerk shall inform the applicants of the date and time fixed for hearing and shall cause the notices to be served on the persons therein named.

(6) Where any member of the immediate family of the deceased is a minor, the notice to him or her may be served on his or her guardian, if any, or on the persons with whom he or she resides, if there is no guardian.

RULE 6 *[Hearing]*

The Commission recommends incorporation of the concept of "member of the immediate family" and deletion of the reference to "near relative" in line with the recommendations made under sections 2, 14 and 61 of the Act.

The provision will now read as follows-

6. − (1) If, on the hearing, the applicants or any of them fail to appear, the court may adjourn the hearing or, at the request of any two applicants or members of the immediate family who are willing to undertake the administration of the estate, may proceed in the absence of any applicant and may direct that an administration grant be issued in accordance with section 65 (5) or (6) of the Act.

(2) If, on the hearing, any person on whom a notice should have been served fails to appear, the court may, if it is not satisfied that all such notices have been served in due time, adjourn the hearing, but if its satisfied that all such notices have been served in due time, the court shall proceed with the hearing in the absence of any person duly served with a notice.

(3) Where any of the members of the immediate family of the deceased is a minor the court may, if no lawful guardian appears to represent the minor, proceed with the hearing or adjourn the hearing until such guardian is appointed.

RULE 7 *[Form of administration grant and its issue]*

The Commission recommends retention of the provision. The Commission observed that as these Rules were meant to guide Traditional Courts in administering small estates, reference in this Rule to the High Court was an error.

The provision will now read as follows-

7. − (1) An administration grant shall be in accordance with Form III in the First Schedule.

(2) Where a court has ordered that an administration grant be issued, the grant shall not be issued until the fees prescribed in the Second Schedule have been paid.

(3) A copy of the administration grant shall be retained in the records of the court and if a copy of the will was annexed to the grant, a copy shall be annexed to the copy of the grant retained by the court.

RULE 8 *[Disputes]*

The Commission recommends retention of the provision subject to reflection of the recommendation under section 21 of the Act. Further, the provision should simply make reference to section 73 of the Act and not necessarily the specific paragraphs under that section.

The provision will now read as follows-

8. − (1) A dispute over which a court has jurisdiction under section 73 of the Act, may be decided on the hearing of an application made under section 65 of the Act and if no application under section 65 of the Act has been made or if such an application has been concluded, an application relating to such a dispute shall be made to the court which made a grant under section 65 of the Act, or, if no such grant has been made by any court, the dispute may be decided by the court as lodged by the applicant.

(2) An application relating to a dispute referred to in subrule (1) shall be made in the manner prescribed under the Courts Act, and a civil summons shall be issued to every person interested in the dispute and the court shall refuse to proceed with the hearing of the application unless it is satisfied that all persons interested in the question are before the court or, if not before the court, have been served in due time with a summons to attend the court.

(3) An application relating to a question over which a court has jurisdiction under section 73 may be made by any person having an interest in the property or by any relative of the minor having an interest in the property or other person having a legitimate interest in the minor.

(4) An application may proceed after the person alleged to have failed to carry out his or her duties or to have acted improperly as guardian has been duly served with a civil summons, and without any other person interested being before the court.

(5) No order may be made against any person who has not been summoned to appear before the court and given an opportunity to make representations to the court.

(6) The court may, at any time during proceedings under section 73 of the Act, direct that any person be summoned to appear before the court and may adjourn the hearing of the application to enable service to be effected and the person summoned to appear.

RULE 9 *[Application under section 14 of the Act]*

The Commission recommends retention of the provision subject to the inclusion of the recommendation made under section 14 of the Act.

The provision will now read as follows-

9. – (1) An application by a member of the immediate family under section 15 of the Act shall be made to the court by which an administration grant with will annexed has been made.

(2) A civil summons shall be issued to all the persons entitled to administer the estate under the administration grant.

(3) On the hearing of the application, the court shall cause the clerk to produce to the court a copy of the administration grant and a copy of the will annexed, and shall record-

(a) the residence of the applicant at the time of the hearing and, if the application is made on behalf of a member of the immediate family, the residence of the member and the reason why the member did not apply personally;

(b) the nature of the property of the testator and its value for the purpose of section 15 (2) of the Act;

(c) the provision, if any, made for the member by the will, and the past, present and future capital or income from any source of the member;

(d) the circumstances of the other members and the beneficiaries under the will;

(e) the amount claimed by the applicant to be reasonable provision and the amount , if any, awarded by the court; and

(f) the reasons of the court for granting or refusing the application, including the conduct of the member in relation to the testator or otherwise and the general circumstances, if any, taken into account in arriving at the decision of the court.

rr. 3, 4 and 7 FIRST SCHEDULE

FORM I

In the ……..... Magistrate Court sitting at …… *

Probate Cause No. …… of 20……..

APPLICATION FOR ADMINISTRATION GRANT ON INTESTACY

by …….
…….
…….
……. Applicants

NOTICE

UNDER SECTION 65 OF THE DECEASED ESTATES
(WILLS, INHERITANCE AND PROTECTION) ACT

to ……
…….
…….
and the persons whose names appear on the back hereof.

Take notice that you are to come to the court house at …… on …… day, the ……. day of ……, 20…….., at the hour of ……, to state whether you have any objection to the making of an Administration Grant in respect of the estate of ……., deceased, to the applicants above-named.

2. The applicants state that ……., formerly of ……. (here state the last ordinary residence of the deceased) died on the ……. day of …….., 20…., without having made a will.

3. The applicants state that they wish to distribute the estate of the said deceased according to the Wills and Inheritance Act.

4. If you do not come to the court house on the day and at the time above-mentioned, an Administration Grant may be made in your absence which will entitle the applicants so to distribute the estate.

Dated this …… day of …… 20…….

SEAL OF COURT

……

Magistrate

FORM II

In the ……... Magistrate Court sitting at …… *

Probate Cause No. …… of 20……..

Estate of ……..……, deceased.

APPLICATION FOR ADMINISTRATION GRANT, WITH WILL

by …….
…….
…….
……. Applicants

NOTICE

UNDER SECTION 65 OF THE DECEASED ESTATES
(WILLS, INHERITANCE AND PROTECTION) ACT

to ……
…….
……. and the persons whose names appear on the back hereof.

Take notice that you are to come to the court house at …… on …… day, the ……. day of ……, 20…….., at the hour of ……, to state whether or not you have any objection to the making of an Administration Grant in respect of the estate of ……..., deceased, to the applicants above-named.

2. The applicants state that ……..., formerly of ……. (here state the last ordinary residence of the deceased) died on the ……. day of ……., 20….., having made a first will dated …… by which he or she-

* (a) appointed the applicants to administer his or her estate;
*(b) nominated this court as the court to deal with applications relating to his or her estate.

* *Delete if not appropriate*

3. The applicants state that you are a ……. of the said ……..., deceased.

4. If you do not come to the court house on the day and at the time above-mentioned, an Administration Grant with the said will annexed may be made in your absence, and if such Administrator Grant is made, the estate will be distributed in accordance with the said will.

5. A copy of the said will may be inspected at the court house during business hours on any working day three weeks after the date of this notice or as soon thereafter as such copy is received.

Dated this …….. day of …… 20…...

SEAL OF COURT

……

Magistrate

FORM III

In the ……... Magistrate court sitting at …… *

Probate Cause No. …… of 20…..

In the Estate of ……, deceased.

ADMINISTRATION GRANT

This Grant certifies that-

…….
…….
…….
and …….

have been appointed administrators of the estate of …… deceased, lately of ……. who died at ……. on the ……..day of ……, 20……., and are hereby authorized as such to administer the estate-

* according to the law of intestacy applicable to the deceased;
* in accordance with the terms of the will, a copy of which is attached hereto.

Dated this ……. day of …… 20……
SEAL OF COURT

……
Magistrate

* *Delete whichever is not applicable.*

SECOND SCHEDULE

The following fees shall be payable in addition to any fee payable on an application-

	K
1. On the issue of an Administration Grant without copy will annexed	50
2. On the issue of an Administration Grant with certified copy of will annexed –	
for the Grant	100

and in addition, for the certified copy of the will, per page 10

WILLS AND INHERITANCE (INSTITUTIONAL MONEY) RULES

under s. 76

The heading of the Rules should read as follows-

Deceased Estates (Wills, Inheritance and Protection) (Institutional Money) Rules.

RULE 1 *[Citation]*

In light of the recommendation in relation to the heading, the rule will now read as follows-

1. These Rules may be cited as the Deceased Estates (Wills, Inheritance and Protection) (Institutional Money) Rules.

RULE 2 *[Reference by District Commissioner]*

The Commission recommends retention of the provision subject to incorporating the recommendations made under section 63 of the Act.

The provision will now read as follows-

2. If, after receiving a report of a death under section 63 (2) (a) of the Act and verifying the amount of institutional money and causing the enquiries required by section 63 (2) (b) to be made, it appears to a District Commissioner or employer or insurer or administrator of a provident fund that the institutional money is not disposed of by a valid will, he or she shall make the reference required by section 63 (2) (d) to the court in the area in which the deceased had his or her principal place of residence immediately prior to his or her death and such reference shall be made by completing a request for certificate in Part A of Form I in the First Schedule.

RULE 3 *[Traditional Court to summon village headman, etc.]*

The Commission recommends retention of the provision subject to incorporating of the recommendations under sections 7, 21 and 63 of the Act.

The provision will now read as follows-

3. −(1) Upon receiving a request under rule 2 the court shall cause particulars thereof to be entered in the civil complaints book as a complaint by the District Commissioner or employer or insurer or administrator of a provident fund and such court shall then summon as a witness a member of the immediate family of the

deceased or a dependant of the deceased or a relative of the deceased person or such other person as the court considers, on reasonable grounds, may be able to give evidence as to the names and whereabouts of the persons interested in any part of the institutional money.

(2) Where the person summoned under subrule (1) appears before the court, such person shall be examined by the court to obtain the evidence referred to in subrule (1).

In light of the recommendations, the marginal note shall change to read "**A court to summon certain witnesses**".

RULE 4 *[Examination of persons interested]*

The Commission recommends retention of the provision subject to reflecting of the recommendations under rule 3.

The provision will now read as follows-

4. −(1) After completing the examination referred to in rule 3, the court shall serve a summons in Form II in the First Schedule on all such persons as appears to the court to be interested in the institutional money in question.

(2) The persons summoned shall be required to appear before the court at the same time which shall be not less than thirty days and not more than sixty days from the date of service of the summons and at the time so notified the court shall examine such of the persons so summoned as appear before the court and such examination shall take place in the presence of all the other persons so summoned who have appeared before the court.

(3) The court shall require each of the persons so examined to answer upon oath such questions as the court may put to them relating to the affairs of the deceased and may permit any person so examined to be cross-examined by, or on behalf of, any other person claiming to be interested in the property of the deceased.

(4) Any person not so summoned who claims to be interested in the property of the deceased person as a creditor, beneficiary or person interested under a will of the deceased may appear before the court at the appropriate or she does so, shall be treated as though he had time, and if he or she has been summoned and the provisions of subrules (2) and (3) shall apply to him or her.

(5) After hearing such evidence and making any further enquiries which it deems necessary for its proper decision, the court shall decide -

(a) whether any claims made by creditors are valid and if so what is the amount due to each creditor;

(b) the persons entitled upon intestacy.

(6) If during the inquiry under this rule it appears that any person genuinely claims that the deceased left a will, the court shall advise that person to cause an application to be made under section 65 and shall either adjourn the inquiry pending the result of any such application or if the will is then produced to the court may proceed as though an application had been made under rule 4 of the Deceased Estates (Wills, Inheritance and Protection) (Small Estates) Rules.

(7) If the court decides to treat the proceedings before it as an application for an administration grant under section 65 the summonses issued under rule 4 shall be deemed to be written notices under section 65 for the purposes of section 64 (3).

(8) If, at the conclusion of proceedings under subrule (7), the court decides that the document produced to it is not a valid will of the deceased person, it shall continue and conclude the inquiry under subrule (5) and if the court considers that the deceased person left a valid will, it may issue a grant under section 65 (4) after complying with section 64 (3).

(9) If during the course of the inquiry it appears to the that the estate of the deceased person exceeds the value of a small estate in gross value the court shall report the case to the High Court and to the Secretary to the Commissioners for Estate Duties under section 76 (3) and await the instructions of the High Court before making its certificate.

RULE 5 *[Announcement of decision and appeals]*

The Commission recommends retention of the provision subject to reflecting the recommendations under section 21 of the Act and also to its redrafting.

The provision will now read as follows-

5. −(1) The decision of the court shall be announced in open court and if it is not announced immediately after the inquiry referred to in rule 4, it shall be announced on a date of which notice has been given to the persons claiming to be interested in the property of the deceased and immediately after announcing its decision, the court shall inform the persons aggrieved with its decision of the right of appeal conferred by this rule.

(2) Any person claiming an interest in the institutional money in question who is aggrieved by a decision of the court under these Rules may appeal against the decision.

RULE 6 *[Court to certify decision]*

The Commission recommends retention of the provision subject to its redrafting.

The provision will now read as follows-

6. A court which has announced its decision under these Rules shall immediately thereafter complete in accordance with its decision three copies of a certificate in Part C of Form I in the First Schedule, and shall forward the original and one copy thereof to the District Commissioner or employer or insurer or administrator of a provident fund who made the reference:

Provided that if the court has decided that the deceased left a valid will it shall return Form I to the District Commissioner or employer or insurer or administrator of a provident fund endorsed accordingly.

RULE 7 *[Further duties of District Commissioner]*

The Commission recommends retention of the provision subject to some necessary modifications.

The provision will now read as follows-

7. − (1) On receipt of a certificate under rule 6, the District Commissioner or employer or insurer or administrator of a provident fund shall complete a request for cheques in Part B of the Form I and shall forward the request in the First Schedule to the holder of or person liable to pay the institutional money.

(2) When the period during which an appeal from the decision of the court has expired, or, if any appeal has been lodged, such appeal has been thoroughly disposed of, the District Commissioner or employer or insurer or administrator of a provident fund shall distribute the institutional money in question in accordance with a certificate of the court as amended by any decision given on appeal.

RULE 8 *[Minors]*

The Commission recommends retention of the provision subject to some necessary modifications.

The provision will now read as follows-

8. Where any person who may be entitled to any share in any money appears to the court to be a minor the court may waive his or her attendance in person and may appoint such responsible person to represent him or her as the court deems fit.

RULE 9 *[Fees Second Schedule]*

The Commission recommends retention of the provision subject some necessary modifications as follows-

9. The fees set out in the Second Schedule shall be a first charge on any institutional money adjudicated upon under these Rules and shall be paid into the Consolidated Fund by the District Commissioner or employer or insurer or administrator of a provident fund at or before the distribution of such money.

FIRST SCHEDULE
DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT
(CAP. 10:02)

DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT
(INSTITUTIONAL MONEY) RULES

In the matter of …… deceased.

PART A

To: The Magistrate
…….. Magistrate Court,
……..

REQUEST FOR CERTIFICATE

I am satisfied that …… late of …… village, Chief ……, ……District, died on the …….. day of ……., 20….. and that there forms part of his estate as at ……, 20…. the following institutional money-

** Holder of Money or person liable to pay:*	*Amount*
…….	K …….

The death was reported to me by …….. of …….. who claims to be related to the deceased as his …….

After enquiry it appears to me that the above-mentioned institutional money was not disposed of by Will.

So far as they are known to me the other facts of the case are†

Wife/Wives: ……. of …….
……. of …….
Children: ……. Sex: …… Age: ……..
……. …… ……..
…….. …… ……..
Relatives: ……. of …….
Creditors: ……. of …….
……. of …….
Property other than institutional money …….

I request you to CERTIFY to me in Part C of this Form who is entitled to the institutional money and what portion of it is payable to each.

Signed ……..

District Commissioner/Insurer/Administrator of a Provident Fund/Employer

Date: …… ……. District

NOTES: * If money is in an account quote account number as well as name of the holder: For example "Stanbic Bank Account Number 0140001907300, Capital City Branch".

†If there is insufficient room on this Form for all the names a separate list should be attached which should contain sufficient information to identify it with the original Form and should be signed by the District Commissioner or employer or the insurer or the administrator of a provident fund.

PART B
REQUEST FOR PAYMENT

TO: ……..
……..
……..
……..

In accordance with section 63 (3) (g) of the Deceased Estates (Wills, Inheritance and Protection) Act, I hereby request you to send to me a separate cheque payable to each of the adult persons shown in the certificate at Part C for the amount shown to be payable plus a proportionate share, as nearly as is practicable, of any interest which may have accrued.

In the case of any person who is shown to be a minor the cheque is to be made payable to the Government of Malawi.

In return herewith with the relevant passbook or other evidence that the money is payable as under:-

*(a) Passbook No. …….

*(b) ……..
……..

Signed: ……
District Commissioner/Insurer/Administrator of a Provident Fund/Employer

Date Stamp: …….. …….District

NOTES: (1) *Enter description of the passbook or other documents to be sent and despatch the completed from with covering letter drawing attention to Part B.

(2) Registered post should be used where passbook or other valuable documents are enclosed.

