



THE REPUBLIC OF UGANDA

The Justification to the Succession (Amendment) Bill 2018

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Justification for the proposed amendments to the succession act.

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JUSTIFICATION FOR THE PROPOSED AMENDMENTS TO THE SUCCESSION ACT.

A. GENERAL

The Succession law of Uganda is outdated with its origin traced as far back as the Succession Ordinance of 1906 which was adopted from English law. The shortcomings in the Ordinance led the enactment of the Succession (Amendment) Decree 1972. The Decree provided for intestacy in the case of Ugandans and recognized the rights of illegitimate and adopted children. Many of the provisions in the Decree of 1972 were discriminatory on the basis of sex. The Succession law of Uganda has therefore been static with archaic and discriminatory provisions that necessitate a review and overhaul to address the gaps and anomalies that have persisted for very long.

Uganda has over the years undergone a significant social-economic development which has rendered some provisions of the current Act obsolete, archaic, unconstitutional and in other instances inadequate to address the current challenges.

Furthermore, although the Constitution adequately provides for equality and non-discrimination, the Succession Act is still full of discriminatory provisions on the basis of sex. For instance, article 21 of the Constitution provides for equality of men and women in all spheres of political, economic, social and cultural life and in every other respect and they shall enjoy equal protection of the law and under article 21 (2) a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic,

standing, political opinion or disability. Discrimination is defined under article 21 (3) to mean giving different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability. Under article 33(4) of the Constitution women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities and article 33(6) provides that laws, customs, cultures, customs or traditions which are against the dignity or interest of women or which undermine their status, are prohibited by this Constitution.

Some of these shortfalls in the Succession Act include; the definition of customary heir which gives preference to the male child; the widows right to the matrimonial home which is restricted to occupancy of the matrimonial home; other gender insensitive sections which discriminate between men and women, lack of adequate protection of rights of children, surviving spouses, the presence of obsolete fines and an inadequate penalty regime that are not deterrent enough. The current Succession Act also accords more rights to lineage heirs than the surviving spouse as seen in section 27. The right to retain the matrimonial home, only extends to male children under 18 years of age and unmarried female children under 21 years of age. When a widower remarries, he may retain the matrimonial home; for a widow, this right is terminated if she remarries. This restriction on a widow's rights render uncertain her control of the property, and hence undermines her use of the property for sale, mortgage or get a loan.

The Act also provides that a father may appoint a guardian for his child in his will. If the father dies without a will the law provides that a guardian will be from the following categories

in order of priority: the father or mother of the deceased man, brothers or sisters of the deceased, brothers and sisters of the deceased man's father, the deceased man's mother's brothers, or the deceased man's mother's father. There are no provisions for a mother's rights to sole guardianship or appointment of a guardian of her children. All these provisions are discriminatory and need to urgently be reviewed and amended or repealed.

Additionally, recent Constitutional court decisions have rendered some provisions of the Succession Act null and void for non-conformity with the Constitution. In the case of Law and Advocacy for Women in Uganda and Attorney General the Constitutional Court declared as null and void sections: 2(n)(i), (ii), 14, 15, 26, 27, 29, 43 and 44 and Rules 1, 7, 8, 9 of the 2nd Schedule of the Succession Act.

Furthermore, Uganda is a signatory to various regional and international law instruments that provide for equality and non-discrimination of persons including the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW), the International Covenant on Civil and Political Rights ("ICCPR") and the African Charter on Human and People's Rights ("ACHPR"). Uganda is therefore bound by these international Conventions and Agreements.

All the above challenges, lacuna in the law and non-conformity of the Succession Act with the Constitution and international instruments calls for urgent action to update the law and bring it in conformity with the Constitution and current social-economic development of Uganda and it is the mandate of Parliament to amend the Succession Act to bring it in line with the Constitution. This Bill seeks to address the Constitutional Court's ruling in 2007 and other identified gaps. These amendments take into account proposals made by the Uganda Law Reform Commission and those arising out of stakeholder consultations.

B. CLAUSE BY CLAUSE JUSTIFICATION

1. SHORT TITLE AND COMMENCEMENT.

- 1) This Act may be cited as the Succession (Amendment) Act, 2018.
- 2) This Act shall come into force on the date to be appointed by the Minister by statutory instrument.

