

Translation from Swahili into English of Tanzania's Customary Law

LOCAL CUSTOMARY LAW (DECLARATION) (NO.4) ORDER

Government Notice No. 436 of 1963

Legal Citation for First Schedule:

Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, Schedule 1, Laws on Guardianship [Sheria za Ulinzi], in Judicature and Application of Laws Act, TANZ. LAWS SUBSIDIARY LEGIS. [CAP 358 R.E. 2002] [hereinafter GUARDIANSHIP LAW], Rule?.

THE FIRST SCHEDULE

LAWS ON GUARDIANSHIP [Sheria za Ulinzi]

Guardianship is of the following types:

Guardianship of children after the death of their father while they were minors.

Guardianship of an heir who is absent at the time of inheritance.

Guardianship of a person who cannot support himself because of poverty or insanity.

Guardianship of the wife and children of a man who is travelling on a long journey.

Guardianship of Children

The clan council shall appoint a guardian of the deceased's minor children.

If the first son is an adult, he will be appointed as the guardian of his younger siblings, given that he is of sound mind and good behavior.

If the first son is deemed to have failed, they will appoint another brother from within the deceased's clan.

If the deceased had many wives, every first son (being an adult and of a good behavior) from each household, shall be given first priority to be the guardian of his younger siblings in his household.

When a guardian is appointed, the clan council shall inform him of his responsibilities. If he is not informed of his responsibilities, then he shall obtain the information from the council.

If the widow agrees to be inherited by one of the deceased's brothers and the clan council accepts him, he shall be the guardian of the deceased's children.

If the guardian fails to fulfill his responsibilities, the clan council has the power to remove him from his duties and appoint another person in his place, following complaints made by the widow or any male relative of the family.

A guardian is forbidden from selling land or permanent crops which are under his protection.

A guardian shall not receive a salary or special payments for his responsibilities, but shall usually be entertained with food and drinks.

The responsibility of a guardian shall be to protect the children and their mother, and to protect their property against loss and destruction.

A guardian has the responsibility of supervising agricultural work, but he must consult the widow if she lives with the children in their domicile.

A guardian may marry a daughter off, but in this matter, he must first consult the widow to gain her consent.

A guardian shall deal with all outdoor domestic activities, for example: to facilitate mediation; payments of taxes and rent, school fees, to attend livestock auctions, etc.

A guardian shall have the responsibility to protect the property of the children under his care, without confusing it with his own property: that is, children's property must be clearly delineated.

Agricultural products shall be used at home for the benefit of the people in the household.

Animal products, such as milk and ghee, shall also be used at home for the benefit of the household.

Domestic animals' offspring shall belong to the children.

A guardian can slaughter, sell or exchange the domestic animals for the benefit or needs of the household.

If the deceased had two or more wives and there is no widow who agrees to be inherited, the clan council can nominate one guardian for all the households.

Accusations or claims about guardianship shall be brought by the mother of the children, another relative, and even by the children when they reach adulthood.

Guardianship accusations shall not be accepted by the magistrate's court if they have not been determined first by the clan council.

When a guardian dies, another one shall be appointed by the clan council.

When the first heir reaches the age of 21, or when he marries (before he reaches this age), and if he is of sound mind, he shall be appointed by the clan council as a guardian of his younger siblings.

When other children attain the age of 21 or when they get married, they shall be independent from guardianship.

If there is no any relative from the children's clan, the clan council from the mother's clan appoints a guardian from their clan.

If there is no any relative, the court may appoint any person who petitioned for guardianship as a children's guardian.

Guardianship of an Absentee Heir

If one of the heirs is absent during the administration of the estate, another relative of his clan is appointed to protect the heir's property until the heir returns.

The clan council appoints a guardian of an absentee heir, and then the clan council informs him of his responsibilities. If he is not informed of his responsibilities, then he shall obtain information from the council.

The eldest son among the heirs present shall be considered first by the clan council, and if in their opinion he is of sound mind and good behaviour, he may be appointed a guardian of the absentee heir.

When all the heirs are absent, the clan council shall appoint a guardian from the clan to manage all inheritance property.

When a guardian of the absentee heir damages or abuses the heir's property, he may be prosecuted.

A guardian shall not combine the heir's property with his own property: that is, the heir's property must be clearly delineated.

A guardian shall not use the property of an absentee heir.

The agricultural products of an absentee heir may be sold if there are problems within the heir's household: if they are sold in greater quantities they are property of the heir.

A guardian of the absentee heir shall not receive a salary or special payments for his responsibilities.