(3) Before sending this Form check that the totals of the amounts shown in Part C for the shares under Items A, B, C and D add up to the total amount of institutional money available.

(4) If there are any queries on the certified distribution District Commissioners or employer or insurer or administrator off a Provident Fund should refer the matter to the appropriate courts with details.

PART C

CERTIFICATE OF ENTITLEMENT

To: The District Commissioner or employer or insurer or the Adminstrator of a Provident Fund*,
Probate Cause No. …… 20…….. …….. District
Certificate issued by the ……. Magistrate Court.

This is to certify that the Court has investigated the question of who is entitled to the money referred to in Part A of this Form and on the …… day of ……., 20…….. decided as follows-

Total amount of institutional money .. .. K ……..

Amount payable to-

A. The Government of Malawi as fee under rule 9 .. .. ..
B. Creditors as follows-
(I) …… of …….. K ……. K ……..
(II) …… of …….. K …….
(III) …… of …….. K ……..

TOTAL FOR CREDITORS K ……

Balance available .. .. K ……

The balance is payable-

C. As to the immediate family as follows-

	Name	*Address*	*Relationship and Age†*	*Amount*
(I)	……	……	……	K…….
(II)	……	……	……	K…….
(III)	……	……	……	K…….
(IV)	……	……	……	K…….
(V)	……	……	……	K…….

TOTAL FOR IMMEDIATE FAMILY K…….

D. As to the dependants as follows-

	Name	*Address*	*Relationship and Age†*	*Amount*
(I)	……	……	……	K…….
(II)	……	……	……	K…….
(III)	……	……	……	K…….
(IV)	……	……	……	K…….
(V)	……	……	……	K…….

TOTAL FOR DEPENDANTS .. .. K……..

E. As to other relations and beneficiaries as follows-

	Name	*Address*	*Relationship and Age†*	*Amount*
(I)	……	……	……	K…….

(II) …… …… …… K…….
(III) …… …… …… K…….
(IV) …… …… …… K…….
(V) …… …… …… K…….

TOTAL FOR OTHER RELATIONS AND BENEFICIARIES .. .. K……..

Dated this …… day of …….. 20……...
Court Seal:

Signed: ……..…..
Registrar / Magistrate

NOTES: (1) * Delete as applicable under First Schedule to the Act.
(2) †Always show age where beneficiary is under 21 years of age, otherwise write "adult".
(3) When Part C has been completed in triplicate the original and 1 copy should be returned to the District Commissioner or employer or insurer or administrator of a provident fund from whom the Form was received. 1 copy at the court.
(4) Only the Registrar or Magistrate may sign Part C of this Form.
(5) If there are more creditors or beneficiaries than can be shown in the space available on this Form a separate list may be attached, signed by the Registrar or Magistrate, but the total amount for the item must be shown on the Form.

REPUBLIC OF MALAWI FORM II

DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT
(INSTITUTIONAL MONEY) RULES

In the High Court of Malawi/
In the …… Magistrate court sitting at ……
Probate Cause No. …….. of 20……..

In the matter of the Estate of …… deceased.

CIVIL SUMMONS

To: ……
……

You are ordered to come to the court House at …….. on the …….. day of ……, 20….. at ……. a.m. to inform the court-

(a) whether you claim to be interested in any part of the institutional money or other property of the above-named deceased;

(b) regarding the affairs of the said deceased.

If you fail to come to court a decision regarding the distribution of such institutional money may be given in your absence.

Dated this …… day of ……. 20….

SEAL OF COURT

……
Registrar/ Magistrate

SECOND SCHEDULE

For adjudicating entitlement to institutional money question:	.. ..	K10 for each K1,000 of the institutional money in

Provided that-

(a) no fee shall be payable if such money is less than K50,000; and
(b) no fee under this item shall exceed K50,000.

DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) BILL, 20…

ARRANGEMENT OF SECTIONS

SECTION

PART VIII

PROTECTION OF ESTATES PENDING GRANT

PART IX

RENUNCIATION BY EXECUTORS

PART X

GRANT OF PROBATE AND LETTERS OF ADMINISTRATION BY THE COURT

A BILL

entitled

An Act to provide for the making of wills and the devolution of property under a will; the inheritance to the estates of persons dying without valid wills; the protection of deceased estates; the administration of deceased estates; the prosecution of offences relating to deceased estates; the civic education of the public; the functions of courts in relation to deceased estates and for other connected matters

ENACTED by the Parliament of Malawi as follows-

PART I

PRELIMINARY

Short title **1.** – This Act may be cited as the Deceased Estates (Wills, Inheritance and Protection) Act.

Application **2.** – This Act shall apply to the administration of estates of all persons dying domiciled, or leaving property, in Malawi on or after the date upon which it comes into operation; but any property belonging to the estate of such persons which, at the coming into operation of this Act, remains partly or wholly undistributed, shall be distributed in accordance with the provisions of this Act.

Interpretation **3.** – In this Act, unless the context otherwise requires-

"administration grant" means the grant made under section 65;

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

"child" means, a child of the deceased person, regardless of the circumstances of the birth of the child and includes an adopted child, and an unborn child in the womb of its mother ;

"court" means the High Court or a court having jurisdiction as specified under section 20;

“court of probate” means a court or authority by whatever name designated, in any country, having jurisdiction in matters of probate;

“dependant” in relation to a deceased person means a person, other than a member of the immediate family, who was maintained by that deceased person immediately prior to his or her death and who was-

(a) his or her parent; or

(b) a minor whose education was being provided for by that deceased person, who is not capable, wholly or in part, of maintaining himself or herself;

“executor” means a person to whom the administration of the estate of a testator or part of such estate is entrusted by express or implied appointment under a will;

“hardship” in relation to any person means deprivation of the ordinary necessities of life according to the way of living enjoyed by that person during the lifetime of the intestate, an in the case of a minor includes deprivation of the opportunities for education which

he or she could reasonably have expected had the intestate continued to live;

"household belongings" means articles and effects of every description used in, and for the purpose, of maintaining and enjoying a home and family life;

"inheritable property" includes all causes of action which survive the deceased, clothing and institutional money but does not include any property which passes to another person by right of survivorship;

"institutional money" means money –

(a) held on a deposit or current account with a bank or a financial or similar institution;

(b) due under any policy of insurance or assurance;

(c) due under provisions of any provident fund or similar provision for employees;

(d) by way of gratuity, pension, terminal benefits, leave pay or otherwise under the terms of employment of the deceased;

(e) received by any public officer, other than the Administrator General, or received by a bank or a financial or similar institution, as representing the property of a person domiciled in Malawi who has died outside Malawi;

(f) held by way of treasury bills or other government bonds;

(g) due under a court order;

Cap. 55:02 (h) due under the Workers' Compensation Act; or

(i) held in or with such other institution as the Minister may prescribe by an order published in the *Gazette*;

"intestate property" means property in respect of which there is an intestacy under section 16;

"member of immediate family", in relation to any person, means that person's spouse and children;

"minor" means a person who has not yet attained the age of eighteen years unless:

(a) the person is lawfully married;

(b) the person is heading a household and is not below the age of fourteen years; or

(c) the person holds property in his or her own right in accordance with this Act or any other written law;

"personal representative" includes an administrator and executor;

"probate" means the certificate of the court that a will, of which a certified copy in accordance with the Oaths, Declarations and Affirmations Act is attached, has been proved a valid will;

Cap. 4:07

"Probate Rules" means rules made by the Chief Justice under section 22;

"provident fund" means fund for the future welfare of any person and includes a similar provision for employees;

Cap. 3:02

Registrar" means the Registrar of the High Court as defined under the Courts Act;

"small estate" means the estate of a deceased person consisting of property which does not exceed K1,000,000 or such higher amount as the Minister shall from time to time specify by notice in *Gazette*

in value at the date of the death of the deceased without making any deduction for debts.

(2) A person is said to die intestate if he or she dies without leaving a will which is valid in accordance with Part II of the Act.

Variation of customary law relating to inheritance

4. Except as provided for in this Act, no person shall be entitled under any other written law or under customary law to take by inheritance any of the property to which a deceased person was entitled at the date of his or her death.

PART II

WILLS

Capacity to dispose of property by will

5. – (1) Subject to this Act, a person who is of sound mind and is not a minor may dispose of all or any of his or her property after his or her death by will.

(2) A will may appoint persons who are not minors to administer the estate of the testator or any property which is disposed of by will.

(3) Subject to section 6, disposal of property by will may be made to any person and subject to any condition other than special provision.

(4) A parent may by his or her will appoint a guardian of his or her minor child for the administration of the benefits of such child under the

will; and subject to Part XIII, a guardian so appointed shall, to the exclusion of any customary guardian, have such powers as are conferred by law upon a guardian.

(5) Where a person appointed as a guardian under subsection (4) dies or otherwise desists from taking up the appointment, the court shall appoint another person as a guardian in the absence of the initial appointee.

(6) A will may nominate a subordinate court to which applications relating to the administration of the testator's estate may be made and a court so nominated shall, subject to section 20, have jurisdiction accordingly.

Making of wills

6. – (1) Every will shall be made in writing and shall be signed by the testator in the presence of at least two competent witnesses who shall also sign the will in the presence of the testator and in the presence of each other as witnesses to the signature of the testator.

(2) Any person who is of sound mind and is not a minor shall be a competent witness for the purpose of this section.

(3) A will may be made outside Malawi in respect of any property in Malawi and a will so made shall be valid if made in accordance with the

provisions of this section or of the law of the place where it was made, or the law of the place where the testator had his or her domicile when the will was made.

(4) Notwithstanding the other provisions of this section and of section 5 (1), a member of the defence forces of Malawi, on actual service as such, may make a will which shall be valid notwithstanding that he or she is a minor or that any of the formalities required by this section have not been complied with.

(5) Subject to subsection (6), the Minister may, for the guidance of the general public, by notice in the *Gazette*, prescribe a form in which a will may be made.

(6) The validity of a will shall not be affected by reason of the fact that it is not made in the form prescribed by the Minister or any other form if that will otherwise complies with the requirements of this section.

Benefit of witness under will

7. – (1) Subject to subsection (2), a person who witnesses the testator's signature of a will and a spouse of such witness shall not be entitled to take any benefit under the will but shall be entitled to act as executor of the will:

Provided that a legatee under a will shall not be disentitled to a benefit under the will by reason that he or she or his or her spouse has attested a codicil confirming the will.

(2) A benefit under a will to a witness who is a member of the immediate family of the testator shall be valid if a court is satisfied, upon the application of or on behalf of the witness, that-

(a) there was no other competent person who could have been witness to the will;

(b) the benefit is fair in all the circumstances or the benefit consists of property that would have devolved to the witness upon intestacy; and

(c) there is no evidence of fraud, coercion, undue influence or other impropriety or suspicious circumstances surrounding the making of the will.

(3) A benefit to a witness as provided under subsection (2) shall not take effect except upon an order of the court made after hearing the

application in respect thereof confirming the conditions set out in that subsection.

Safe custody of wills

8. – (1) A living person may deposit his or her will for safe custody with the Registrar or at the office of the District Commissioner or a resident magistrate or a magistrate of the first grade subject to such conditions relating to the deposit and withdrawal thereof as may be prescribed in Probate Rules.

(2) Nothing in this section shall preclude the deposit of a will with any other person, whether such other person is a bank, an insurer, a law firm, an administrator of a provident fund or an employer.

Revocation and alteration of wills

9. – (1) The testator may at any time revoke his or her will-

(a) by destroying the will with the intention to revoke it; or

(b) by making in a subsequent will or some document executed like a will a statement of his or her intention to that effect.

(2) Where a testator dies having made more than one will the latest in time of the said wills shall prevail over the earlier wills to the extent of any revocation, variation or inconsistency.

(3) No obliteration, interlineation or other alteration made in a will after its execution has any effect unless such alteration is signed and attested as a will is required to be signed and attested under section 6, or is referred to in a memorandum written at the end or some other part of the will and so signed and attested.

Effect of subsequent marriage and divorce

10. – (1) A will shall be revoked by the marriage after the making of the will by the testator unless the will was made in contemplation of marriage with the person who becomes the spouse of the testator as the case may be.

(2) Upon the end of a marriage of a testator by reason of divorce, unless the will provides otherwise-

(a) any gift made in a will in existence at the time the marriage ends by the testator to the spouse; or

(b) any appointment of the spouse as an executor, trustee, advisory trustee or guardian made by the will,

shall be revoked.

PART III

CONSTRUCTION OF WILLS

Intention of the testator to prevail

11. – (1) Subject to the provisions of this Part and Part IV, it shall be the duty of a court, in construing a will, to give effect to the intention of the testator so far as such intention can be ascertained from the wording of the will, and, in so doing, the court shall not be bound to follow any statutory provision, rule of common law or doctrine of equity.

(2) The intention of a testator, as disclosed by his or her will, shall not be set aside because it cannot take effect to the full extent, but effect shall be given to it as far as possible.

Where two constructions possible

12. Where any clause of a will is susceptible of two meanings, one of which has some effect and one of which can have none, the former shall be preferred.

Will to speak as from death

13. – (1) Every will shall be construed with reference to the estate comprised therein, so as to take effect as if made immediately before the death of the testator.

(2) A gift to a person who predeceases the testator shall lapse and be of no effect.

Technical words and terms not necessary

14. It shall not be necessary for technical words or terms of art to be used in a will, but only that the wording be such that the intention of the testator can be ascertained therefrom.

PART IV

PROVISION IN A WILL FOR MEMBERS OF THE IMMEDIATE FAMILY OF THE TESTATOR

Provision for members of immediate family not adequately provided for by will

15. – (1) On the application in the prescribed manner of a person claiming to be, or to be acting on behalf of, a member of the immediate family of a testator, a court may, if it is satisfied that-

(a) the applicant is a member of the immediate family or person acting on behalf of such member; and

(b) the testator has, intentionally or inadvertently or otherwise, omitted to make a reasonable provision in his or her will for such member,

order that a reasonable provision shall be made for the member in accordance with this section.

(2) Where an application is made under subsection (1), it shall be competent for the court to order, as the court considers on reasonable grounds to be just and proper, that such part of the value of the testator's estate after payment of the testator's debts and funeral and administration expenses of the estate, be applied for the maintenance of the member, and the manner in which it is to be so applied.

(3) In considering whether an order under this section should be made and, if so, what order is proper, the court shall have regard to-

(a) the nature of testator's property;

(b) any past, present or future capital or income from any source of the applicant;

(c) the conduct of the applicant in relation to the testator and otherwise;

(d) the circumstances of the other members of the immediate family and the beneficiaries under the will; and

(e) the general circumstances of the case.

PART V

INTESTACY

Property in respect of which there is intestacy

16. – If a person dies without having left a will valid under section 6, there shall be an intestacy in respect of the property to which he or she was entitled at the date of his or her death:

Provided that if the deceased person left a will which does not dispose of all his or her property there shall be an intestacy in respect of the property which is not disposed of by will.

Principles of fair distribution of intestate property to immediate family and dependants

17. – (1) Upon intestacy the persons entitled to inherit the intestate property shall be the members of the immediate family and dependants of the intestate and their shares shall be ascertained upon the following principles of fair distribution -

(a) protection shall be provided for members of the immediate family and dependants from hardship so far as the property available for distribution can provide such protection;

(b) every spouse of the intestate shall be entitled to retain all the household belongings which belong to his or her household;

(c) if any property shall remain after paragraphs (a) and (b) have been complied with, the remaining property shall be divided between the surviving spouse or spouses and the children of the intestate;

(d) as between the surviving spouse or spouses and the children of the intestate their shares shall be determined in accordance with all the special circumstances including-

(i) any wishes expressed by the intestate in the presence of reliable witnesses;

(ii) such assistance by way of education or other basic necessities any of the spouses or children may have received from the intestate during his or her lifetime; and

(iii) any contribution made by the spouse or child of the intestate to the value of any business or other property forming part of the estate of the intestate, and in this regard the surviving spouse shall be considered to have contributed to the business unless proof to the contrary is shown by or on behalf of the child,

but in the absence of special circumstances the spouses and children shall, subject to subsection (3) be entitled to equal shares;

(e) as among the children of the intestate, the age of each child shall be taken into account with the younger child being entitled to a greater share of the property than the older child unless the interests of the children require otherwise; and

(f) in the absence of any spouse or child of the intestate the property described in paragraph (c) shall be distributed between the dependants of the intestate, if more than one, in equal shares.

(2) If the intestate left more than one female spouse surviving him each living in a different locality, each spouse and her children by the intestate shall be entitled to a share of the property of the intestate in their locality in accordance with this section; but such spouse and children shall have no claim to any share of the property of the intestate in the locality where another spouse lives:

Provided that this subsection shall not apply to the property of the intestate of a value exceeding a small estate or institutional money or private land.

(3) If the intestate left more than one female spouse surviving him all living in the same locality, each spouse and her children by the intestate

shall be entitled to a share of the property of the intestate proportionate to their contribution.

(4) Re-marriage shall not deprive a surviving spouse of property inherited under intestacy except in the case of property on customary land where title in that property shall devolve to the children of the spouse by the intestate upon the re-marriage of the surviving spouse.