Justification:

The purpose of subclause (2) is to empower the Minister to appoint the date of commencement for the Act. This provision allows the Minister to ensure that arrangements for implementation of the Act are in place before the law becomes effective. The second option would be to delete the commencement provision and the Act comes into force on the date of publication in the Gazette. The latter option is ideal where no additional arrangements are required to implement the law.

2. AMENDMENT OF SECTION 2 OF THE SUCCESSION ACT.

The Succession Act in this Act referred to as the principal Act is amended in section 2 –

- (a) by substituting for paragraph (b), the following-
- (b) “child,” “issue” and “lineal descendant” means the offspring of the deceased regardless of the age of the offspring including a child adopted by the deceased in a manner recognised under the laws of Uganda;

Justification:

The current paragraph (b) makes a distinction between legitimate

and illegitimate children. The purpose of the amendment is to remove any reference to illegitimate children since all children are equal before the law and have rights of succession to a parent's property.

b) by inserting the following new paragraph immediately after paragraph (d)

“(da) “currency point” has the value assigned to it in the First Schedule;”

Justification:

The purpose of this provision is to define “currency point” for purposes the proposed new First Schedule being introduced in the Act. Currently, fines in the Act are expressed in Shilling which makes it hard to increase as it requires an amendment to the Act each time there is need to enhance the fines. The proposal is to express the fines in currency points and empower the Minister to amend the Schedule by statutory instrument in case there is need to enhance the fines without necessarily going through the whole process of amending the Act. This is to conform to the current drafting practice in the Commonwealth jurisdictions and also address issues of currency devaluation and inflation. In future if there is need to enhance the penalty, the Minister can by statutory instrument increase the value of the currency points instead of going through the process of amending the law.

c) by substituting for paragraph (e) the following-

“(e) customary heir or heiress” means a person recognised under the rites and customs of a particular tribe or community of a deceased person as being the customary heir or heiress of that person;”

Justification:

As a result of the proposed amendments to section 27, a customary heir is no longer entitled to a portion of the estate by virtue of this position.

According to most Ugandan traditions, the customary heir (usually the eldest son of the deceased) received the bulk of the estate in trust for other beneficiaries and assumed some of the responsibilities of the deceased. The position of a customary heir was fashioned to ensure cohesion and continuity within a clan. This role has however sometimes been abused, with many of those appointed using the property for their own gain. This has been exacerbated by the absence of effective customary mechanisms for checking the exercise of this function. To check these unfair practices, the law restricts the entitlement of a customary heir of an intestate to 1% of the estate. However, it is often the case, that this provision is circumvented in favour of the customary position where the heir takes charge of the estate to the detriment of the beneficiaries of the estate.

The amendment is to ensure that the role of the customary heir is maintained as a ceremonial role that does not entitle one to administer the estate unless otherwise appointed as executor by the deceased or otherwise directed by court.

- (d) by substituting for paragraph (f), the following-
“daughter” includes a daughter adopted in a manner recognised under the laws of Uganda;

Justification:

The current paragraph (f) provides that daughter includes an illegitimate daughter and a step daughter. The proposed amendment is to remove reference to illegitimate daughter as

stated earlier, there is no need to make reference to illegitimate daughter as all children have same rights under the law. Additionally, the amendment seeks to remove reference to step daughter. As the law is now, step children are free to benefit from the estate of the step parent. An example can be given of a case currently in court of a couple where the wife had passed away now her step children were claiming they have a right to enjoy a share of their step mother's estate although most of this property claimed was owned personally by the deceased step mother and had been inherited from her family. The amendment is to cure this anomaly. A step child should not benefit from the estate of a step parent unless he or she was adopted legally by that step parent in accordance with the laws of Uganda, but they should benefit from the estate of their own biological or adoptive parents.

- (e) by inserting immediately after paragraph (j), the following-
 - “(ja) “guardian” means a person having legal and parental responsibility for a minor child;”

Justification:

The purpose of this provision is to introduce a new paragraph to define guardian. Currently, the law does not define who a guardian is.