When there are claims or accusations by any relatives of the absentee heir, the clan council shall dismiss the guardian if he does not fulfill his obligation, and then appoint another person.

If there is no any relative within the clan of the absentee heir, the court, following a report from any person, may appoint any person to be a guardian in proper arrangements.

Guardianship of a Person Who Cannot Support Himself

A person who cannot support himself because of poverty or insanity is placed under guardianship of a person from his clan.

This guardian is appointed by the clan council and has responsibilities which are the same as those of the child's guardian.

If a person who cannot support himself does not have a relative, then the court, following a report of any person, can place him under the guardianship of any person.

Guardianship of the Family and Property of a Man Who Is Travelling on a Long Journey

If a husband is travelling on a long journey, he may appoint a guardian to protect his wife, children and property.

The guardian shall supervise livestock and agriculture activities.

The guardian shall supervise all domestic outdoor matters related to the household that would be supervised by the husband.

The guardian shall deal with all the problems encountered by the people of the traveller's household.

The wife shall not move from her husband's household without the guardian's consent.

The guardian of the traveller's wife can hold the wife accountable for committing adultery.

The guardian, on behalf of the husband, may bring a suit in court for damages against the wife who committed adultery.

Only the husband shall dismiss the guardian.

When the guardian dies or moves away, and the husband can not be informed, then the clan council may appoint another guardian.

The guardian is not entitled to claim any payment for performing his responsibility.

When the guardian breaches his responsibilities of protecting the traveller's property and taking care of the wife and children, the clan council may summons the guardian and give him a warning.

Where the guardian continues to breach his responsibilities, the wife or any relative may sue the guardian and be summoned to appear before the magistrate's court.

Legal Citation for Second Schedule:

Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, Schedule 2, Laws on Inheritance [Sheria za Urithi], in Judicature and Application of Laws Act, TANZ. LAWS SUBSIDIARY LEGIS. [CAP 358 R.E. 2002] [hereinafter INHERITANCE LAW], Rule ?.

THE SECOND SCHEDULE

LAWS ON INHERITANCE [Sheria za Urithi]

Inheritance follows the patrilineal side.

The person who administers a funeral is the deceased's elder brother, or, if there is no brother, any other close male relative.

If the deceased was a child, the administrator is his father or his guardian.

Expenses for the funeral and mourning come from the deceased's estate, but if the deceased had no property, then the administrator takes that responsibility.

The administrator of the deceased's property is the eldest brother of the deceased, or his father, and if there is no brother or father, can be any other male relative chosen with the help of the clan council. If there is no male relative, his sister is the administrator.

After a mourning period is over, clan members shall convene together to take inventory of the inheritance property and discuss the credits and debts of the deceased.

The creditors shall be invited to submit their claims.

The debtors of the deceased shall be announced and also a schedule of payments is laid down.

After establishing debtors and liabilities, administration for the distribution of the inheritance property is agreed upon.

If any creditor does not mention his claims while he is at the meeting, his claims shall not be accepted afterwards.

If inherited property is not sufficient to pay all the debts of the deceased, important debts are paid first and other debts are paid in instalments.

The heirs shall pay the remaining debts from their own properties.

Claims and debts of the deceased are inherited.

After the administration of the estate plan is established, inheritance property is usually distributed immediately.

If there are no problems, the distribution of property is conducted a few days after the mourning period is over; whatever the circumstances are, the period should not exceed one month.

If one heir makes a request to obtain his share, then the division of property is done immediately.

If the heirs are not in haste, the property may not be distributed immediately.

If some creditors of the deceased are absent or not aware of the mourning period, they should submit their claims to the first son heir, and if the inheritance has already been distributed, the first son heir shall pay them with the help of his fellow heirs, depending on the amount of inheritance share they received.

The first heir of the deceased is the first male child by his most senior wife. If the deceased did not leave a male child by his senior wife, his first male child from any wife shall be the first heir.

Women are allowed to inherit except clan land. They can use clan land without selling it during their lifetime. But if there are no men in that clan, a woman can inherit this land completely.

Inheritance is in three degrees: first degree, second degree, and third degree.

The person in the first degree is the first heir and he gets a larger share of inheritance than any other heirs.

Those in the second degree will each get a bigger share of inheritance than those in the third degree.

If the deceased, when he was alive, distributed to his heirs some share of his property, this share shall be counted in the distribution of the deceased's estate.

Usually, the first degree is for the first son, the second degree is for other sons, and the third degree is for daughters.

If the deceased left male children, or both male and female children, they shall inherit all his property exclusively.