Inheritance of intestate property by other relations

18. – In the absence of the beneficiaries to the estate of an intestate referred to under section 17, the whole of such property comprising the estate of the intestate shall be distributed as follows –

(a) the grandchildren of the intestate shall, if they survive the intestate, be entitled in equal shares;

(b) if none of the persons referred to in paragraph (a) survive the intestate, the brothers and sisters of the whole blood of the intestate shall, if they survive the intestate, be entitled in equal shares and failing any surviving brothers and sisters of the whole blood of the intestate, the brothers and sisters of the half blood of the intestate shall, if they survive the intestate, be entitled in equal shares;

(c) if none of the persons referred to in paragraphs (a) and (b) survive the intestate, the grandparents of the intestate shall, if they survive the intestate, be entitled in equal shares;

(d) if none of the persons referred to in paragraphs (a), (b) and (c) survive the intestate, the uncles, aunts, nephews and nieces of the intestate shall be entitled in equal shares;

(e) if none of the persons referred to in paragraphs (a), (b), (c) and (d) survive the intestate, other relatives who are in the nearest degree of consanguinity shall, if they survive the intestate, be entitled in equal shares; or

(f) if none of the persons referred to in paragraphs (a), (b), (c) and (d) survive the intestate, the Government shall be entitled to take title in the property comprising the estate of the intestate.

PART VI

SURVIVORSHIP

Uncertainty regarding survivorship

19. Where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such death shall, subject to any order of a court, for all purposes affecting rights in, to or

over property, be presumed to have occurred in order of seniority in the age of the deceased persons, and accordingly the younger shall be deemed to have survived the elder.

PART VII

JURISDICTION OF COURTS AND POWERS OF CONSULAR OFFICERS

Jurisdiction courts and powers of consular officers

20. – (1) Subject to this section, the High Court shall have jurisdiction in all matters relating to the probate and the administration of estates of deceased persons, with power to grant probates of wills and letters of administration to the estates of deceased persons and to alter or revoke such grants.

(2) The High Court shall have jurisdiction to reseal grants of probate and letters of administration made by a court of probate in any country.

(3) A court of a resident magistrate or a court of a magistrate of the first grade shall exercise jurisdiction relating to the estate of a deceased person which is a small estate to grant probate and letters of administration in relation thereto.

(4) No act of a magistrate exercising jurisdiction under subsection (3) shall be invalid because it is afterwards discovered that the gross value of the estate exceeds the limit of a small estate but the magistrate shall report to the High Court any such discovery of which he or she becomes aware.

(5) The High Court may direct that any proceedings under this Act in a court of a resident magistrate or magistrate of the first grade are to be removed to and continued in the High Court:

Provided that the High Court shall not give any direction under this subsection unless it considers that it is necessary in the interests of justice or for the protection of a beneficiary or creditor that the estate should be administered under the supervision of the High Court.

(6) The High Court may authorize the payment to a personal representative of remuneration for his or her services as such, to such extent as, in all circumstances, appears reasonable:

Provided that nothing in this subsection shall be construed so as to deprive an executor of remuneration to which he or she is entitled under the provisions of a will.

Grants to Consular Officers

21. – (1) Where any national of a State to which this section applies–

(a) dies within Malawi; or

(b) dies outside Malawi leaving property within Malawi, and no person is present in Malawi at the time of his or her death who is rightfully entitled to administer the estate of such deceased person, a consular officer of such State within Malawi may take possession of the property of such deceased person, and shall be entitled to obtain from the court letters of administration of the property of such deceased person limited in such manner as the court may deem fit.

(2) Where any person who is a national of a State to which this section applies is a person to whom a grant of representation to the estate in Malawi of a deceased person may be made, then, if the court is satisfied

that such national is not resident in Malawi, the court may, on the application of a consular officer of that State, make to that consular officer such grant of representation to the estate of the deceased as would be made to him or her if he or she were duly authorized by power of attorney to act for the person entitled to the grant.

(3) Letters of administration granted to a consular officer shall be granted to him or her in his or her official style and title and not in his or her personal name, and the estate of the deceased shall vest in each successive holder of the office during his or her continuance in office without any order of court or instrument whatsoever.

(4) Where a person who is a national of a State to which this section applies–

(a) is entitled to any money or other property in Malawi forming part of the estate of a deceased person, or to receive payment in Malawi of any money becoming due on the death of a deceased person; or

(b) is among the persons to whom any money or other property of a deceased person may under any written law be paid or delivered without any grant of probate or other proof of title,

then, if that national is not resident in Malawi, a consular officer of that State shall have the right and power to receive and give a valid discharge for any such money or property as if he or she were duly authorized by power of attorney to act for him in that behalf:

Provided that no person shall be authorized or required by this subsection to pay or deliver any money or property to a consular officer if it is within his or her knowledge that any other person in Malawi has been expressly authorized to receive that money or property on behalf of such national.

(5) Notwithstanding any rule of law conferring immunity or privilege in respect of the official acts and documents of consular officers, a consular officer shall not be entitled to any immunity or privilege in respect of any act done by virtue of the powers conferred on him or her by or under this section or in respect of any document for the time being in his or her possession relating thereto.

Chief Justice to make Probate Rules

22. – (1) The Chief Justice may make Probate Rules-

(a) regulating proceedings for the grant of probate and letters of administration and other proceedings under this Act;

(b) for the procedure to be observed in relation to wills deposited under section 8 and for the preservation, copying and inspection of wills and grants of probate and administration;

(c) prescribing fees and forms; and

(d) generally in relation to matters of probate and letters of administration.

(2) Without prejudice to the generality of subsection (1), Probate Rules may require a person to whom a grant of letters of administration is made to give security for the due administration of the estate by a bond with one or more sureties and for the furnishing of accounts to court.

(3) A bond for the due administration of an estate shall engage the parties thereto to make payment to the Registrar or a resident magistrate or magistrate of the first grade.

(4) Upon the application of any person beneficially interested in the estate and upon being satisfied that the engagement of any such bond has not been kept the Court may direct the Registrar to, or a resident magistrate or a magistrate of the first grade shall, assign the bond to some proper person and thereupon such person shall be entitled to sue on the bond in his or her own name as if it had originally been given to him or her and not to the Registrar or resident magistrate or magistrate of the first grade and to recover thereon, as trustee for all persons interested, the full amount recoverable in respect of any breach thereof.

PART VIII

PROTECTION OF ESTATES PENDING GRANT

Receiver pending grant

23. Where any person dies leaving property in Malawi, the court, may appoint such person as the court thinks fit to be a receiver of probate or letters of administration, if it appears on the application of any person -

(a) claiming to be interested in such property;

(b) having custody or control thereof at the time of the death of the deceased; or

(c) being at such time an attorney of the deceased,

that there is danger that such property may be wasted or may otherwise be dealt with in contravention of this Act.

Sale by order of court

24. The court may, on application by a receiver of property appointed under section 23, or any person interested in the estate, order the sale of the whole or any part of such property, if it appears that such sale will be beneficial to the estate.

Suits against receiver

25. A person aggrieved may bring a suit against a receiver appointed under section 23 in relation to any thing done or intended to be done by him or her in respect of the property of the deceased in the exercise or intended exercise of the powers vested in him or her.

Chief Justice to make rules for application to receiver

26. The Chief Justice may make rules to guide the court in hearing an application for appointment of a receiver under section 23.

PART IX

RENUNCIATION BY EXECUTORS

Express renunciation of right to probate

27. A person who is entitled to probate may expressly renounce such right orally on the hearing of any application to the court or in writing signed by the person making the renunciation and attested by a person before whom an affidavit may be sworn.

Citation and presumed renunciation

28. – (1) A person claiming an interest in the estate of a deceased person or a creditor of a deceased person may cause to be issued by the court a citation directed to the executors appointed by the will of the deceased calling upon them to accept or renounce their executorship.

(2) A person served with a citation may acknowledge service thereof, but if he or she defaults on the terms of the acknowledgement of the service, he or she shall be deemed to have renounced his or her executorship; and if, having made such acknowledgement, he or she does not proceed to apply for probate, the court may limit the time within which such application is to be made and if the application for probate is not made within the time so limited the executor in default shall be deemed to have renounced his or her right to probate and the court may appoint another person it deems fit to be the executor of the estate.

Effect of renunciation

29. Renunciation under section 27 or 28 shall preclude the right of the person so renouncing to probate but the court may at any time grant probate to such person if it is shown that the grant is likely to benefit the estate or the persons interested therein.

PART X

GRANT OF PROBATE AND LETTERS OF ADMINISTRATION BY THE COURT

Grants to Corporations

30. – (1) A corporation or company or trust corporation may be granted probate or letters of administration either solely or jointly with another person.

(2) Probate or letters of administration shall not be granted to a syndic or nominee on behalf of a corporation or company.

Numbers of executors and administrators

31. – (1) Probate or letters of administration shall not be granted to more than four persons in respect of the same property.

(2) In the case of a minority or life interest under a will or on intestacy, probate or letters of administration shall, subject to the maximum number specified in subsection (1), be granted to not less than two persons and a court shall appoint another person to act as a personal representative in such cases if there is one person acting as such at any time.

Beneficiary may oppose appointment of personal representative

32. Any beneficiary under a will or on intestacy may apply to the court opposing the appointment of a personal representative under a will or on intestacy.

Grant of probate

33. – (1) Probate may be granted only to an executor appointed by the will, and shall not be granted to a minor or person of unsound mind.

(2) The appointment of an executor may be express or by necessary implication.

(3) Where several executors are appointed, probate may be granted to them simultaneously or at different times.

(4) If an executor is appointed by the will for a limited purpose only, probate shall not be granted to him or her except limited to that purpose.

Estate duty affidavit

34. Every application for a grant of probate or letters of administration shall be accompanied by a copy of the estate duty affidavit and by a certificate of the Secretary to the Estate Duty Commissioners under section 33 of the EstateDuty Act.

Cap.43:02

Probate of copy, draft or contents of wills

35. – (1) Where a will has been lost or mislaid or has been destroyed by a wrong or an accident and not only by any act of the testator–

(a) if a copy or draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is admitted to probate;

(b) if no such copy or draft has been preserved, probate, limited as provided in paragraph (a), may be granted to the contents of the will if they can be established by evidence.

(2) Where a will is in the possession of a person outside Malawi who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, probate may, if the interests of the estate so require, be granted of the copy so transmitted, limited as provided in paragraph (a).

Codicil propounded after probate

36. Where, after probate has been granted, a codicil of the will is propounded, probate may be granted of the codicil:

Provided that where the codicil expressly revokes the appointment of any executor to whom probate has been granted, such probate shall be revoked and a new probate granted of the will and codicil together.

Authenticated copy of will proved abroad

37. Where a will has been proved and deposited in a court of competent jurisdiction outside Malawi, and a properly authenticated copy of the will is produced, probate may be granted of the authenticated copy of the will or letters of administration granted with a copy of the authenticated copy of the will attached.

Effect of probate

38. – (1) Probate of a will when granted establishes the will and evidences the title of the executor from the death of the testator.

(2) Probate of a will shall also have the effects described in section 50.

Failure of executors

39. – (1) Subject to subsections (2) and (3), where–

(a) no executor is appointed by a will;

(b) the executor or all the executors appointed by a will have renounced, or are persons to whom probate may not be granted;

(c) no executor survives the testator;

(d) all the executors die before obtaining probate or before having administered all the estate of the deceased; or

(e) the executors appointed by any will do not appear and take out probate,

letters of administration with the will annexed may be granted of the whole estate or so much thereof as may be unadministered to such person or persons as the court deems the fittest to administer the estate.

(2) A prior right to such grant shall belong to the following persons in the following order–

(a) a universal or residuary legatee;

(b) a personal representative of a deceased universal or residuary legatee;

(c) such person or persons, being beneficiaries under the will, as would have been entitled to a grant of letters of administration if the deceased had died intestate;

(d) a legatee having a beneficial interest;

(e) a creditor of the deceased; and

(f) the Administrator General as the public trustee.

(3) A court shall not grant letters of administration with the will annexed in respect of a will by which an executor is appointed, if the executor–

(a) is living and his or her whereabouts are known; and

(b) is a person to whom probate may be granted; and

(c) has not renounced his or her office,

unless and until a citation has been issued calling upon the executor to accept or renounce his or her office and the executor has renounced or has been deemed to have renounced his or her office in accordance with sections 27 and 28.

Attorney of absent executor

40. Where any executor is absent from Malawi, and there is no other executor within Malawi willing to act, letters of administration with the will annexed may be granted to a lawfully constituted attorney, ordinarily resident within Malawi, of the absent executor, limited until the absent executor obtains probate for himself or herself, and in the meantime to any purpose to which the attorney's authority is limited.

Attorney of person entitled to letters of administration

41. Where any person, to whom letters of administration might be granted under section 39, is absent from Malawi, letters of administration with the will annexed may be granted to his lawfully constituted attorney ordinarily resident in Malawi, limited in the manner provided in section 40.

Codicil propounded

42. The provisions of section 36 shall apply in the case of a grant of letters

after letters of administration granted

of administration with the will annexed in like manner as they apply in the case of a grant of probate.

Letters of administration on intestacy

43. – (1) Where the deceased has died intestate, letters of administration of his or her estate may be granted to any person who, under sections 17 or 18, would be entitled to the whole or any part of such deceased's estate.

(2) Where more than one person applies for letters of administration, it shall be in the discretion of the court to make a grant to any one or more of them, and in the exercise of its discretion the court shall take into account greater and immediate interests in the deceased's estate in priority to lesser or more remote interests.

(3) Where no person as mentioned in subsection (1) applies for letters of administration, letters of administration may be granted to a creditor of the deceased.

(4) Where it appears to the court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who under ordinary circumstances would be entitled to a grant of letters of administration, the court may, in its discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as it thinks fit to

be administrator; and in every such case letters of administration may be limited or not as the court thinks fit.

Attorney of person entitled to administration

44. Where a person entitled to letters of administration in the case of an intestacy is absent from Malawi, and no person equally entitled is willing to act, letters of administration may be granted to a lawfully constituted attorney, ordinarily resident in Malawi, of such person, limited until such person obtains letters of administration himself or herself and in the meantime to any purpose to which the attorney's authority is limited.

Letters of administration pending production of will

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

Pending litigation

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

Trust property

47. Where a person dies, leaving property of which he or she was the sole

surviving trustee, or in which he or she had no beneficial interest on his or her own account, and leaves no general representative, or one who is unable or unwilling to act as such, letters of administration, limited to such property, may be granted to the beneficiary, or to some other person on his or her behalf.

Grants with exception

48. Whenever the nature of the case requires that an exception be made, probate or letters of administration with or without the will annexed shall be granted subject to such exception.

Grants of excepted part

49. Whenever a grant with exception of probate or letters of administration with or without the will annexed has been made, further grant may be made of the part of the estate so excepted.

Effect of grant of letters of administration or probate

50. – (1) Subject to all such limitations and exceptions contained therein and, where the grant is made for a special purpose, for that purpose only, letters of administration entitle the administrator to all rights belonging to the deceased as if the letters of administration had been granted at the moment of his or her death:

Provided that letters of administration shall not render valid any intermediate acts of the administrator tending to the diminution or damage of an intestate's estate.

(2) Probate and, subject to subsection (1), letters of administration have effect over all the inheritable property of the deceased throughout Malawi and–

(a) shall be conclusive against all debtors of the deceased and all persons holding inheritable property of the deceased;

(b) afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted.

Death of one of several personal representatives

51. Subject to section 31, where probate or letters of administration have been granted to more than one executor or administrator and one of them dies, the representation of the estate to be administered shall, in the absence of any direction in the will or grant, accrue to the surviving executor or administrator.

Death of sole or surviving personal representatives

52. Subject to section 31, on the death of a sole or sole surviving executor who has proved the will or of a sole or sole surviving administrator, letters of administration may be granted in respect of that part of the estate not fully administered, and in granting such letters of administration the court shall apply the same provisions as apply to original grants:

Provided that where one or more executors have proved the will or where letters of administration with the will annexed have been issued, the court may grant letters of administration under this section without citing an executor who has not proved the will.

Expiry of limited grant when estate not fully administered

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

PART XI

REVOCATION AND ALTERATION OF GRANTS AND REMOVAL OF EXECUTOR AND ADMINISTRATOR

Rectification of errors

54. Errors in names and descriptions, or in setting forth the time and place

of the deceased's death, or in specifying the purpose in a limited grant, may be rectified by the court, and the grant of probate or letters of administration may be altered and amended accordingly.

Revocation of grants and removal of executors, etc.

55. – (1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons–

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

(d) that the grant has become useless and inoperative;

(e) that the person to whom the grant was made has without reasonable cause omitted to furnish an account of his or her administration after having been lawfully called upon to do so

or has prepared an account which is untrue in a material respect.

(2) Where it is satisfied that the due and proper administration of the estate and the interests of the persons beneficially entitled thereto so require, the court may suspend or remove an executor or administrator and provide for the succession of another person to the office of such executor or administrator who may cease to hold office, and for the vesting in such person of any property belonging to the estate.

Payments by or to representatives whose grants are revoked

56. – (1) Where any probate is, or letters of administration are, revoked, all payments made in good faith to any executor or administrator under such probate or administration before the revocation thereof shall, notwithstanding such revocation, be a legal discharge to the person making the same.