- (f) by repealing paragraph (l);

Justification:

Paragraph (l) defines “illegitimate child”. The succession Act provides for domicile for purposes of determining the law applicable in Succession matters. In determining the domicile of origin, the Act distinguishes between persons of legitimate birth and illegitimate birth whereby, the former acquires the domicile

of their mothers while the latter acquire the domicile of their fathers. The law on domicile needs to be amended to remove distinctions on the basis of legitimacy. The proposal is therefore to repeal paragraph (l) to remove the definition of “illegitimate child,” and the distinction between an “illegitimate child” and “persons of legitimate birth” in sections 6 and 7.

g) by substituting for paragraph (n) the following-

“(n) legal heir” means the living relative nearest in degree to an intestate”;

Justification:

Section 2 (n) (i) and (ii) define legal heir and in the definition, a male heir is preferred to a female heir. This is on the basis of sex and is discriminatory. This definition has already been pronounced as unconstitutional in Law and Advocacy for Women in Uganda vs. Attorney General, Constitutional Petitions No. 13 of 2005 & no. 5 of 2006 on the basis that it is discriminatory on the basis of sex. The proposed amendment is to remove the discrimination and bring the definition in conformity with the Constitution.

h) by substituting for paragraph (o) the following-

“(o) minor” means a person who has not attained the age of eighteen years, and “minority” means the status of such person; ^[11]_[SEP]

Justification:

The current paragraph (o) defines a minor to mean a person who has not attained the age of 21 years. This is contrary to the Constitution which places the age of majority at 18 years. The proposed new definition is to align with the Constitution.

i) by inserting immediately after paragraph (p) the following-

“(pa) “other residential holding” means-

- a) a residential holding owned by the intestate as a residential holding- but not occupied by him or her, surviving spouse and any children under the age of eighteen years because he or she was living in premises owned by another person or in a principal residential holding; or
- b) a country home occasionally occupied by him or her, surviving spouse and any children under the age of eighteen years;”

Justification:

Currently, this term is not defined in the Act although it is used under section 26 (2). The purpose is therefore to clearly define what constitutes other residential holding for purposes of this Act. Additionally, it seeks to also protect village/country homes from distribution. The proposal is to the effect that both the principal residential holding and other residential holding including country homes should not devolve to anybody but be maintained for benefit of the surviving spouse and lineal descendants of the deceased.

j) by inserting immediately after paragraph (r) the following-

(ra) “principal residential holding” means the residential holding normally occupied by the spouse , surviving spouse and any children under the age of eighteen years prior to the death of one of the spouses as their principal residential holding and includes the house and the chattels in the house and one third of the land on which the house is located or a portion of

the land surrounding the house as the court may in the circumstances determine;”

Justification:

The new paragraph (ra) is to clearly define what constitutes a principle residential holding. Currently the term used is residential holding. The new definition introduces the word “principal” to differentiate it from the “other residential holding”.

- k) by inserting immediately after paragraph (u) the following-
“(ua) separation” means either separation for a period of at least six months consecutively -
 - (i) by agreement, where the parties consent to suspend the marriage in writing and the consent is witnessed by at least one representative of each party; or
 - (ii) by judicial order, where one or both parties petition the court asking for a suspension of the marriage on evidence that the parties can no longer live together;”

Justification:

The Act currently does not define what amounts to separation for purposes of the Act. The new definition is to cure this lacuna and clearly spell out what constitutes separation under the Act. Also, in order for the provision relating to separation to qualify under the Act, a period of separation of six months has been proposed.

- l) by repealing paragraph (u);

Justification:

Paragraph (u) currently defines “senior wife”. This provision has now become redundant and obsolete since the Bill proposes to use the term spouse in place of “wife” or “husband”.

- m) by inserting immediately after paragraph (v) the following –**

“(va) “spouse” means a husband or wife married in accordance with the laws of Uganda or laws of another country recognised in Uganda as a marriage under the laws of Uganda”; and

Justification:

This new paragraph seeks to introduce and define the term “spouse”. The term spouse is proposed to be used instead to “husband” and “wife”. This is for clarity.

- n) by substituting for paragraph (v) the following-**

“(v) “son” includes a son adopted in any manner recognized under the laws of Uganda.”

Justification:

The current paragraph (v) provides that son includes an illegitimate son and a step son. The proposed amendment is to remove reference to illegitimate son as stated earlier, there is no need to make reference to illegitimate son as all children have same rights under the law.