The widow has no share of the inheritance if the deceased left relatives of his clan; her share is to be cared for by her children, just as she cared for them. (The share of a childless widow is mentioned in paragraph 77, laws on the Laws of Persons, the share not being counted among her husband's inheritance).

A husband shall not inherit the property of his wife in the inheritance if a Will was not left – except if the wife had no children and had left no relatives in her clan.

If there are no sons, an elder daughter from the first house shall be the first heir. Except where there is a male relative who stands as a father, he shall receive the bridewealth of the daughters when they get married.

The mode of distribution of the inheritance in the second and third degrees is in accordance with their ages – that is, older children receive more than the younger ones and males receive more than females.

AN EXAMPLE – Inheritance that involved cattle only:

The total number of cattle – 24

First Degree I – Son – age 23 – will receive 9 cattle

Second Degree II – Son – age 20 – will receive 5 cattle

Son – age 14 – will receive 4 cattle

Third Degree III – Daughter – age 25 – will receive 3 cattle

Daughter – age 22 – will receive 2 cattle

Daughter – age 18 – will receive 1 bull/cow

If a child is the only child, s/he shall inherit all the property – except for a female child, she shall not inherit clan land, although she can use it without selling it during her lifetime.

Even though, paragraph 20 must be observed.

If there are daughters, but there are no sons who are alive or who left children, then there is no second degree.

If there are sons, but there are no daughters who are alive or who left children, then there is no third degree.

Grandchildren shall inherit in the second or third degree of their father or mother, in the inheritance of their grandfather, if their father or mother died before their grandfather.

If the grandchildren are the children of the first son, they shall not inherit in the first degree should their father have left another son from that household.

If so, the elder son remaining is the one that shall be the first-degree heir, and will receive the largest share in his father's inheritance.

Those grand children shall inherit in the second degree.

An illegitimate child (that is, a child who moved to his maternal uncle's home) shall inherit from his mother's inheritance; and if his mother died without leaving legitimate children, and died before his grandfather, then this illegitimate child shall inherit in the degree of his mother in his grandfather's inheritance.

If the mother of an illegitimate child left other children who are legitimate, the illegitimate child will inherit his mother's property, according to his age and along with the other children.

If the grandfather of the illegitimate child did not have another child, other than the mother of this child, and if the mother is dead, this illegitimate child shall be a legal heir of his grandfather.

Children who were legitimized by their parent's marriage are considered as legitimate children, although a child who was legitimized by marriage cannot precede others in inheritance, even though the child was born first, should there be a son in another house whose mother was married to the deceased before he married the mother of the child that was legitimized.

Children who were legitimized by special payments (mentioned in paragraph 181 on the Laws of Persons) shall inherit after the children born legitimately or legitimized by marriage in the second degree, if he is a man, and in the third degree, if she is a woman. Illegitimate children shall not inherit in the patrilineal side unless there is a Will. If the deceased did not leave any children or grand children, his brother and sister who share the same father and mother shall inherit – the first brother inherits in the first degree, the other brother in the second degree and the sister inherits in the third degree. If the deceased did not leave a brother or sister who shares the same father and mother, then children of his brother or sister who share the same father and mother shall inherit the deceased's property before a brother or sister who shares the same father, but a different mother. If there are not any brothers or sisters, then their children shall inherit. If the deceased did not leave brothers or sisters and if they did not have children, then his father shall inherit. If the deceased's father is already dead, then his uncles and aunts shall inherit. If there is neither father, nor paternal aunt, then other relatives on the father's side shall inherit. If there are not any relatives, then the husband shall inherit his wife's property, and the wife her husband's property. The deceased's heir shall have the responsibility of taking care of the widow. If there is no heir, then the property of the deceased shall be taken by the Local Government. If the leader of the clan dies, the clan council selects a new leader.

Legal Citation for Third Schedule:

Local Customary Law (Declaration) (No. 4) Order, Government Notice (GN) 436/1963, Schedule 1, Laws of Wills [Sheria za Wosia], in Judicature and Application of Laws Act, TANZ. LAWS SUBSIDIARY LEGIS. [CAP 358 R.E. 2002] [hereinafter WILLS LAW] Rule ?.

THE THIRD SCHEDULE

LAWS OF WILLS [Sheria za Wosia]

A Will is a statement, which is voluntarily made by a person during his lifetime to show his intention and how he decided his property to be distributed upon his death. A Will can be of two types: An oral Will and a written Will. Special witnesses who must be present at the same time shall witness a Will. A testator (a person who makes a Will) selects his witnesses. Besides special witnesses, a wife (of a testator) or his other wives at his household must also witness. People who are mentioned as inheritors in a Will shall not be witnesses to the Will except his wife or wives. A Will is invalidated if a testator is of unsound mind because of insanity, illness, and drunkenness or sudden anger. A Will may not be opposed for these reasons except by a person who is concerned with it.