(2) The executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself or herself out of the assets of the deceased in respect of any payments made by him or her which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.

Surrender of revoked grants

57. – (1) When a grant of probate or letters of administration is revoked under this Act, the person to whom the grant was made shall forthwith deliver up the probate or letters to the court which made the grant; and if

(2) the person wilfully and without sufficient cause omits so to deliver up the probate or letters, he or she shall be guilty of an offence and liable to a fine of K50,000 and to imprisonment for three months.

PART XII

RE-SEALING

Sealing of certain grants made outside Malawi

58. – (1) Where a court of probate has, before or after this Act, granted probate or letters of administration to the estate of a deceased person, the court–

(a) upon production of–

(i) the grant so made;

(ii) a duplicate sealed with the seal of the court which made the grant; or

(iii) a copy certified by or under the authority of the court of probate which made the grant; and

(b) upon the deposit of a copy of the grant,

may seal with the seal of the court the document so produced and deposited and thereupon the grant so made outside Malawi shall be of the like force and effect and have the same operation in Malawi as if granted by the court.

(2) Probate Rules may prescribe the security to be given and evidence of domicile to be furnished in relation to any application for sealing under subsection (1).

PART XIII

SMALL ESTATES

Application

59. This Part shall apply only to small estates except as may be otherwise expressly provided.

Exercise of jurisdiction by magistrate courts

60. – (1) Parts VIII, IX, X and XII shall not apply to the exercise by a court of resident magistrate or a court of a magistrate of the first grade of jurisdiction under this Act, but instead this Part shall apply.

(2) Part XI shall apply to a court of resident magistrate or a court of a magistrate of the first grade as though an administration grant made by such court was a grant of probate or of letters of administration.

Relatives may agree between themselves

61. − (1) Where all the members of immediate family and dependants of a deceased person who are not minors agree on the manner of distribution and administration of a small estate they may proceed in accordance with such agreement:

Provided that–

(a) this section shall not apply to the distribution or administration of private land or institutional money;

(b) no such agreement shall prevent a court from exercising its jurisdiction under this Act;

(c) upon an application to a court relating to such estate the rights of the persons entitled to any share or interest in the estate shall be the rights and interests provided for in this Act notwithstanding any agreement to the contrary.

(2) Where none of the members of the immediate family and dependants of a deceased person who are not minors is not available to proceed in accordance with subsection (1), persons comprising the next degree of consanguinity of the relations of the deceased person as outlined under section 17, who are not minors and survive the deceased, may agree on the manner of distribution and administration of the small estate subject to the proviso in subsection (1).

Private land

62. Where a small estate includes private land, no dealing with such land shall, subject to Part VIII, be lawful until an administration grant has been made in respect of the estate under section 65.

Institutional money

63. – (1) Where upon the death of a person, institutional money is payable to the personal representatives or to members of the immediate family or to dependants of that person or to any person, such institutional money shall be dealt with in accordance with this section.

(2) Where subsection (1) applies –

(a) the personal representatives or a member of the immediate family or a dependant of the deceased or any person in possession of evidence that institutional money is payable may report the death of the deaceased to the District Commissioner of the district which the deceased claimed to be or was known to be the deceased's district of origin or where the deceased ordinarily resided prior to his or her death, and on making such report, shall deposit with the District Commissioner the evidence that institutional money is payable together with a death certificate or other suitable evidence of the death;

(b) in the event that there is more than one District Commissioner as referred to in paragraph (a) they each receive a report of the death of a person, the District Commissioners shall decide, giving due weight to the wishes of the members of the immediate family, or failing agreement among such members, of the most senior member of the immediate family, which of the District Commissioners shall proceed under this section and if the District Commissioners fail so to decide, the District Commissioner preferred by the members of the immediate family or, where applicable by the most senior member of the immediate family shall have the authority to proceed under this section;

(c) the District Commissioner shall thereupon verify the amount of the institutional money and shall cause enquiries to be made whether or not such money is disposed of by any will made by the deceased;

(d) where it appears to the District Commissioner that the institutional money may have been disposed of by a valid will he or she shall take no further action except to advise the

persons concerned to apply for an administration grant under section 65;

(e) where it appears to the District Commissioner that the institutional money is not disposed of by a valid will, he or she shall refer the matter to court and shall request the court to certify the beneficiaries of the institutional money and their shares and the creditors of the deceased;

(f) in the reference under paragraph (e), the District Commissioner shall set out the facts of the case to the best of his or her knowledge or information;

(g) upon receipt of the reference under paragraph (e), the court shall certify who are the beneficiaries or creditors of the deceased and their shares and shall forward the certificate to the District Commissioner who made the reference;

(h) upon receipt of a certificate issued under paragraph (g) and a request for payment by a District Commissioner, the holder of or a person liable to pay, the institutional money shall within ninety days from the date of the request send to the District

Commissioner a separate cheque payable to each of the persons shown in the certificate for the amount shown therein to be payable to him or her:

Provided that in the case of any person shown to be a minor the cheque shall be made payable to the Government and the District Commissioner shall open a separate deposit account for every such minor and shall deposit therein the amount due to the minor.

(3) The receipt of a District Commissioner for a sum paid to the District Commissioner under subsection (2) by the holder of, or by a person liable to pay institutional money shall be a good discharge to the person paying the money for the sum so paid.

(4) Money held by a District Commissioner under a deposit account on behalf of a minor under subsection (2) may be applied for the benefit of such minor by the District Commissioner deems fit.

(5) Where subsection (1) applies and institutional money is disposed of by will, payment may be made to the personal representative of the deceased.

(6) Where institutional money is due under a contract of employment, a policy of insurance or assurance, a provident fund, the employer, insurer or administrator of a provident fund shall, if it appears that the institutional money is not disposed of by a valid will, refer the matter to court, setting out the facts as known according to available information and shall request the court to certify the beneficiaries and their shares and the creditors of the deceased, and the certificate of the court shall be authority for the employer, insurer or administrator of a provident fund to make payments to the beneficiaries and the creditors.

Production to court of a will or certified copy and Court to which application may be made for a grant

64. – (1) Where a person dies having left a will–

(a) if the will has been deposited with any person under section 8 and a court to which an application is made under subsection (4) so requests, or if a court to which an original will is produced sends the will to the Registrar , the Registrar shall send to the court making the request or sending the original will two certified copies of the will;

(b) in any other case the person in possession of the will shall produce the original will to a court to which an application may be made under subsection (4) and may apply to such court for an administration grant.

(2) Any person with whom a will is deposited under section 8 shall, on request of the court, forward the will to the court.

(3) Where an original will is produced to a court under subsection (1) (b), the court shall make a copy thereof and issue written notices under section 65.

(4) A person who has verified the fact that a deceased person left a will which is deposited for safety under section 8 may apply to-

(a) the court nominated by the will;

(b) the court having jurisdiction in the area in which the deceased ordinarily resided prior to his or her death;

(c) the court having jurisdiction in the are in which private land belonging to the estate is situated;

(d) such other court as may be prescribed,

for a certified copy of the will to be produced to the court, and for an administration grant.

Administration grant

65. – (1) Any person interested in a small estate as executor of a will, beneficiary or, under a will or intestacy, creditor of an estate, may apply to a court for an administration grant in such manner as may be prescribed.

(2) Before hearing any application under subsection (1), the court shall, by notice, require the members of the immediate family and the persons, if any, named in the will, if any, as executors to attend before the court for the hearing of the application on a date and at a time specified in the notice, which date shall not be less than thirty days and not more than sixty days from the date of service of the notice.

Effect of administration Grant

66. Subject to section 63, an administration grant entitles the administrator to all the inheritable property of the deceased with effect from the date of the death of the deceased.

Death or disability of personal representative

67. If a person to whom an administration grant has been made dies or becomes unable by reason of illness, whether physical or mental, or any other cause to carry out his or her duties before the estate has been fully administered, the other persons to whom the grant was made, if more than one, shall be entitled to continue and complete the administration:

Provided that on the application of any interested person the court may and, if there is only one remaining administrator, shall appoint another administrator.

Guardians

68. – (1) Where it is known to a court that a guardian of a minor has been appointed by a will, the court shall not appoint any other person to be guardian of that minor except in exercise of its powers under section 73.

(2) A court may direct the transfer to, or the vesting in, the guardian of a minor of any property of the minor and may authorize or direct the sale of the property of a minor or any part thereof.

(3) A guardian appointed by a will or under this Act shall be entitled to represent the interests of the minor in any proceedings in court relating to the administration of the estate in which the minor has a share.

Duties and powers of administrator and executor

69. – (1) The duties of every administrator and executor, where applicable shall be–

(a) to pay the debts and funeral expenses of the deceased and to pay estate duty if estate duty is payable;

(b) if the deceased left a valid will, to distribute the property disposed of by the will in accordance with the provision thereof or of an order of court under section 15;

(c) in respect of intestate property, to effect a distribution thereof in accordance with the rights of the persons interested therein under this Act.

(2) Where a sale of any of the property forming part of the estate of a deceased person is necessary or desirable in order to carry out the duties outlined in subsection (1) the administrators shall have power to sell such property in such manner as appears likely to secure receipt of the best price available for such property.

(3) Where the value of the property to which a person was entitled at the date of his or her death is less than the limit of a small estate, an administrator of his or her estate shall not be deemed to be an executor within the meaning of the Estate Duty Act.

Cap.43:02

Expenditure on care and management

70. An administrator or guardian may incur expenditure on such acts as may be necessary for the proper care and management of any property belonging to the estate of a deceased person or to a minor.

Administrator or guardian not to derive benefit

71. – (1) Unless there is express provision to that effect in the will, no administrator or guardian shall derive any pecuniary benefit from his or her office.

(2) If an administrator or guardian purchases, either directly or indirectly, any part of the property of the deceased or of a minor for whom he or she is responsible, the sale may be set aside by the court on the application made within a reasonable time of any other person interested in the property sold or in the proceeds of sale.

Exercise of powers of several administrators

72. – (1) Where there are several administrators, the powers of all may, in the absence of any direction to the contrary in the will or administration grant, be exercised by the majority of them.

(2) Where there are only two administrators, the court shall have power on the application by either or both of the two administrators, to appoint one more administrator to act generally or in respect of a particular matter in question.

Disputes

73. (1) On the application in the prescribed manner by an interested person, a court shall have jurisdiction, where there is a dispute, in relation to a deceased person's estate –

(a) to decide whether a document purporting to be a will is a valid will and whether the deceased person died testate or intestate;

(b) to decide what is the property to which the deceased person was entitled at the date of his or her death;

(c) to decide if any person is or is not entitled as a beneficiary of the estate;

(d) to decide how the distribution of the property forming part of the deceased person's estate should be carried out;

(e) to order the sale or other disposition of property belonging to a deceased person's estate for the purpose of paying the debts of the deceased or for the purposes of distribution;

(f) to appoint a guardian in place of a guardian who has acted improperly;

(g) to decide whether an administrator or the person administering the property of a deceased person by agreement under section 61 has failed to carry out any of his

or her duties and to order payment of compensation by such administrator or other person to a person who has suffered injury as a result of such failure; and

(h) to decide any other matter in dispute which the court considers to be competent for its jurisdiction.

(2) In the determination of a dispute under subsection 1 (g), the court shall be guided by the following principles-

(a) that no order for compensation shall be made if the injury had come to the knowledge of the injured person, not being a minor, more than two years before the application relating thereto was made to the court;

(b) that in case the injured person was a minor an application for compensation for injury suffered may be made within two years after–

(i) he or she ceased to be a minor; or

(ii) the date when the injury came to his or her knowledge, whichever is later in time.

Offences by administrators and guardians

74. – (1) An administrator or guardian who wrongfully deprives a minor of property or a share in property to which the minor is entitled intending thereby to benefit such administrator or guardian or any other person shall be guilty of an offence or liable to a fine of K100,000 and to imprisonment for three years.

(2) A court shall order restitution of property or otherwise in favour of the minor against the administrator or guardian found guilty under this section.

Subsequent discovery that estate dealt as small estate exceeds limit of small estate

75. (1) No act of a court exercising jurisdiction under this Part or of an administrator to whom an administration grant has been made shall be with invalid because it is afterwards discovered that the gross value of the estate in relation to which the act was done exceeds the value of a small estate.

(2) Every administrator of an estate appointed under this Part who discovers that the gross value of estate exceeds the value of a small estate shall immediately report the discovery to the court by which he or she was appointed and to the Secretary to the Commissioners of Estate Duty, stating what he or she now considers the gross value of the estate to have been at the death of the deceased and the reason for the lateness of the discovery.

(3) The presiding officer of a court who discovers that the gross value of an estate, which has been the subject of the proceedings in the court is believed to exceed the value of a small estate or who receives a

report under subsection (2) shall, after such further inquiry, if any, as he or she deems appropriate, report the matter to the High Court and to the Secretary to the Commissioners of Estate Duty; and such report shall set out briefly the circumstances of the estate and shall contain a recommendation whether further proceedings in court relating to the estate should be continued in the High Court or the original court.

(4) After making a report under subsection (3), the presiding officer of the court shall not exercise jurisdiction under this Part without the written directions of the High Court and shall do so subject to such directions as the High Court may consider it appropriate.

Chief Justice to make rules on small estate

76. – The Chief Justice may make rules prescribing the procedure to be observed in respect of applications relating to small estates, the forms to be used and the fees to be paid and all other matters arising under this Part.

PART XIV
GENERAL

Preservation of wills and

77. – (1) The original of every will of which probate is granted or in

register of wills

respect of which a grant of letters of administration with a certified copy of the will annexed or an administration grant with a certified copy of the will annexed is made under this Act shall be deposited and preserved in the registry of the court that made the grant, but it may, if the court so determines, be transmitted for such preservation to a registry of the High Court.

(2) A court shall maintain a register of all wills deposited with it and may at any time furnish a certified copy thereof to any person.

(3) Subject to the control of the court and to the provisions of the Deceased Estates (Wills, Inheritance and Protection) (Deposit of Wills) Rules, a will deposited with a court shall be open to inspection.

Court's discretion in matters of probate or letters of administration

78. – (1) A court shall not be bound to grant any application under this Act for a grant of probate or letters of administration but may exercise its discretion in relation thereto.

(2) If an application for a grant of probate or letters of administration is refused the court shall state the reason for refusal within a reasonable time not being more than a period of thirty days failing which the application shall be deemed granted by that court and the court shall proceed to effect the grant unless the interests of justice require otherwise.

Payment of salary or wages by employers

79. – (1) Notwithstanding any of the other provisions of this Act, where a person was employed at the date of his or her death, his or her employer shall immediately pay directly to the surviving spouse or in the absence of a surviving spouse to the senior and responsible member of the deceased person's family known to be living with him or her, the amount due to his or her estate in respect of salary, wages, allowances or arrears for the pay period interrupted by his or her death and, if still unpaid, the immediately prior pay period and the payment to such surviving spouse or other member of his or her family shall be a good discharge to the employer for the amount so paid and the recipient of the amount shall, if required, account to the personal representative of the deceased for the expenditure thereof.

(2) The person to whom money is paid under subsection (1) may apply the money for the purpose of paying normal household expenses of the family of the deceased or family expenses in relation to the funeral of the deceased.

Sane murderer not to benefit from estate of victims

80. – (1) Notwithstanding any of the other provisions of this Act, a person who, while sane, murders another person, shall not be entitled, directly or

indirectly, to any share in the estate of the murdered person and the beneficiaries to the estate of the murdered person shall be ascertained as though the person who murdered the other had never been born.

(2) For the purposes of this section the conviction of a person of a crime of murder shall be sufficient evidence of the fact that the person convicted committed the murder unless the contrary is proved.

(3) Subject to subsections (1) and (2), the benefit under a will or on intestacy accruing to a person charged with the murder of testator or intestate shall be held upon trust as directed by the court and upon his or her conviction the proceeds from the trust shall be applied as the court may deem appropriate.

Application of Trustee Act Cap.5:02

81. – (1) The Trustee Act shall apply to personal representatives of small estates as it applies to all other personal representatives in respect of deceased estates.

(2) A personal representative shall have all the powers of investment of trustees and Part II of the Trustee Act shall apply in relation to investments made or retained by a personal representative.

(3) Nothing in this section shall be construed so as to derogate from the generality of the provisions of the Trustee Act.

Proof of claims

82. – (1) When a personal representative has received a notice from a claimant in respect of an estate or property which he or she wishes to distribute, he or she may, by a notice in writing served personally or by post, require the claimant prior to a date to be named in such notice, which shall not be less than sixty days from the service of such notice, either to institute proceedings to establish the claim or otherwise to satisfy the personal representative of the validity of the claim by affidavit.

(2) At the expiry of the time mentioned in the notice, the personal representative shall be at liberty to distribute the estate or property to which the notice relates amongst the parties entitled thereto without having regard to the claims of persons who shall have been served with such notice but shall have failed to comply with the requirements thereof and the personal representative shall not be liable to any such person for the estate or property so distributed.

(3) Nothing in this section shall prejudice the right of any claimant to trace the property or any property representing the property being claimed into the hands of any person, other than a *bona fide* purchaser of the legal estate in the property for value without notice, who may have received it.