The proposed amendment also removes reference to step son. As the law is now, step children are free to benefit from the estate of the step parent. An example was given of a case currently

in court of a couple where the wife had passed away now her step children were claiming they have a right to enjoy a share of their step mother's state although most of this property claimed was owned personally by the deceased step mother and had been inherited from her family. The amendment is to cure this anomaly. A step child should not benefit from the estate of a step parent unless he or she was adopted legally by that step parent in accordance with the laws of Uganda, but they should benefit from the estate of their own parent.

3. REPEAL OF SECTION 3 OF THE PRINCIPAL ACT.

The principal Act is amended by repealing section 3.

Justification:

Section 3 provides that no person shall, by marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. This section provides for Interests and powers not acquired nor lost by marriage but does not cover exceptions where one acquires interest in the property of another by virtue of a marriage. A case in point being the provisions on family land and the proprietary interest created by marriage in the Land (Amendment) Act of 2007. There are also instances where a person may contribute to the improvement of property owned by his or her spouse and therefore may acquire interest therein. This section is therefore obsolete and needs to be repealed.

4. REPEAL OF SECTION 7 OF THE PRINCIPAL ACT.

The principal Act is amended by repealing section 7.

Justification:

Section 7 provides that the domicile of origin of an illegitimate child is in the country in which, at the time of his or her birth, his or her mother was domiciled and under section 6 the domicile of origin of every person of legitimate birth is in the country in which, at the time of his or her birth, his or her father is domiciled, or, if he or she is a posthumous child, in the country in which his or her father was domiciled at the time of the father's death. The Act therefore in determining the domicile of origin distinguishes between persons of legitimate birth and illegitimate birth whereby, the former acquire the domicile of their mothers while the latter acquire the domicile of their fathers. This is discriminatory.

The case of Kajubi v. Kabali (1944) EACA 14 hinted on non-discrimination of children born out of wedlock as far as succession rights were concerned. One judge said there is no bastardy law in Africa. The deceased had 7 children with his wife whom he married under the Marriage Ordinance. He had 43 children with other mothers. The children of the wife married under the Marriage Ordinance wanted a bigger share of their father's estate. But the clan leader distributed the property to all the children of the deceased and he used his discretion to determine the scheme of distribution. This was challenged by the children of the official wife, hence giving rise to the case. The court of appeal upheld the decision of the clan leader. All children are equal and have rights of succession to a parent's property. It is against this premise that there is a proposal to amend the definition of "child" in the Act to remove the distinction between

illegitimate and legitimate children. It should therefore follow that the law on domicile is amended accordingly for purposes of uniformity and to remove discrimination.

5. AMENDMENT OF SECTION 9 OF THE PRINCIPAL ACT.

The principal Act is amended in section 9-

- (a) by substituting for the word “man” the word “person”; and
- (b) by inserting immediately after the word “his” wherever it appears, the word “or her”.

Justification:

Currently, the section only allows a man to acquire new domicile by taking up fixed habitation in a country which is not his domicile of origin. The section is discriminatory in so far as it does not make a similar provision for a woman. The proposed amendment is to remove the discrimination and use gender sensitive terminologies.

6. SUBSTITUTION OF SECTION 13 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 13 the following-

“13. Domicile of origin of a minor.

Where a parent or guardian of a minor is domiciled in Uganda, that child is domiciled in Uganda.”

Justification:

Section 13 provides that the domicile of a minor follows the

domicile of the parent from whom the minor derived his or her domicile of origin. Secondly, that the domicile of a minor does not change with that of the minor's parent if the minor is married or holds any office or employment in the service of the Government, or has set up, with the consent of the parent, in any distinct business.

This provision as it is currently in the law is unconstitutional since under article 31 (1) only persons of 18 years and above have a right to form a family or hold any formal office or employment in Government. A minor can therefore not legally be married or formally employed in Government. The proposed amendment to cure this anomaly.

7. SUBSTITUTION OF SECTION 14 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 14 the following-

“14. Domicile of choice.

A person may acquire the domicile of his or her spouse upon marriage if that person did not have the same domicile as the spouse before marriage.

Justification:

Sections 14 and 15 of the Succession Act provides that the domicile of a married woman depends on that of her husband. Section 14 of the Succession Act, which provides that a woman acquires the domicile of her husband upon marriage, was among the provisions nullified by the Constitutional Court. There is no provision on a husband taking on the domicile of his wife.