To prove that a testator had a sound mind will depend on the witness of those special witnesses and that of his wife or wives, and even other evidence, if available. If witnesses do not agree with one another, it shall be the role of the court to accept and determine relevant evidence (for the purpose of being satisfied that the testator had a sound mind).

Oral Wills

An oral will must be witnessed by at least four witnesses – that is, family members should be at least two and neutral people at least two.

An oral Will may be changed or cancelled as stated in paragraphs 4, 5, and 11.

Witnesses of the first Will, if they are present, and can be available, should witness.

If all the witnesses die before a testator, the Will shall not be accepted, and the estate shall be distributed as a person who died intestate.

If a testator still wants to decide on how his property should be distributed, he must make a new Will.

If some witnesses die, but those still living are not less than two, a Will shall be followed.

Written Wills

A written Will shall not be written with a pencil: it may be typed or written with ink or by indelible pen.

The date on which a Will was written must be inserted.

A written Will must be attested by witnesses who know how to read and write – that is, witnesses should number at least two (one from the clan and a neutral person), should the person who made the Will know how to read and write. There should be at least four witnesses (two from the clan and two neutral people) – if the person who made the Will is illiterate.

The testator shall sign the written Will if he knows to read and write; if he is illiterate, he should put the mark of his right hand thumb.

Witnesses should attest the signature or the mark of the testator, and also sign the Will.

The paper bearing the writing of the Will shall not be filled in or anything added to it.

A written Will may be changed or cancelled by making another written Will.

A written Will may be registered and kept in the court, but this is not compulsory, it is voluntary.

Registering or keeping a Will shall not be accepted as confirmation of the legality of the Will, in case all legal requirements mentioned earlier were not fulfilled.

A person under the age of 21 shall not make an oral Will or a written Will.

A written Will shall not be cancelled or changed by an oral Will; but an oral Will may be changed or cancelled by a written Will, if all witnesses who witnessed the oral Will are still alive and still available to witness.

Regarding both types of Wills

A testator may bequeath his property without listing everything that he will have at the time of his death.

If a testator bequeaths only part of his property, the rest will be distributed according to the rules of intestate – unless the Will is bequeathed to a person among the heirs. According to the rules of intestate, property that is not included in a Will is to be counted at the time of distribution.

A testator has the mandate to change the rules of intestate. But he may not deny his heir's share of inheritance without reasonable grounds.

Reasons which are considered reasonable to enable a testator to deny his heir's share of inheritance are as follows:

If the heir has committed adultery with his wife.

If the heir has tried to kill him, or has assaulted him, or badly injured the person making the Will, or his mother (that is, the heir's mother).

If the heir, without reasonable cause, did not take care of the person making the Will at a time of famine or sickness.

If an heir had destroyed the property of a testator, the extent of the damage will be taken into account when estimating his share of the inheritance it is thought he deserves to receive.

Religion is not considered as a cause for denying someone of his inheritance.

A person who wants to deny an heir his share of inheritance must state clearly in his Will and explain, giving the reasons for denial.

An heir who is to be denied of his inheritance share may be given a chance to defend himself in the presence of the testator, or before the clan council.

A person who knew that he was denied his inheritance and who did not take the opportunity to defend himself shall not oppose a Will after the testator dies.

If a person who is denied inheritance did not know about it before the testator dies, the clan council may listen to him. The council may have the right to accept or reject his claims.

If it is found that a person was denied an inheritance in a Will without a reasonable cause, the Will shall become ineffective and the estate shall be distributed according to the rules of intestate.

The clan council determines such a matter, but if a person is not satisfied he can appear before a magistrate in a court.

A husband can make a Will to his wife so that she can inherit agricultural production or income from his property until she remarries or dies.

If the husband has many wives, he may bequests to allow all his wives (not giving to some and denying others), so that they can inherit agricultural production or his property by observing the rules of intestate, until they remarry or die.

A husband may make a Will and give his childless widow inheritance of agricultural production or part of the share of property jointly acquired with him (as stipulated in paragraph 77 of the Law of Persons) which otherwise could have returned to the patrilineal side.

A man can make a Will allowing his friend to inherit property or his personal domestic household or part of his inheritance property, but this should not exceed the share given to each real heir.