Payments to representatives in country of domicile

83. Where a personal representative in Malawi has been granted probate or letters of administration to the estate in Malawi of any person who was at the time of his or her death domiciled outside Malawi and probate of whose will or letters of administration of whose estate or equivalent grant in the place of such domicile has been granted to some other person, the personal representative may pay over to such other person the balance of the estate in Malawi after payment of proved debts and funeral and administration expenses without seeing to the application of such balance and without incurring any liability in regard to such payment.

Unlawful possession, etc. of deceased estate

84. – (1) Any person not being entitled thereto under a will or upon any intestacy who, in contravention of the will or of this Act, takes possession of, grabs, seizes, diverts or in any manner deals in, or disposes of, any property forming part of the estate of a deceased person, or does anything, in relation to such property, which occasions or causes or is likely to occasion or cause deprivation or any form of hardship to a person who is entitled thereto under the will or upon the intestacy, shall be guilty of an offence and liable to a fine of K1,000,000 and to imprisonment for ten years and in addition to such sentence, the court shall make an order directing that-

(a) the property or the monetary value thereof be immediately restored to the person or persons lawfully entitled thereto or to the estate of the deceased person; and

(b) the whole, or such part as the court shall specify in the order, of the fine imposed be paid to the person or persons entitled or into the estate of the deceased person.

(2) subject to any other written law in relation to spent convictions, a person found guilty under this section shall not qualify as an administrator or guardian in relation to an estate of a deceased person in Malawi.

Special public prosecutors

85. – (1) For purposes of effective enforcement of the offence under section 84 at all levels of society and throughout Malawi, the Director of Public Prosecutions shall, by notice in the *Gazette*, appoint such persons as he or she considers to be fit and proper to act as special public prosecutors of offences under that section within such area as he or she shall specify in such notice, and not less than two persons shall be appointed in respect of one area.

(2) Persons to be appointed as special public prosecutors shall –

(a) be persons permanently residing in the areas in respect of which they are appointed and who are publicly regarded in those areas as persons who can make impartial judgments;

(b) be nominated by the relevant District Commissioner after he or she has consulted–

(i) the Traditional Authority of the area concerned; or

(ii) if the area concerned is not served by a Traditional Authority, such persons as he or she reasonably considers to be reputable leaders of the community in that area,

and the Director of Public Prosecutions shall not proceed to appoint any person as a special public prosecutor unless he or she is satisfied that such consultation has been made in respect of that person.

(3) No person shall be appointed a special public prosecutor except with his or her consent given in writing and on his or her understanding and acknowledgement, expressed in writing, that his or her work as a special public prosecutors shall be voluntary:

Provided, however, that the person so appointed shall be paid such allowance as shall be approved by the Minister responsible for finance and which shall be set at levels that reflect the voluntary nature of the work of a special public prosecutor.

(4) Persons appointed as special public prosecutor shall have powers–

(a) to receive allegations of commission, or of the likelihood of commission, of offences under section 84;

(b) on their own motion or upon any allegation so received, to monitor and investigate the commission of any offence under section 84;

(c) to secure the property which is the subject of the alleged offence or of an imminent commission of an offence under section 84; but without prejudice to rights of enjoyment of the property by those entitled thereto or to the authority of the administrators of the property appointed under a will or the authority of the Administrator General to exercise his or her powers or perform his or her functions in relation to such property under any law;

(d) to prepare a record of their findings;

(e) based on their findings, to bring before any court of a magistrate within their respective areas charges against any person alleged to commit or to have committed an offence

under section 84 and to conduct the prosecution before the court.

(5) For the purposes of conducting prosecutors pursuant to this section, every special public prosecutor shall–

(a) if not already appointed in the public service, be deemed to be a person employed in the public service;

(b) be deemed to act as a subordinate to the Director of Public Prosecutions; and

(c) be under the general or special directions of the Director of Public Prosecutions.

(6) The Director of Public Prosecutions may from time to time issue practice directions for the guidance of the special public prosecutors on procedures according to the Criminal Procedure and Evidence Code and may, by such practice directions, also prescribe any other matter relating to the conduct of prosecutions, including but not limited to–

Cap. 8:01

(a) the law under this Act;

(b) techniques of investigating offences;

(c) the form and preparation of charge sheets;

(d) the manner of keeping records; and

(e) the manner of making returns to the office of the Director of Public Prosecutions.

(7) Any court of a magistrate in the area assigned to a special public prosecutor shall be competent to try an offence under section 84 committed within that area.

(8) A special public prosecutor shall refrain and desist from exercising his or her powers and duties under this section in respect of the property of a deceased person if he or she has an interest in the property or is a relative of the deceased person.

(9) A special public prosecutor shall not be liable to any person whosoever for damages, compensation, costs or other civil claim in respect of anything done or purported to be done by him or her in good faith under this Act.

(10) For the avoidance of doubt, nothing in this section shall be construed as to preclude the conduct of prosecution of any offence under section 84 directly by the Director of Public Prosecutions or by an officer

subordinate to the Director of Public Prosecutions or by a police officer in exercise of the powers of his or her office.

Civic awareness

86. The Minister responsible for matters of gender and community affairs shall have power to design and implement programmes for the civic awareness of the law under this Act and, for that purpose–

(a) that Minister shall enlist the services of chiefs and other traditional authorities and the services of non-governmental organizations in disseminating information, and in the conduct of any other activities, connected with such programmes;

(b) there shall be appointed in the public service such officers as shall be required to carry out activities for the implementation of such programmes.

Repeal

87. The Wills and Inheritance Act is hereby repealed.

Transitional

88. An application to the court for probate, letters of administration or re-sealing made before the coming into operation of this Act may be continued as though the application had been made under this Act.

Saving

89. Except as expressly provided, nothing in this Act shall be deemed to affect the rights and duties of personal representatives or the law relating to the administration of estates.

Regulations

90. The Minister may make regulations for the better carrying out of this Act.

SUBSIDIARY LEGISLATION

DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION)

(DEPOSIT OF WILLS) RULES

under s. 22

ARRANGEMENT OF RULES

RULES

Citation

1. These Rules may be cited as the Deceased Estates (Wills, Inheritance and Protection) (Deposit of Wills) Rules.

Deposit of wills for safe custody

2. – (1) A testator who wishes to deposit his or her will for custody under section 8 of the Act with the Registrar or a District Commissioner or a subordinate court shall deliver it to the Registrar or District Commissioner or a magistrate of a particular subordinate court in a sealed envelope bearing on the outside all the known names of the testator, together with the prescribed fee and the Registrar or District Commissioner or magistrate shall assign to each will and mark on the envelope a serial number and shall give the depositor a receipt bearing the serial number assigned to the will in Form I in the Schedule.

(2) The Registrar, every District Commissioner and every magistrate shall maintain an index of all known names of the testators whose wills are deposited with him or her and the date on which each will was so deposited and the serial number of the will and the index shall be in Form I in the Schedule and the serial numbers used by a District Commissioner or magistrate shall be such as are assigned by the Registrar.

(3) All wills so deposited shall be kept by the Registrar or District Commissioner or magistrate in a safe place until the death of the maker thereof, unless re-delivery is demanded and the receipt issued under subrule (1) is produced by the testator in person in his or her lifetime, or if he or she should be unable to attend in person, by his or her agent specifically authorised for that purpose.

(4) When a will is re-delivered in the manner provided for under subsection (3), the testator or his or her agent shall sign a receipt for the will.

(5) The Registrar or District Commissioner or magistrate may require such proof of the authority of any person claiming to be the agent of a testator as he or she shall deem appropriate, and may dispense with the production of his or her receipt for the will if he or she is satisfied that there is good reason for its non-production and that the application is genuine.

Monthly circular

3. – (1) The Registrar or District Commissioner or magistrate within fourteen days after any month during which a will was deposited with him or her or withdrawn from him or her, prepare a circular in Form II in the Schedule indicating the wills deposited and withdrawn during that month.

(2) The circular will indicate the serial number of the will, whether the will was deposited or withdrawn, the name of the testator, his or her village, his or her chief and his or her home District Commissioner.

(3) Upon receipt of each circular, each District Commissioner shall note in his or her index the deposit or withdrawal of a will by a resident of his or her District, and, in the case of a deposit, the place where it is deposited.

(4) The information contained in such monthly circulars may not be disclosed to any person except for the purposes of these Rules.

Action to be taken on notification of testator's

4. – (1) Where an application for probate or letters of administration with will annexed is made to the Registrar or resident magistrate or magistrate of

death

the first grade and he or she is informed that the original of the testator's will is deposited with a District Commissioner or magistrate, the Registrar or resident magistrate or magistrate of the first grade shall, on being satisfied of the death of the deceased, request the District Commissioner or magistrate with whom the will is deposited to forward the original will to him or her.

(2) If a District Commissioner with whom a testator's will is deposited is informed by a court that the court is satisfied of the death of the testator, the District Commissioner shall forward the original of the testator's will in its sealed envelope to the Registrar or resident magistrate or magistrate of the first grade.

(3) On receipt of the original will, the Registrar or resident magistrate or magistrate of the first grade shall break the seal on the envelope and if the estate appears to be a small estate, shall cause two photostat copies of the will to be made and shall send such copies to the District Commissioner, who shall forward them to the court of the resident magistrate or magistrate of the first grade concerned, with a note of the amount of the fees due in respect of the making of such copies.

Secrecy

5. – (1) No information concerning a will deposited for custody may be given to any person except to the Registrar, another District Commissioner,

resident magistrate or a magistrate of the first grade in accordance with these Rules or the Deceased Estates (Wills, Inheritance and Protection) (Small Estates) Rules and the envelope containing the original will may not, so long as the will is in custody, be opened by any person except by the Registrar or resident magistrate or magistrate of the first grade when informed of the death of the testator.

(2) Any person who discloses any information relating to the will otherwise than in accordance with these Rules or the Deceased Estates (Wills, Inheritance and Protection) (Small Estates) Rules shall be guilty of an office and liable to a fine of K2,000 and imprisonment for three months.

Fees

6. – (1) The fee payable on the deposit of a will under rule 2 shall be K200 and such fee shall not, under any circumstances, be refunded.

(2) When any will is withdrawn pursuant to rule 2 (3) and the same or another will is re-deposited by the same testator, a fresh fee of K200 shall be paid.

SCHEDULE rr. 2 and 3

FORM I

WILLS DEPOSITED FOR CUSTODY

Index	*Receipt*

Name of Maker and Serial Number ……	Address	000001 ……
000001 ……	Village*……	A packet said to contain the will of ……
Names in full ……..	Chief* …….....	……
……..	District …….. ..	…….
Other names (if any) ……	Other address (business, etc.) ……	received for safe custody
……..	……..	the …… day of
Date: ……	……..	……..., 20……
Fee: ……	……..	Fee: …….

……..

District Commissioner
Registrar/Magistrate

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* The name of the Depositor's Village and Chief need not be given if these are not applicable, in which case the Depositor's home address should be given.

FORM II

To: The Registrar of the High Court;
All District Commissioners.

CUSTODY OF WILLS

The following wills were deposited for safe custody or withdrawn at …… by the under-named during the month of ……..., 20……

DEPOSITS

Register No.	*Date*	*Depositor*	*Village*	*. Chief*	*District*
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……

WITHDRAWALS

Register No.	*Date*	*Depositor*	*Village*	*. Chief*	*District*
……...	…….	……	…….	……..	……
……...	…….	……	…….	……..	……

……... …… …… …… …….. ……
……... …… …… …… …….. ……

……
District Commissioner/Registrar/Magistrate
Date…….……..……..……..……..

under s. 22

ARANGEMENT OF RULES

RULES

Citation

1. These Rules may be cited as the Deceased Estates (Wills, Inheritance and Protection) (Non – Contentious Probate) Rules.

Interpretation

2. In these Rules unless the context otherwise requires-

(a) "grant" mean a grant, made by the High Court or a court of a resident magistrate or a magistrate of the first grade, of probate of a will or of letters of administration with or without a will annexed, and the resealing by the High Court in Malawi of probate or letters of administration issued by a court of probate outside Malawi;

(b) "gross value" in relation to an estate means the value of the estate without deduction for debts, encumbrances, funeral expenses or estate duty;

How application to be made

3. – (1) An application for a grant may be made in person or in writing to the Registrar or a resident magistrate or a magistrate of the first grade.

(2) An application for a grant made by a legal practitioner for and on behalf of an applicant shall be in writing.

(3) Every application for a grant, except an application for probate or by a trust corporation, shall state the names, addresses and descriptions of the proposed sureties.

(4) Every application for a grant shall state the address for service of the applicant.

(5) An applicant for a grant making the application in person shall supply all information necessary to enable the court to which the application is made prepare the documents leading to the grant and where the applicant prepares the documents himself or herself, he or she shall lodge such documents unsworn.

(6) Where an applicant for a grant appears in person and supplies information as required under subsection (5), the court shall embody such information in proper order for purposes of the grant.

Contents of oaths

4. – (1) Every application for a grant shall be supported by an oath in the form applicable to the circumstances of the case which shall be contained in an affidavit sworn by the applicant and by such other documents as these Rules or the court may require.

(2) On an application for a grant of letters of administration with will annexed, the oath shall state whether any executors have been appointed by the will and if there have been any such appointed, whether the executors so appointed have renounced or are persons to whom probate may not be granted or have pre-deceased the testator or have died before obtaining probate or have died before having administered all the estate of the deceased or having been appointed by the will do not appear and take out probate and what the applicant's right to a grant is and whether any minority or life interest arises under the will or intestacy.

(3) On an application for a grant of administration in case of intestacy, the oath shall state what is the entitlement of the applicant according to the rules for the distribution of the estate of the intestate, and who are the other persons entitled to shares in the estate.

(4) The oath shall state the deceased's domicile at his or her death, and the place and date of his or her death.

(5) An affidavit for the purposes of this rule may be in one of the forms in Form I in the First Schedule with such variations as, subject to the provisions of these Rules, the circumstances may require.

Jurisdiction exercised by court

5. – (1) All matters relating to grants may be disposed of by a court sitting in chambers:

Provided that the court may adjourn any matter for determination in open court and give such directions regarding the attendance of any person in court in relation to the matter as it may deem appropriate.

(2) A court may refuse to make an order for any grant to be issued until all inquiries which it sees fit to make have been answered to its satisfaction and may require proof of the identity of the deceased or of the applicant beyond that contained in the oath.

Proof of death

6. Every application for a grant other than an application for resealing shall be accompanied by the death certificate of the deceased or the affidavit of a person who knew the deceased in his or her lifetime certifying

of his or her personal knowledge the fact of the death of the deceased or by such other evidence of the death of the deceased as the court may approve.

Administration bond

7. – (1) Every applicant for a grant of letters of administration shall furnish to the court an administration bond in Form II in the First Schedule with sureties to the satisfaction of the court and the amount of the bond shall be the gross value of the estate.

(2) Except where the sole surety is a bank or an insurance company, there shall be two sureties to every administration bond and a reasonable premium paid to the bank or an insurance company in respect of the issue of such a bond shall be a proper expense of administration.

(3) The court shall so far as is reasonably possible satisfy itself that every surety is a responsible person.

Additional name

8. Where it is necessary to describe the deceased in a grant by some name in addition to his or her true name, the applicant shall state in the oath the true name of the deceased and shall depose that some part of the estate, specifying it, was held in the other name, or as to any other reason that there may be for the inclusion of the other name in the grant.

Marking of wills

9. Every will in respect of which an application for a grant is made shall be marked by the signature of the applicant and the person before whom the oath is sworn, and shall be exhibited to the affidavit required under these Rules:

Provided that where the court is satisfied that compliance with this rule might result in the loss of the will, it may allow a photographic copy thereof to be marked or exhibited in place of the original document.

Engrossment for purposes of record

10. – (1) Where the court considers that in any particular case a photographic copy of the original will would not be satisfactory for purposes of record, it may require an engrossment suitable for photographic purposes to be lodged.

(2) Where a will contains alterations which are not admissible to proof, there shall be lodged an engrossment of the will in the form in which it is to be proved.

(3) Any engrossment lodged under this rule shall reproduce the punctuation, spacing and division into paragraphs of the will and, if it is one to which subrule (2) applies, it shall be made bookwise on durable paper following continuously from page to page on both sides of the paper.

(4) Where any pencil writing appears on a will, there shall be lodged a facsimile copy of the will or of the pages or sheets containing the pencil writing, in which there shall be reproduced in red ink those portions which appear in pencil in the original.

(5) Where, following a probate action, a will has been pronounced for, any engrossment of the will lodged on the subsequent application for a grant shall reproduce the notation.

Evidence as to due execution of will

11. – (1) Where a will contains no attestation clause or the attestation clause is insufficient or where it appears to the court that there is some doubt about the due execution of the will, the court shall, before admitting it to proof, require an affidavit as to due execution in Form XI in the First Schedule from one or more of the attesting witnesses, or, if no attesting witness is conveniently available, from any other person who was present at the time the will was executed.

(2) If no affidavit can be obtained in accordance with subrule (1) the court may, if it thinks fit, having regard to the desirability of protecting the interests of any person who may be prejudiced by the will, accept evidence on affidavit from any person it may think fit to show that the signature on the will is in the handwriting of the deceased or of any other matter which may raise a presumption in favour of the due execution of the will.