The provision that a wife takes up the domicile of her husband at marriage and not vice versa is discriminatory and falls short of the Constitutional standard of equality between spouses at marriage, during marriage and at its dissolution. And was declared unconstitutional in the case of Law and Advocacy for Women in Uganda Vs Attorney General. Parties to a marriage should have an equal right to determine their domicile or to each retain their domicile of origin.

8. REPEAL OF SECTION 15 OF THE PRINCIPAL ACT.

The principal Act is amended by repealing section 15.

Justification:

Sections 14 and 15 of the Succession Act provides that the domicile of a married woman depends on that of her husband. Section 14 of the Succession Act, which provides that a woman acquires the domicile of her husband upon marriage, was among the provisions nullified by the Constitutional Court. There is no provision on a husband taking on the domicile of his wife.

The provision that a wife takes up the domicile of her husband at marriage and not vice versa is discriminatory and falls short of the Constitutional standard of equality between spouses at marriage, during marriage and at its dissolution. And was declared unconstitutional in the case of Law and Advocacy for Women in Uganda Vs Attorney General. Parties to a marriage should have an equal right to determine their domicile or to each retain their domicile of origin.

9. SUBSTITUTION OF SECTION 18 OF THE PRINCIPAL ACT

The principal Act is amended by substituting for section 18 the following-

“18. Where a person dies leaving movable property in Uganda, in the absence of proof of any domicile elsewhere, succession to the property shall be regulated by the laws of Uganda.”

Justification:

Section 18 of the Act provides for succession to movable property stating that, if a man dies leaving movable property in Uganda, in the absence of proof of any domicile elsewhere, succession to the property is regulated by the law of Uganda.

The language of the section presumes that it's only men who have the capacity to hold/own movable property. The amendment is to remove the discrimination based on sex since women as well have the capacity to hold/own property.

10. REPEAL OF PART III OF THE PRINCIPAL ACT.

The principal Act is amended by repealing Part III.

Justification:

Part III provides for the various degrees of consanguinity. The new amendment to the definition of legal heir makes this Part redundant. This is therefore a consequential amendment as a result of several proposed amendments in the Bill. For instance, instead of reference to next of kin, there is proposed a substitution with spouse and lineal descendants. Additionally, most provisions under the Act are discriminatory and unconstitutional as male relatives are preferred.

11. AMENDMENT OF SECTION 26 OF THE PRINCIPAL ACT.

Section 26 of the principal Act is amended-

- (a) by substituting for subsection (1), the following-
“(1) The principal residential holding and any other residential holding shall devolve to the surviving spouse and lineal descendants of the deceased.”
- (b) by repealing subsection (2)

Currently, Section 26 & Second Schedule to the Succession Act discriminate between male and female children as far as their rights of occupancy and the residential holding is concerned.

Section 26 provides that the residential holding normally occupied by a person dying intestate prior to his or her death as his or her principal residence or owned by him or her as a principal residential holding, including the house chattels therein, shall be held by his or her personal representative upon trust for his or her legal heir subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act.

The principal residential holding is reserved from distribution as it is held in trust for the legal heir. Actual occupation of either spouse or child does not affect any of their shares in the intestate. The concept of a legal heir as provided for in the Act was declared null and void by the Constitutional Court on the basis of being discriminatory and thereby unconstitutional. It would also be unfair for the law to uphold the practice of bestowing the principal residential holding upon one child at the expense of the other children. It would be fairer if all the children were awarded a reversionary interest in the same. Similarly, a spouse should not be awarded a mere right of occupancy alone;

they too should be awarded a real interest in the principal residential holding and all children should be equally entitled to the reversionary interest in ^[1]_[SEP]the principal residence of either parent. A spouse should also be entitled to a proportion of the reversionary ^[1]_[SEP]interest of the principal residence. The proposed amendment is to address this challenge.

12. SUBSTITUTION OF SECTION 27 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 27 the following-

“27. Distribution on the death of an intestate.