(3) If the court is not satisfied that the will was duly executed, it may refer the matter into open court.

Execution of will of blind or illiterate testator

12. Before admitting to proof a will which appears to have been made by a blind or illiterate testator or by another person by direction of the testator, or which for any other reason give rise to the doubt as to the testator having had knowledge of the contents of the will at the time of its execution, the court shall satisfy itself that the testator had such knowledge.

Alteration of wills

13. – (1) Where there appears in a will any obliteration, interlineation or other alteration which is not authenticated by the signature of the attesting witnesses or by the re-execution of the will or by the execution of a codicil, the court shall require evidence to show whether the alteration was present at the time when the will was executed and shall give directions as to the form in which the will shall be proved.

(2) If from any mark on the will it appears to the court that some other document has been attached to the will, or if a will contains any reference to another document in such terms as to suggest that it ought to be incorporated in the will the court may require the document to be produced and may call for such evidence in regard to the attaching or incorporation of the document as it may think fit.

(3) Where there is doubt as to the date on which a will was executed, the court may require such evidence as it thinks necessary to establish the date.

Attempted revocation of wills

14. Any appearance of attempted revocation of a will by burning, tearing or otherwise and every other circumstances leading to a presumption of revocation by the testator, shall be accounted for to the satisfaction of the court.

Additional affidavit or evidence may be required

15. The court may require an affidavit from or the personal attendance of any person it may think fit for the purpose of satisfying itself as to any of the matters referred to in rule 12, 13, 14 or 15.

Soldiers' wills

16. If it appears to the court that there is *prima facie* evidence that a will is one to which section 5 (4) of the Act applies, the will may be admitted to proof if the court is satisfied that it was made in compliance with the provisions of that subsection.

Making and issue of grant

17. – (1) When a court has directed that a grant shall be made, and, in cases where an administration bond is required, has approved the sureties, the Registrar or a resident magistrate or a magistrate of the first grade shall prepare a grant in the appropriate form.

(2) One of the forms in Forms VIII and IX in the First Schedule shall be made with such variations, limitations and exceptions as the court may direct.

(3) Every grant shall be signed by the Registrar or a resident magistrate or a magistrate of the first grade shall be sealed with the seal of the court.

(4) When an administration bond is required, the grant shall not issue until such a bond has been executed by the approved sureties.

Sealing of foreign grants

18. – (1) An application under section 58 of the Act for the sealing in Malawi of a grant made outside Malawi shall be made by the person to whom the grant was made or by any person authorized in writing to apply on his or her behalf.

(2) The application shall be accompanied by a copy of the estate duty affidavit and the certificate of the Secretary to the Estate Duty Commissioners under section 33 of the Estate Duty Act.

Cap. 43:02

(3) The application shall be supported by an affidavit verifying the domicile of the deceased unless a notification of domicile appears on the grant.

(4) The Registrar shall send notice of the sealing to the court which made the grant outside Malawi.

(5) Where notice is received in the High Court of the re-sealing of a Malawi grant, notice of any amendment or revocation of the grant shall be sent to the court by which it was re-sealed.

Citations

19. – (1) Every citation shall issue from the registry of the court and shall be settled by the Registrar or a resident magistrate or a magistrate of the first grade before being issued.

(2) Every averment in a citation, and such other information as the Registrar or a resident magistrate or a magistrate of the first grade may require shall be verified by an affidavit sworn by the citor, if there are two or more citors, by one of them:

Provided that the Registrar or resident magistrate or magistrate of the first grade may, in special circumstances, accept an affidavit sworn by the citor's legal practitioner.

(3) The citor shall enter a caveat in Form IV before issuing a citation.

(4) Every citation shall be served personally on the person cited unless the court, on cause shown by affidavit, directs some other mode of service, which may include notice by advertisement.

(5) Every will referred to in a citation shall be lodged in the registry of the court before the citation is issued, except where the will is not in the possession of the citor and the Registrar or resident magistrate or magistrate of the first grade is satisfied that it is impracticable to require it to be lodged.

(6) A person who has been cited to appear may, within eight days of service of the citation upon him or her, inclusive of the day of such service, or at any time thereafter if no application has been made by the citor under rule 22 (5) or rule 23 (2), enter an appearance in the registry by filing a duly completed document in Form VI and shall forthwith thereafter serve on the citor a copy of Form VI sealed with the seal of the court.

Caveats

20. – (1) Any person who wishes to ensure that no grant is sealed without notice to himself or herself may enter a caveat at the court.

(2) Any person who wishes to enter a caveat under this rule (hereafter referred to as the "caveator") may do so by completing Form IV

and filing the same with the Registrar or a resident magistrate or a magistrate of the first grade.

(3) Where the caveat is filed by a legal practitioner the name of the caveator shall be stated in Form IV.

(4) Except as otherwise provided by this rule, a caveat shall remain in force for six months from the date on which it is entered and shall then ceases to have effect, without prejudice to the entry of a further caveat or further caveats.

(5) The Registrar or a resident magistrate or a magistrate of the first grade shall maintain an index of caveats and on receiving an application for a grant he or she shall cause the index to be searched and he or she shall not consider an application for a grant with knowledge of a caveat in respect thereof.

(6) A caveator may be warned by the issue from the registry of the court of a warning in Form V at the instance of a person with sufficient interest in the estate and such warning shall state his or her interest, and, if he or she claims under a will, the date of the will and shall require the caveator to give particulars of any contrary interest which he or she may

have in the estate of the deceased; and every warning shall be served on the caveator.

(7) A caveator who has not been warned may at any time during which the caveat is in force withdraw his or her caveat by giving notice of such intention in writing to the Registrar or resident magistrate or magistrate of the first grade and if the caveator has been warned and the caveator has not acknowledged service of the warning and has not indicated his or her intention to contest the warning, he or she may withdraw his or her caveat by giving notice of withdrawal in writing to the person who issued the warning and to the Registrar or resident magistrate or magistrate of the first grade.

(8) A caveator having an interest contrary to that of the person who issued a warning may, within eight days of the service of the warning on him or her, inclusive of the day of service, or at any time thereafter if no affidavit has been filed under subrule (10), acknowledge service of the warning and indicate his or her intention to contest the warning by filing Form VI at the registry of the court and shall forthwith thereafter serve on the person who issued the warning a copy of Form VI sealed with the seal of the court.

(9) A caveator having no interest contrary to that of the person who issued the warning but wishing to show cause against the issue of a grant to that person may, within eight days of service of the warning on him or her, inclusive of the day of service, or ay time thereafter if no affidavit has been filed under subrule (10), issue and serve a summons for directions.

(10) If the time limited for acknowledgement of service has expired and the caveator has not acknowledged nor given his or her intention to contest the warning, the person who issued the warning may file in the registry an affidavit showing that the warning was duly served and that he or she has not received a summons for directions under subrule (9), and thereupon the caveat shall cease to have effect.

(11) Unless a court by order made on summons otherwise directs-

(a) a caveat in respect of which an acknowledgement of service of a warning is duly filed with the registry of the court shall remain in force until the commencement of a probate action, or until it has been disposed of under the rules relating to probate actions;

(b) any caveat in force at the beginning of a probate action or proceedings by way of citation or motion shall, subject to subrule (7), remain in force until an application for a grant is made by the person shown to be entitled thereto by the decision of the court in such action or proceedings, and upon such application any caveat entered by a party who had notice of the action or proceedings shall cease to have effect;

(c) if no caveat is in force at the commencement of a probate action, the commencement of the action shall operate to prevent the issue of a grant as if a caveat had been entered immediately before such commencement.

Citation to accept or refuse grant

21. – (1) A citation may be issued under section 28 of the Act or under subrules (2) or (3).

(2) Where power to make a grant to an executor has been reserved, a citation calling on the executor to accept or refuse a grant may be issued at the instance of the executors who have proved the will or of the executor of the last survivor of deceased executors who proved the will.

(3) A citation calling on an executor who has inter-meddled in the estate of the deceased to show cause why he or she should not be ordered to

take a grant may be issued at the instance of any person interested in the estate at any time after the expiry of six months from the death of the deceased:

Provided that no citation to take a grant shall issue while proceedings as to the validity of the will are pending.

(4) A person cited who is willing to accept or take a grant may apply *ex parte* to a court for an order for a grant on filling an affidavit showing that he or she has acknowledged service of the citation and has indicated his or her intention to contest the citation and that he or she has not been served by the citor with notice of any application for a grant to himself or herself.

(5) If the time limited for acknowledgement of service of the citation has expired and the person cited has not made the acknowledgement, the citor may-

(a) in the case of a citation under section 28 of the Act apply by summons to the court for an order for a grant to himself or herself;

(b) in the case of a citation under subrule (2), apply by summons for an order striking out the acknowledgement and for the endorsement on the grant of a note that the executor in respect of whom power was reserved has been duly cited and has not made the acknowledgement and that all his or her rights in respect of the executorship have wholly ceased;

(c) in the case of a citation under subrule (3), apply by summons to the court for an order requiring the person cited to take a grant within a specified time;

and the summons shall be served on the person cited.

Citation to profound a will

22. – (1) A citation to propound a will shall be directed to the executors named in the will and to all persons interested thereunder, and may be issued at the instance of any citor having an interest contrary to that of the executors or such other persons.

(2) If the time limited for appearance has expired and no person cited has entered an appearance, or if no person who has appeared proceeds with reasonable diligence to propound the will, the citor may apply by summons for an order for a grant as if the will were invalid.

Address for service

23. All caveats, citations, warnings and appearances shall contain an address for service within the jurisdiction.

Limited grants

24. An application for an order for a grant limited to part of an estate shall be made by summons and shall be supported by an affidavit stating–

(a) whether the application is made in respect of the real estate only or any part thereof, or real estate together with personal estate, or in respect of a trust estate only;

(b) whether the estate of the deceased is known to be insolvent;

(c) that the persons entitled to a grant in respect of the whole estate in priority to the applicant have renounced either explicitly or by failing to appear to a citation or have consented to the present application.

Inspection of deceased's will

25. – Every will preserved in accordance with section 77 of the Act shall be open to inspection on payment of the prescribed fee.

Application by members of immediate family

26. – (1) An application by a member of the immediate family under section 15 of the Act shall be made by petition to which the executors of the will shall be the sole respondents.

(2) Such application shall be in accordance with Form VI in the First Schedule and shall be made within six months of the death of the testator and shall be verified by the affidavit of the applicant to which the respondents to the application shall file affidavits in reply.

(3) A petition under subrule (1) shall be heard in open court and the court may require the attendance in court of any of the persons having an interest in the matter.

Fees

27. The fees set out in the Second Schedule shall be payable in respect of the proceedings and matters therein mentioned:

Provided that if the Registrar or a resident magistrate or a magistrate of the first grade is satisfied that any applicant is unable to pay any of the prescribed fees he or she may waive or postpone payment thereof.

FIRST SCHEDULE

r. 4

FORM I

OATHS FOR EXECUTORS

In the High Court of Malawi/

In the …….... Magistrate Court sitting at …… *

In the Estate of ……..……... (deceased).

WE, A.B. and D.C., make oath and say (or solemnly, sincerely and truly declare and affirm) that we believe the paper writing hereto annexed, and marked by us, to contain the true and original last will and testament (with a codicil(s) thereto) of ……., deceased, who died on the ……. day of ……., 20 ……. at ……. aforesaid, domiciled in ……., that we are respectively ……. of the said deceased, and two of the executors named in the said will and will administer according to law all the estate which by law devolves to and vests in the personal representatives of the said deceased and will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of K…… and no more, to the best of our knowledge, information and belief.

Signatures …….
of
Deponents ……

Sworn/Affirmed by both the above-named

deponents at ……..

this …… day of ……., 20 ……..

Before me, ……..
A Commissioner for Oaths

* Delete whichever is inapplicable

---

r. 4

FORM II A

OATH – ADMINISTRATION WITH WILL ANNEXED

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *
In the Estate of …….…… (deceased).
WE, A.B. and D.C, of ……... make oath and say (or solemnly, sincerely and truly declare and affirm) that we believe the paper writing hereto annexed and marked by us, to contain the true and original last will and testament (with codicil(s) thereto) of ……., of ……, formerly of ……, deceased, who died on the …….. day of ……, 20 …… at ……., domiciled in ……...; that…… and …….. the executors named in the said will (or codicil) died in the lifetime of the said deceased; that no life interest arises in his estate and that no beneficiary is a minor; that we are respectively the …… of the said deceased and the residuary legatees and devisees named in the said will (or codicil) of the said deceased**, and will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, and will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of K …….. and no more, to the best of my knowledge, information and belief.

Signatures …….
of
Deponents ……

Sworn/Affirmed by both the above-named

deponents at ……..

this …… day of ……., 20 ……..

Before me, …….
A Commissioner for Oaths

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* Delete whichever is inapplicable
** If not applicable, set out the entitlement of the applicants for grant and state who has a prior right and how they are cleared off.

FORM IIB r. 4

OATH FOR ADMINISTRATOR (INTESTACY)

In the High Court of Malawi/

In the ……... Magistrate Court sitting at ……... *

In the Estate of …….……. (deceased).

I, A.B., of …….. make oath and say (or solemnly, sincerely and truly declare and affirm) that ……., of …….. died on the ……. day of ……., 20 …… at ……..., domiciled in Malawi, and intestate; that I am the …….** of the said deceased and entitled to a part of the estate of the said deceased and am not aware of any person who has a greater or more immediate interest in such estate except …… that no minority or life interest arises out of the intestacy; and that I will administer according to law all the estate which by law devolves to and vests in the personal representative of the said deceased, and will exhibit a true and perfect inventory of the said estate, and render a just and true account thereof whenever required by law so to do; and that the whole of the said estate amounts in value to the sum of K …….. and no more, to the best of my knowledge, information and belief.

Signatures …….
of
Deponents ……

Sworn/Affirmed by both the above-named

deponents at ……..

this …… day of ……., 20 ……..

Before me, ……..
A Commissioner for Oaths

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* Delete whichever is inapplicable
** Set out the relationship of the deponent to the deceased.

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r. 7

FORM III A

ADMINISTRATION BOND

In the High Court of Malawi/

In the …….. Magistrate Court sitting at …… *

In the Estate of ..……..…. (deceased).

WE, (1) …… are jointly and severally bound unto the court in the sum of (2) …… pounds, for the payment of which to the said court we bind ourselves and each of us and our (3) ……

Sealed with our Seal(s)

Dated the …….. day of ……..., 20……...

The condition of this obligation is such that if the above-named (4) …….., the (5) ……, of (6) …….., deceased, who died on the ……..…. day of ……..……., and the intended administrator (with the will (7) annexed) (8) of all the estate which by law devolves to and vests in the personal representative of the said (9) deceased ……. do, when lawfully called on in that behalf, make or cause to b e made a true and perfect inventory of the said estate which has or shall come to he hands, possession or knowledge of the said intended administrator, and do exhibit the said inventory or cause it o be exhibited in court whenever required by law so to do; and do well and truly administer the said estate according to law (10); and further do make or cause to be made a true and just account of the administration of the said estate whenever required by law so to do; and further do, if so required, render and deliver up the letters of administration of the said estate whenever required by law so to do; and further do, if so required, render and deliver up the letters of administration in the court if it shall hereafter appear that any will was made by the said deceased which is exhibited in the said court with a request that it be allowed and approved accordingly (11); then this obligation shall be void and of no effect, but shall otherwise remain in full force and effect.

Signed, sealed and delivered by the within-named in the presence of ……...
A Commissioner for Oaths (or other person) authorized by law to administer an oath). (12)
The Common Seal of ……. was made hereunto affixed in the presence of ……

---

* Delete whichever is inapplicable
(13) Insert full names, addresses and descriptions of principals and sureties.
(14) Unless otherwise directed, the sum to be inserted should be the gross value of the estate.
(15) Individuals bind themselves, their executors and administrators.
Trust and other Corporations bind themselves and their successors.
(1) Insert full name of principals.
(2) Set out the capacity in which application for the grant is made (which must agree with that stated in the oath).
(3) Full name and address of the deceased.

(4) "and codicils" if any.
(5) Delete if deceased died intestate.
(6) Insert any limitation on the estate to be administered, or any extension to include settled land. On an application for a second or subsequent grant, insert "left unadministered by" (previous grantee). If the grant is to be a limited one, give particulars.
(7) On a creditor's application insert here: "paying all and singular the debts owed by the said deceased at his death in due course of administration, rateably and proportionately and according to the priority required by law, not however, preferring his own debt by reason of his being administrator nor the debt of any other person".
(8) If the deceased died intestate, this paragraph should be deleted.
(9) In the case of the intended administrator, the bond must, unless attested by an authorized officer of the registry, be attested by the person before whom the oath was sworn. Attestation is not required in the case of a corporation.

FORM III B r. 19

In the High Court of Malawi

ADMINISTRATION BOND ON APPLICATION FOR SEALING A FOREIGN GRANT

under s. 58

In the Estate of ……..……... (deceased).
WE, (1) …… are jointly and severally bound unto the Registrar of the High Court in the sum of (2) …… pounds, for the payment of which to the said Registrar we bind ourselves and each of us and our (3).
Sealed with our Seal(s)

Dated the …….. day of ……..., 20 ……..

Signed, sealed and delivered by the within-named in the presence of …… A Commissioner for Oaths (or other person authorized by law to administer an oath. (9) The Common Seal of ……. was hereunto affixed in the presence of ……..

---

(1) Insert full names, addresses and descriptions of principals and sureties.
(2) Unless otherwise directed, the sum to be inserted should be the gross value of the estate.
(3) Individuals bind themselves, their executors and administrators.
Trust and other Corporations bind themselves and their successors.
(4) Insert full name(s), address(es) and description(s) of person(s) to whom the grant is made.
(5) "and codicils", if any.
(6) Delete if deceased died intestate.
(7) Description of Court by which grant was issued.
(8) Full name and address of the deceased.
(9) Where the application required to be supported by an oath sworn by the applicant, his or her signature must, unless attested by an authorized officer of a registry, be attested by the person before whom the oath was sworn. Attestation is not required in the case of a corporation.

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r. 19

FORM III C

FORM OF RESEAL IN MALAWI OF A FOREIGN GRANT

In the High Court of Malawi

PROBATE CAUSE NO.: …… of 20 ……

RESEALED by this High Court of Malawi under section 58 of the Deceased Estates (Wills, Inheritance and Protection) Act.

This …… day of ……., 20……..
SEAL
of the
HIGH COURT

……
Registrar of the High Court

NOTE: The above form should be endorsed on the foreign grant which is being resealed.

FORM IV rr. 20, 21

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

CAVEAT

In the Estate of …….. deceased.

LET no grant be sealed in the estate of ……., late of ……, deceased, who died on the ……..day of ……., 20 ……, at ……without notice to (1) …….. dated this …… day of ……, 20 ……..
Signed (2) ……..
Legal Practitioners for the said (3) ……

---

* Delete whichever is inapplicable
(1) Name and address within the jurisdiction for service of party by whom the caveat is entered.
(2) To be signed by the caveator's legal practitioner or by the caveator if acting in person.
(3) If the caveator is acting in person, substitute "in person".

FORM V r. 21

In the High Court of Malawi

In the ……... Magistrate Court sitting at …… *

WARNING TO CAVEATOR

To …… of ……,
a party who has entered a caveat in the estate of……..,
deceased.

You are hereby warned within eight days after service hereof upon you, inclusive of the day of such service:

(1) to enter an appearance either in person or by your legal practitioner, at the Registry, setting forth what interest you have in the estate of the above-named …… deceased, contrary to that of the party at whose instance this warning is issued;

or

(2) if you have no contrary interest but wish to show cause against the sealing of a grant to such party, to issue and serve a summons for directions by Registrar.

And take notice that in default of your so doing, the Court may proceed to issue a grant of probate or administration in the said estate notwithstanding your caveat.

Dated the …….. day of …….. . 20 ……..

…….
Registrar/Magistrate

---

* Delete whichever is inapplicable

Issued at the instance of [(set out the name and interest (including the date of the will, if any, under which the interest arises) of the party warning, the name of his legal practitioner and the address for service. If the party warning is acting in person, this must be stated].

---

r. 21 FORM VI

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

APPEARANCE TO WARNING OR CITATION

Caveat No.: ……. dated the …….. day of …….., 20 ……., (1)
Citation dated the …… day of …… 20 …….., (1)

Full name and address of the Deceased:

……
……
……

Full name and address of person warning (or citor):-
(2)

……
……
……

Full name and address of person warning (or citor):-
(3)

……
……
……

Enter an appearance for the above-named caveator (or person cited) in this manner.

Dated the …… day of ……. 20……...

(*Signed)* …….

whose address for service is:-

Legal Practitioner (or "In Person")

……

* Delete whichever is inapplicable
(4) Delete whichever is inapplicable.
(5) Here set out the interest of the person warning, or citor, as shown in warning or citation.
(6) Here set out the interest of the caveator or person cited, stating date of the will, if any, under which such interest arises.

FORM VII

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

PETITION No.: …….. of 20 ……

In the matter of section 15 of the Deceased Estates (Wills, Inheritance and Protection) Act, and
In the matter of the estate of …….. deceased.

1. …….

2. ……. Applicants

vs

1. …….

2. ……. Respondents

To: The High Court of Malawi/
To: The ……... Magistrate Court sitting at …… *

The Humble Petition of …… shows as follows:

(1) Probate of the will of the above-named deceased was granted to the Respondents by the High Court of Malawi/ ……Magistrate Court sitting at …… on the …… day of …… 20 …..

(2) The first applicant, ……. resides at …… and is related to the said deceased (hereinafter referred to as "the Testator") as his ……

(3) Immediately prior to the death of the Testator the first applicant was dependent on the Testator as follows:

(set out nature and degree of dependency)

(4) Under the Testator's said will, the first applicant is entitled to no benefit (or as the case may be)

(5)

(6) Set out similar information regarding the second applicant (if there is one).

(7)

(8) The nature and extent of the Testator's estate is set out in the Estate Duty affidavit filed by the Respondents is as follows:

(set out the particulars of the estate)

(9) The first applicant has or had the following capital and income:

(set out past, present and future capital and income)

and no other past, present or future capital from any source)

(10) Set out similar information relating to the second applicant, if there is one.

(11) The circumstances of the other dependants, wives, children and relatives of the Testator and the beneficiaries under the Testator's will, so far as such circumstances are known to the applicants, are as follows:

(set out full details)

(12) Reasonable provision for the applicants would be:

(set out amount claimed by each applicant)

And your Petitioner(s) will

Affidavit:

We, …… and ……..,

* Delete whichever is inapplicable

---

r. 18

FORM VIII

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

GRANT OF PROBATE

In the Estate of ……., deceased.

PROBATE

This grant certifies that …… have been duly appointed Executors of the Will of the late ……, who died at …… on the …….. day of ……, 20 ……. and hereby authorized as such to administer the estate of the said deceased in accordance with the terms of his will, a copy of which is attached to this grant.

SEAL ……

Registrar/Magistrate

At ……..

This …… day of …… 20……

* Delete whichever is inapplicable

r. 18

FORM VIII A

GRANT OF PROBATE (LIMITED)

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

In the Estate of ……..……..…….. deceased.

PROBATE (LIMITED)

This grant certifies that ……. and …….. were duly appointed Executors of the will of the late …….. who died at …… on the ……. day of ……, 20……; that the said …… is hereby duly authorized as Executor to administer the estate of the said deceased in accordance with the terms of his will, a copy of which is attached to this grant, and that the rights of ……. the other executor named in the said will are hereby reserved.

SEAL

……
Registrar/Magistrate

At ……..
This …….. day of …….. 20……

* Delete whichever is inapplicable

r. 18

FORM IX

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

In the Estate of ……..……..……., deceased.

LETTERS OF ADMINISTRATION

These are to certify that …… and …….. have been duly appointed administrators of the estate of the late ……. who died at …… on the ……. day of

……, 20……., and are hereby authorized as such to administer his estate (according to law)* *(in accordance with the terms of his will, a copy of which is attached hereto) (1).

……

Registrar/Magistrate

At …….

This …….. day of …… 20……

* Delete whichever is inapplicable

**(1) Delete whichever is not applicable.

FORM IX A

r. 18

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

In the Estate of ……..……..……., deceased.

LETTERS OF ADMINISTRATION TO UNADMINISTERED ESTATE

These are to certify that …… and …….. have been duly appointed administrators of the estate of the late ……. who died at …… on the ……. day of ……, 20……., as still remains unadministered, and are hereby authorized as such to administer such part of his estate as remains unadministered (according to law) *(in accordance with the terms of his will, a copy of which is attached hereto)**.

SEAL ……

Registrar/Magistrate

At …….

This …….. day of ……. 20…….

* Delete whichever is inapplicable

** Delete whichever is inapplicable

FORM X

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

RENUNCIATION OF PROBATE

In the Estate of ……..……..…….. deceased.

Whereas ……, of …….. deceased, died on the …….. day of ……., 20……,

at …… having made and duly executed his last will and testament bearing date the ……. day of …….., 20……., and thereof appointed ……. his sole executor; now I, the said …….. do hereby declare that I have not inter-meddled in the estate of the said deceased and will not hereafter inter-meddle therein with intent to defraud creditors, and I hereby renounce all my right and title to the probate and execution of the said will.

(*Signature*) …….

Sworn by the said ……..……..
this …… day of ……. 20..…..,
in the presence of ……
Signature of Witness: …….
Address: …….
……..

---

* Delete whichever is inapplicable

FORM X A

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

RENUNCIATION OF ADMINISTRATION

In the Estate of ……..……..…….. deceased.

Whereas ……., of …….. deceased, died on the …….. day of …….., 20……., intestate, a spinster,* leaving …… widow, her lawful mother** and the only person entitled to the estate of the said ……. deceased.

Now I, ……., the said ……, do hereby renounce all my right and title to letters of administration of the estate of the said deceased (and I further consent to the same being granted to ……, my lawful ……..).

(*Signature*) …….

Sworn by the said ……..……..
this …… day of ……. 20……,
in the presence of ……
Signature of Witness: …….
Address: …….
……..

---

* Delete whichever is inapplicable
** Amend as necessary

---

r. 12

FORM XI

In the High Court of Malawi/

In the ……... Magistrate Court sitting at …… *

AFFIDAVIT BY ATTESTING WITNESS OF DUE EXECUTION OF A WILL

In the Estate of ……..……..…….. deceased.

I, ……, of …….. (description) make oath and say (or solemnly, sincerely, truly declare and affirm) that I am one of the subscribing witnesses to the last will and testament of the said ……., of ……., the said will now being hereunto annexed bearing date ……, and that the said testator executed the said will on the day of the ……, and that the said testator executed the said will on the day of the date thereof by signing his name at the foot or end thereof as the same now appears thereon, in the presence of me and of ……. the other subscribed witness thereto, both of us being present at the same time, and we thereupon attested and subscribed the said will in the presence of the said testator.

……..
(*Signature of Deponent*)

Sworn by the above-named deponent
at ……..
this …… day of …… 20……,
Before me, ……..
A Commissioner for Oaths

SECOND SCHEDULE

r. 28

FEES

		K
1.	On application for a grant of probate or letters of administration	400
2.	On deposit of a will under section 7	200
3.	On search for a will deposited under section 78	100
4.	(a) Photostat copy of a will relating to an estate other than a small estate under section 78 – per sheet	10
	(b) Photostat copy of a will relating to a small estate – per sheet of will supplied to a court	20
5.	Typed copy of a will deposited under section 78 .. .. per 100 words or part thereof	50
6.	Inspection of any will, in addition to the search fee – per hour or part thereof	50

DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) (SMALL ESTATES) RULES

under s.76

ARRANGEMENT OF RULES

RULES

Citation

1. These Rules may be cited as the Deceased Estates (Wills, Inheritance and Protection) (Small Estates) Rules.

Interpretation

2. In these Rules, unless the context otherwise requires-

"gross value" in relation to any estate means the value of the estate without deduction for debts, encumbrances, funeral expenses or estate duty; and

How application for grant is to be made

3. – (1) An application under section 65 of the Act may be made by the persons appointed by a will to administer the estate or by not less than two nor more than four other persons.

(2) After recording a complaint the clerk shall inquire whether or not the deceased left a will, whether or not the gross value of the estate does not exceed the value of a small estate and where the deceased ordinarily resided prior to his or her death.

(3) If the applicants state that the deceased left no will and if the clerk is satisfied-

(a) by evidence on oath of the alleged death; and

(b) that the court appears to have jurisdiction in case of intestacy,

he or she shall notify the District Commissioner of the district in which the court is situate of the death and shall inquire whether the deposit of a will of the deceased person is recorded and if the District Commissioner

informs the clerk that no such will is recorded, the clerk shall immediately prepare a notice in Form I in the First Schedule in accordance with rule 5.

(4) In cases where the applicants state that the deceased left no will, the application under section 65 shall be made to the court having jurisdiction and in the area in which the deceased ordinarily resided prior to his or her death for the administration grant.

Procedure in case of will

4. – (1) If, on an application under section 65 of the Act, the applicants state that the deceased left a will, the clerk shall require the will to be produced to him or her or information to be given regarding the office where the will has been deposited under section 8 of the Act and if the applicants are unable either to produce the will or to state where the will is deposited, the clerk shall advise the applicants to apply to the court for a grant in respect of a lost will or to proceed as though the will has been revoked and the deceased had died intestate.

(2) If the applicants, by evidence on oath, satisfy the clerk of the death of the deceased and state that the will of the deceased is deposited for safe custody with a person under section 8 of the Act, and if it appears to the clerk that the court may have jurisdiction under section 64 of the Act, the clerk shall write to that person informing them of the death and in the case of a person other than the Registrar requesting them to forward the

original will to the Registrar or resident magistrate or magistrate of the first grade.

(3) If the applicants produce to the clerk a document which they claim to be the will of the deceased, the clerk shall forthwith make a copy thereof and act in accordance with section 64 (3) of the Act.

(4) In cases where subrule (2) or subrule (3) apply, the clerk shall obtain from the applicants all information required for the purpose of preparing a notice in Form II in the First Schedule and on receipt from the person requested under subrule (2) of the original will of the deceased, the clerk shall, unless it appears that some other court has been nominated in the will, proceed in accordance with rule 5 (4) and if the person to whom a request has been made under subrule (2) states that he or she has not and cannot trace the original will, the clerk shall inform the applicants accordingly and advise them in accordance with subrule (1).

(5) If, on receipt of the original will, it appears that some other court has been nominated, the clerk shall apply for the transfer of the application to the nominated court in the same way as for the transfer of a normal court case.

Notice to members of the immediate family

5. – (1) For the purpose of preparing a notice under rule 3 or rule 4, the clerk shall inquire of the applicants the names of the members of immediate family of the deceased and where they live, and the applicants shall truthfully and fully inform the clerk accordingly.

(2) When the clerk is satisfied that he or she has been fully informed about the members of the immediate family of the deceased and their addresses, he or she shall include the names and addresses of all members of the immediate family in the notice and shall make sufficient copies for service on each of them.

(3) If the applicants state, or the clerk is satisfied by inspection of the will or certified copy thereof that there is a person named in the will as executor who is not among the applicants, the clerk shall cause such person to be included in the list of persons to be served with a notice.

(4) The clerk shall thereupon request the court to fix the date of hearing of the application.

(5) The clerk shall inform the applicants of the date and time fixed for hearing and shall cause the notices to be served on the persons therein named.

(6) Where any member of the immediate family of the deceased is a minor, the notice to him or her may be served on his or her guardian, if any, or on the persons with whom he or she resides, if there is no guardian.

Hearing

6. – (1) If, on the hearing, the applicants or any of them fail to appear, the court may adjourn the hearing or, at the request of any two applicants or members of the immediate family who are willing to undertake the administration of the estate, may proceed in the absence of any applicant and may direct that an administration grant be issued in accordance with section 65 (5) or (6) of the Act.

(2) If, on the hearing, any person on whom a notice should have been served fails to appear, the court may, if it is not satisfied that all such notices have been served in due time, adjourn the hearing, but if its satisfied that all such notices have been served in due time, the court shall proceed with the hearing in the absence of any person duly served with a notice.

(3) Where any of the members of the immediate family of the deceased is a minor the court may, if no lawful guardian appears to represent the minor, proceed with the hearing or adjourn the hearing until such guardian is appointed.

Form of administration grant and its issue

7. – (1) An administration grant shall be in accordance with Form III in the Schedule.

(2) Where a court has ordered that an administration grant be issued, the grant shall not be issued until the fees prescribed in the Second Schedule have been paid.

(3) A copy of the administration grant shall be retained in the records of the court and if a copy of the will was annexed to the grant, a copy shall be annexed to the copy of the grant retained by the court.

Disputes

8. – (1) A dispute over which a court has jurisdiction under section 73 of the Act, may be decided on the hearing of an application made under section 65 of the Act and if no application under section 65 of the Act has been made or if such an application has been concluded, an application relating to such a dispute shall be made to the court which made a grant under section 65 of the Act, or, if no such grant has been made by any court, the dispute may be decided by the court and as lodged by the applicant.

(2) An application relating to a dispute referred to in subrule (1) and a civil summons shall be issued to every person interested in the dispute and the court shall refuse to proceed with the hearing of the

application unless it is satisfied that all persons interested in the question are before the court or, if not before the court, have been served in due time with a summons to attend the court.

(3) An application relating to a question over which a court has jurisdiction under section 73 of the Act may be made by any person having an interest in the property or by any relative of the minor having an interest in the property or other person having a legitimate interest in the minor.

(4) An application may proceed after the person alleged to have failed to carry out his or her duties or to have acted improperly as guardian has been duly served with a civil summons, and without any other person interested being before the court.

(5) No order may be made against any person who has not been summoned to appear before the court and given an opportunity to make representations to the court.

(6) The court may, at any time during proceedings under section 73 of the Act, direct that any person be summoned to appear before the court and may adjourn the hearing of the application to enable service to be effected and the person summoned to appear.

Application under section 15 of the Act

9. – (1) An application by a member of the immediate family under section 15 of the Act shall be made to the court by which an administration grant with will annexed has been made.

(2) A civil summons shall be issued to all the persons entitled to administer the estate under the administration grant.