(1) Subject to sections 29 and 30, the estate of an intestate, except his or her residential holding or other residential holding, shall be divided among the following classes in the following manner-

- (a) where the intestate is survived by a spouse, a lineal descendant and a dependent relative-
 - (i) the spouse shall receive 50 percent;
 - (ii) the dependant relatives shall receive 9 percent;
 - (iii) the lineal descendants shall receive 41 percent of the whole of the property of the intestate, but where the intestate leaves no surviving spouse or dependant relative under paragraph a (i) or (ii) of this paragraph capable of taking a proportion of his or her property, that proportion shall go to the lineal descendants;
- (b) where the intestate is survived by a spouse and a dependent relative but no lineal descendant-

- (i) the spouse shall receive 80 percent; and
- (ii) the dependent relative shall receive 20 percent, of the whole of the property of the intestate;
- (c) where the intestate is survived by a spouse or a dependent relative but no lineal descendant, the spouse or the dependent relative, as the case may be, shall receive 100 percent, of the whole of the property of the intestate;
- (d) where the intestate leaves no person surviving him or her, capable of taking a proportion of his or her property under paragraph (a), (b) or (c), the estate shall be divided equally between those relatives in the nearest degree of kinship to the intestate;
- (e) where the intestate leaves no person surviving him or her, capable of taking a proportion of his or her property under paragraph (a), (b), (c) or (d), the whole of their property shall belong to the legal heir.

(2) A person may apply to court for an order that he or she is entitled to the deceased's estate or occupation of the residential holding occupied by the deceased.

(3) In making the order under subsection (3), court shall have due regard to-

- (a) the nature of the relationship between the deceased and the applicant;
- (b) contribution made by the applicant to the deceased's estate; and
- (c) any other relevant evidence that the court deems necessary."

Justification:

Section 27 governs distribution of property of an intestate. It however makes reference to a male intestate and makes no mention of distribution in the case of a female intestate. Where a male dies intestate, his property is distributed according to the percentages provided. This is a supposition that either females do not own property or cannot die intestate. There is need to consider women as well because they too have the capacity to hold/own property, and/or can die intestate. Under the Constitution, every person has a right to own property either individually or in association with others. Women are thereby free to own individual property. This provision was declared unconstitutional by the Constitutional Court on the ground that it discriminates between male and female.

Further, currently, under section 27, a spouse is entitled to only 15% of the deceased spouse's estate whether it is a monogamous or polygamous relationship. The challenge that this section presents is that men and women under the Constitution are stated to be equal at the start, during and at dissolution of marriage under Article 31. This should presuppose that at dissolution by death, they should be entitled to 50% of the estate. If the spouses have participated in the accumulation of wealth together, it is unfair for them to take only 15% of the estate and yet even the Constitution states otherwise. Presently, the entitlement of wives under the intestate distribution schedule is meagre in light of the fact that in most instances, the wife/ wives may have substantially contributed to the deceased's estate. This is even more inequitable where the deceased male was in a polygamous marriage because all the wives share in 15 percent of his estate regardless of its size, the length of the marriage or contributions made towards its acquisition and preservation.

The amendment proposes to remove the discrimination based on sex and also increase the percentage that the surviving spouse is entitled to. The new percentages would be: the spouse shall receive 50 percent; the dependant relatives shall receive 9 percent and the lineal descendants shall receive 41 percent.

13. AMENDMENT OF SECTION 28 OF THE PRINCIPAL ACT.

Section 28 of the principal Act is amended –

- a) in subsection (1) by substituting for the word “wives” the word “spouses”;

Justification:

Consequential amendment to replace reference to wives with spouses.

- (a) by inserting immediately after subsection (1) the following-

“(1a) Notwithstanding subsection (1), in the distribution of property among members of the same class, the administrator shall consider the circumstances of each case including the age, contribution, duration of marriage or degree of dependency of the beneficiary;

- (1b) A person aggrieved by the decision of the administrator under subsection (1a) may appeal to the court against the decision within fourteen days from the date of the decision.”

Justification:

The purpose of this provision is to override subsection (1) which provides that all lineal descendants, wives and dependent

relatives shall be entitled to share their proportion of a deceased intestate's property in equal shares.

The new proposal seeks allow the executor or executrix to look at and consider the circumstances of each case including the age, contribution, duration of marriage or degree of dependency of the beneficiary in distributing property among similar beneficiaries. For instance, in a polygamous marriage, a spouse who has been married to the deceased for over thirty years and made contributions towards the acquisition of the property of the deceased should not receive the same share as a younger spouse who was only married to the deceased for six months. Also, a child who is disabled or impaired in any way and requires a lot of resources to take care of her or him should not receive the same share as the child who is able bodied and can get an education and a job in future.