(3) On the hearing of the application, the court shall cause the clerk to produce to the court a copy of the administration grant and a copy of the will annexed, and shall record-

(a) the residence of the applicant at the time of the hearing and, if the application is made on behalf of a member of the immediate family, the residence of the member and the reason why the member did not apply personally;

(b) the nature of the property of the testator and its value for the purpose of section 15 (2) of the Act;

(c) the provision, if any, made for the member by the will, and the past, present and future capital or income from any source of the member;

(d) the circumstances of the other members and the beneficiaries under the will;

(e) the amount claimed by the applicant to be reasonable provision and the amount , if any, awarded by the court; and

(f) the reasons of the court for granting or refusing the application, including the conduct of the member in relation to the testator or otherwise and the general circumstances, if any, taken into account in arriving at the decision of the court.

_____

rr. 3, 4 and 7

FIRST SCHEDULE

FORM I

In the ……... Magistrate Court sitting at …… *

Probate Cause No. …… of 20……..

APPLICATION FOR ADMINISTRATION GRANT ON INTESTACY

by …….
…….
…….
……. Applicants

NOTICE

UNDER SECTION 65 OF THE DECEASED ESTATES
(WILLS, INHERITANCE AND PROTECTION) ACT

to ……
…….
…….
and the persons whose names appear on the back hereof.

Take notice that you are to come to the court house at …… on …… day, the ……. day of ……, 20……., at

the hour of ……, to state whether you have any objection to the making of an Administration Grant in respect of the estate of ……., deceased, to the applicants above-named.

2. The applicants state that ……., formerly of ……. (here state the last ordinary residence of the deceased) died on the …… day of ……., 20…., without having made a will.

3. The applicants state that they wish to distribute the estate of the said deceased according to the Wills and Inheritance Act.

4. If you do not come to the court house on the day and at the time above-mentioned, an Administration Grant may be made in your absence which will entitle the applicants so to distribute the estate.

Dated this …… day of …… 20…….

SEAL OF COURT

……
Magistrate

FORM II

In the ……... Magistrate Court sitting at …… *

Probate Cause No. …… of 20……..

Estate of ……..……, deceased.

APPLICATION FOR ADMINISTRATION GRANT, WITH WILL

by …….
…….
…….
……. Applicants

NOTICE

UNDER SECTION 65 OF THE DECEASED ESTATES
(WILLS, INHERITANCE AND PROTECTION) ACT

to ……
…….
……. and the persons whose names appear on the back hereof.

Take notice that you are to come to the court house at …… on …… day, the …… day of ……, 20……., at the hour of ……, to state whether or not you have any objection to the making of an Administration Grant in respect of the estate of ……., deceased, to the applicants above-named.

2. The applicants state that ……., formerly of ……. (here state the last ordinary residence of the deceased) died on the ……. day of …….., 20….., having made a first will dated …… by which he or she-

* (a) appointed the applicants to administer his or her estate;
*(b) nominated this court as the court to deal with applications relating to his or her estate.

* *Delete if not appropriate*

3. The applicants state that you are a …….. of the said …….., deceased.

4. If you do not come to the court house on the day and at the time above-mentioned, an Administration Grant with the said will annexed may be made in your absence, and if such Administrator Grant is made, the estate will be distributed in accordance with the said will.

5. A copy of the said will may be inspected at the court house during business hours on any working day three weeks after the date of this notice or as soon thereafter as such copy is received.

Dated this …….. day of …… 20…...
SEAL OF COURT

……
Magistrate

FORM III

In the ……... Magistrate court sitting at …… *

Probate Cause No. …… of 20…..

In the Estate of ……, deceased.

ADMINISTRATION GRANT

This Grant certifies that-

…….
…….
…….
and …….

have been appointed administrators of the estate of …… deceased, lately of ……. who died at ……. on the ……..day of ……, 20…….., and are hereby authorized as such to administer the estate-

* according to the law of intestacy applicable to the deceased;
* in accordance with the terms of the will, a copy of which is attached hereto.

Dated this ……. day of …… 20……
SEAL OF COURT

……
Magistrate

* *Delete whichever is not applicable.*

SECOND SCHEDULE

The following fees shall be payable in addition to any fee payable on an application-

		K
1.	On the issue of an Administration Grant without copy will annexed	50
2.	On the issue of an Administration Grant with certified copy of will annexed –	
	for the Grant	100
	and in addition, for the certified copy of the will, per page	10

DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) (INSTITUTIONALMONEY) RULES

Unders.76

ARRANGEMENT OF RULES

RULES

Citation

1. These Rules may be cited as the Deceased Estates (Wills, Inheritance and Protection) (Institutional Money) Rules.

Reference by District Commissioner

2. If, after receiving a report of a death under section 63 (2) (a) of the Act and District verifying the amount of institutional money and causing the enquiries required by section 63 (2) (b) to be made, it appears to a District Commissioner or employer or insurer or an administrator of a provident fund that the institutional money is not disposed of by a valid will, he or she shall make the reference required by section 63 (2) (d) to the court in the area in which the deceased had his or her principal place of residence immediately prior to his death and such reference shall be made by completing a request for certificate in Part A of Form I in the First Schedule.

A court to summon certain witnesses

3. – (1) Upon receiving a request under rule 2 the court shall cause particulars thereof to be entered in the civil complaints book as a complaint by the District Commissioner or employer or insurer or an administrator of a provident fund and such court shall then summon as a witness a member of the immediate family of the deceased or a dependant of the deceased or a

relative of the deceased person or such other person as the court considers, on reasonable grounds, may be able to give evidence as to the names and whereabouts of the persons interested in any part of the institutional money.

(2) Where the person summoned under subrule (1) appears before the court, such person shall be examined by the court to obtain the evidence referred to in subrule (1).

Examination of persons interested

4. – (1) After completing the examination referred to in rule 3, the court shall serve a summons in Form II in the First Schedule on all such persons as appears to the court to be interested in the institutional money in question.

(2) The persons summoned shall be required to appear before the court at the same time which shall be not less than thirty days and not more than sixty days from the date of service of the summons and at the time so notified the court shall examine such of the persons so summoned as appear before the court and such examination shall take place in the presence of all the other persons so summoned who have appeared before the court.

(3) The court shall require each of the persons so examined to answer upon oath such questions as the court may put to them relating to the affairs of the deceased and may permit any person so examined to be

cross-examined by, or on behalf of, any other person claiming to be interested in the property of the deceased.

(4) Any person not so summoned who claims to be interested in the property of the deceased person as a creditor, beneficiary or person interested under a will of the deceased may appear before the court at the appropriate or she does so, shall be treated as though he had time, and if he or she has been summoned and the provisions of subrules (2) and (3) shall apply to him or her.

(5) After hearing such evidence and making any further enquiries which it deems necessary for its proper decision, the court shall decide -

(a) whether any claims made by creditors are valid and if so what is the amount due to each creditor;

(b) the persons entitled upon intestacy.

(6) If during the inquiry under this rule it appears that any person genuinely claims that the deceased left a will, the court shall advise that person to cause an application to be made under section 65 and shall either adjourn the inquiry pending the result of any such application or if the will

is then produced to the court may proceed as though an application had been made under rule 4 of the Deceased Estates (Wills, Inheritance and Protection) (Small Estates) Rules.

(7) If the court decides to treat the proceedings before it as an application for an administration grant under section 65 the summonses issued under rule 4 shall be deemed to be written notices under section 65 for the purposes of section 64 (3).

(8) If, at the conclusion of proceedings under subrule (7), the court decides that the document produced to it is not a valid will of the deceased person, it shall continue and conclude the inquiry under subrule (5) and if the court considers that the deceased person left a valid will, it may issue a grant under section 65 (4) after complying with section 64 (3).

(9) If during the course of the inquiry it appears to the court that the estate of the deceased person exceeds the value of a small estate in gross value the court shall report the case to the High Court and to the Secretary to the Commissioners for Estate Duties under section 75 (3) and await the instructions of the High Court before making its certificate.

Announcement of decision

5. – (1) The decision of the court shall be announced in open court and if

and appeals

it is not announced immediately after the inquiry referred to in rule 4, it shall be announced on a date of which notice has been given to the persons claiming to be interested in the property of the deceased and immediately after announcing its decision, the court shall inform the persons aggrieved with its decision of the right of appeal conferred by this rule.

(2) Any person claiming an interest in the institutional money in question who is aggrieved by a decision of the court under these Rules may appeal to the superior court than the one that made the decision.

Court to certify decision

6. A court which has announced its decision under these Rules shall immediately thereafter complete in accordance with its decision three copies of a certificate in Part C of Form I in the First Schedule, and shall forward the original and one copy thereof to the District Commissioner or employer or insurer or administrator of a provident fund who made the reference.

Provided that if the court has decided that the deceased left a valid will it shall return Form I to the District Commissioner or employer or insurer or administrator of a provident fund endorsed accordingly.

Further duties of District Commissioner and other

7. – (1) On receipt of a certificate under rule 6, the District Commissioner or employer or insurer or administrator of a provident fund shall complete

persons

a request for cheques in Part B of the Form I and shall forward the request in the First Schedule to the holder of or person liable to pay the institutional money.

(2) When the period during which an appeal from the decision of the court has expired, or, if any appeal has been lodged, such appeal has been thoroughly disposed of, the District Commissioner or employer or insurer or administrator of a provident fund shall distribute the institutional money in question in accordance with a certificate of the court as amended by any decision given on appeal.

Minors

8. Where any person who may be entitled to any share in any money appears to the court to be a minor the court may waive his or her attendance in person and may appoint such responsible person to represent him or her as the court deems fit.

Fees

9. The fees set out in the Second Schedule shall be a first charge on any institutional money adjudicated upon under these Rules and shall be paid into the Consolidated Fund by the District Commissioner or employer or insurer or administrator of a provident fund at or before the distribution of such money.

FIRST SCHEDULE

DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT (CAP. 10:02)

DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT (INSTITUTIONAL MONEY) RULES

In the matter of …… deceased.

PART A

To: The Magistrate
…….. Magistrate Court,
……..

REQUEST FOR CERTIFICATE

I am satisfied that …… late of …… village, Chief ……, ……District, died on the …….. day of ……., 20….. and that there forms part of his estate as at ……, 20…. the following institutional money-

** Holder of Money or person liable to pay:*	*Amount*
…….	K ……

The death was reported to me by ……. of …….. who claims to be related to the deceased as his ……

After enquiry it appears to me that the above-mentioned institutional money was not disposed of by Will.

So far as they are known to me the other facts of the case are†

Wife/Wives: …… of ……
…… of ……

Children: …….. Sex: …… Age: …….
……. ……... ……..
……. …….. ……..
Relatives: …… of …….
Creditors: …… of …….
……. of …….
Property other than institutional money …….

I request you to CERTIFY to me in Part C of this Form who is entitled to the institutional money and what portion of it is payable to each.

Signed ……..
District Commissioner/Insurer/Administrator of a Provident Fund/Employer

Date: …… ……. District

NOTES: * If money is in an account quote account number as well as name of the holder: For example "Stanbic Bank Account Number 0140001907300, Capital City Branch".

†If there is insufficient room on this Form for all the names a separate list should be attached which should contain sufficient information to identify it with the original Form and should be signed by the District Commissioner or employer or the insurer or the administrator of a provident fund.

PART B
REQUEST FOR PAYMENT

TO: ……..
……..
……..
……..

In accordance with section 63 (3) (g) of the Deceased Estates (Wills, Inheritance and Protection) Act, I hereby request you to send to me a separate cheque payable to each of the adult persons shown in the certificate at Part C for the amount shown to be payable plus a proportionate share, as nearly as is practicable, of any interest which may have accrued.

In the case of any person who is shown to be a minor the cheque is to be made payable to the Government of Malawi.

In return herewith with the relevant passbook or other evidence that the money is payable as under:-

*(a) Passbook No. …….

*(b) ……..
……..

Signed: ……
District Commissioner/Insurer/Administrator of a Provident Fund/Employer

Date Stamp: …….. ……District

NOTES: (1) *Enter description of the passbook or other documents to be sent and despatch the completed from with covering letter drawing attention to Part B.

(2) Registered post should be used where passbook or other valuable documents are enclosed.

(3) Before sending this Form check that the totals of the amounts shown in Part C for the shares under Items A, B, C and D add up to the total amount of institutional money available.

(4) If there are any queries on the certified distribution District Commissioners or employer or insurer or administrator off a Provident Fund should refer the matter to the appropriate courts with details.

PART C
CERTIFICATE OF ENTITLEMENT

To: The District Commissioner or employer or insurer or the Adminstrator of a Provident Fund*,
Probate Cause No. …… 20…….. …….. District
Certificate issued by the ……. Magistrate Court.

This is to certify that the Court has investigated the question of who is entitled to the money referred to in Part "A" of this Form and on the …… day of ……., 20…….. decided as follows:

Total amount of institutional money .. .. K ……

Amount payable to-

A. The Government of Malawi as fee under rule 9 .. .. ..
B. Creditors as follows-
(I) …… of …… K …….. K ……..
(II) …… of …… K …….
(III) …… of …… K …….

TOTAL FOR CREDITORS K…… K ……

Balance available .. .. K ……

The balance is payable-

C. As to the immediate family as follows-

Name	*Address*	*Relationship and Age†*	*Amount*
(I) ……	……	…….	K……
(II) ……	……	…….	K……
(III) ……	……	…….	K……
(IV) ……	……	…….	K……
(V) ……	……	…….	K……

TOTAL FOR IMMEDIATE FAMILY K……

D. As to the dependants as follows-

Name	*Address*	*Relationship and Age†*	*Amount*
(I) ……	……	…….	K……
(II) ……	……	…….	K……
(III) ……	……	…….	K……
(IV) ……	……	…….	K……
(V) ……	……	…….	K……

TOTAL FOR DEPENDANTS .. .. K……

E. As to other relations and beneficiaries as follows-

Name	*Address*	*Relationship and Age†*	*Amount*
(I) ……	……	…….	K……
(II) ……	……	…….	K……
(III) ……	……	…….	K……
(IV) ……	……	…….	K……
(V) ……	……	…….	K……

TOTAL FOR OTHER RELATIONS AND BENEFICIARIES .. .. K……

Dated this …… day of …… 20……
Court Seal:

Signed: ……..…….
Registrar/Magistrate

NOTES: (1) * Delete as applicable under First Schedule to the Act.
(2) †Always show age where beneficiary is under 21 years of age, otherwise write "adult".
(3) When Part C has been completed in triplicate the original and 1 copy should be returned to the District Commissioner or employer or insurer or administrator of a provident fund from whom the Form was received. 1 copy at the court.
(4) Only the Registrar or Magistrate may sign Part C of this Form.
(5) If there are more creditors or beneficiaries than can be shown in the space available on this Form a separate list may be attached, signed by the Registrar or Magistrate, but the total amount for the item must be shown on the Form.

REPUBLIC OF MALAWI FORM II

DECEASED ESTATES (WILLS, INHERITANCE AND PROTECTION) ACT
(INSTITUTIONAL MONEY) RULES

In the …… Magistrate court sitting at …….
Probate Cause No. …….. of 20……..

In the matter of the Estate of …… deceased.

CIVIL SUMMONS

To: ……
……

You are ordered to come to the court House at …….. on the …….. day of ……, 20….. at ……. a.m. to inform the court-

(a) whether you claim to be interested in any part of the institutional money or other property of the above-named deceased;

(b) regarding the affairs of the said deceased.

If you fail to come to court a decision regarding the distribution of such institutional money may be given in your absence.

Dated this …… day of …….. 20….

SEAL OF COURT

……
Registrar/Magistrate

SECOND SCHEDULE

For adjudicating entitlement to institutional money question:	.. ..	K10 for each K1,000 of the institutional money in

Provided that-

(a) no fee shall be payable if such money is less than K50,000; and

(b) no fee under this item shall exceed K50,000.

ESTATE DUTY (AMENDMENT) BILL, 20…

ARRANGEMENT OF SECTIONS

SECTION

A BILL

entitled

An Act to amend the Estate Duty Act

ENACTED by the Parliament of Malawi as follows –

Short title

1. This Act may be cited as the Estate Duty (Amendment) Act, 20…

Replacement of Schedule to Cap. 43:02

2. The Estate Duty Act is amended by deleting the Schedule and replacing it as follows –

"SCHEDULE s.4

The rates per centum of estate duty shall be according to the following scale –

Rate per cent.

Where the principal value of the estate

does not exceed	K1,000,000	Nil
exceeds K1,000,000	but does not exceed K1,500,000	4
exceeds K1,500,000	but does not exceed K3,000,000	5
exceeds K3,000,000	but does not exceed K5,000,000	6
exceeds K5,000,000	but does not exceed K7,500,000	7
exceeds K7,500,000	but does not exceed K15,000,000	8
exceeds K15,000,000	but does not exceed K25,000,000	9
exceeds K25,000,000		10.”.

OBJECTS AND REASONS

The object of this Bill is to give effect to the recommendation made by the Law Commission in its Report on the review of the Wills and Inheritance Act (Cap. 10:02) which identified the low level of principal values of deceased estates prescribed by the Schedule as working against the interests of beneficiaries which results in payment of high levels of estate duty even for relatively small estates.

Attorney General