14. SUBSTITUTION OF SECTION 29 OF THE PRINCIPAL ACT.

The Principal Act is amended-

(a) by substituting for section 29 the following-

“29. Reservation of a principal and any other residential holding from distribution.

(1) A spouse or child of an intestate occupying a residential holding or any other residential holding under section 26 shall be required to bring that occupation into account in assessing any share in the property of an intestate to which the spouse or child may be entitled under section 27.

(2) A person entitled to any interest in a principal residential holding or any other residential holding under section 26(1) shall not be required to bring that interest into account in assessing any share in the property of an intestate to which that person may be entitled under section 27.

(3) A person who evicts or attempts to evict the occupants of the principal residential holding or any other residential holding commits an offence and is liable on conviction to a fine not exceeding five thousand currency points or imprisonment not exceeding seven years or both.”

Justification:

Section 29 provides that no wife or child of an intestate occupying a residential holding under section 26 and the Second Schedule to this Act shall be required to bring that occupation into account in assessing any share in the property of an intestate to which the wife or child may be entitled under section 27.

Rule (1) of the Second Schedule provides that in the case of a residential holding occupied by the intestate prior to his or her death as his or her principal residence, any wife or husband, as the case may be, and any children, under eighteen years of age if male, or under twenty-one years of age and unmarried if female, who were normally resident in the residential holding shall be entitled to occupy it. This disparity in age is against the constitutional provisions on equality and non - discrimination on grounds of sex for example. The same is repeated in paragraph (2) and (3).

The right to retain the matrimonial home only extends to wives and male children under 18 years of age and unmarried female

children under 21 years of age. When a widower remarries, he may retain the matrimonial home; for a widow, this right is terminated if she remarries. This restriction on a widow's rights render uncertain her control of the property, and hence undermines her use of the property for any other purpose such as sale, mortgage or collateral.

Both section 29 and rule 1 of the Second Schedule were declared un constitutional in Law and Advocacy for Women in Uganda vs. Attorney General, Constitutional Petitions No. 13 of 2005 & no. 5 of 2006 because they are discriminatory first by giving the right to retain the matrimonial home to only wives and not husbands and also discriminating the age or the male child (18 years) and unmarried female child (21 years).

The purpose of this amendment is to bring it in conformity with the Constitution and also to create an offence and a deterrent penalty for persons who evict or attempt to evict occupants of the principal residential holding.

15. AMENDMENT OF SECTION 30 OF THE PRINCIPAL ACT.

Section 30 of the principal Act is amended as follows-

- a) by inserting immediately after subsection (1) the following-
“(1a) The provision of subsection (1) shall not apply where at the time of death, it is the intestate who had separated from the surviving spouse.”; and by substituting for subsection (3) the following-
“(3) Notwithstanding subsection (1), a court may, on application by or on behalf of the spouse before distribution of the intestate property, declare that

subsection (1) shall not apply to the applicant.”

Justification:

Currently, section 30 (1) provides that no wife or husband of an intestate shall take any interest in the estate of an intestate if, at the death of the intestate, he or she was separated from the intestate as a member of the same household and the only exemption provided in subsection (2) is where such wife or husband has been absent on an approved course of study in an educational institution.

According to section 30, in order to benefit from the estate, a spouse should not have been separated as a member of the same household at the time of death with his or her deceased counterpart. To avoid losing the right to inherit, the surviving spouse must apply within six months of the death to obtain a waiver of this rule by the court hearing the application for letters of administration.

The considerations for waiver in this provision do not take into account or consider as material the spouse at whose instance the termination occurred. This leaves it open to any form of separation including abandonment. It would be unfair for the law to exclude those who have simply been abandoned by their spouses without undergoing any formal processes such as judicial separation or the actual termination of the marriage through divorce. It should also be noted that separation may be a temporary measure with a possibility of reconciliation. Where one dies intestate under these circumstances, the section should not stand.

Two amendments have been proposed to cure this problem: First a new paragraph (ua) has been inserted in the definition section

to clearly define what amounts to separation to mean separation for a period of at least six months consecutively -

- iii) by agreement, where the parties consent to suspend the marriage in writing and the consent is witnessed by at least one representative of each party; or*
- iv) by judicial order, where one or both parties petition the court asking for a suspension of the marriage on evidence that the parties can no longer live together;”*

Secondly an amendment has been proposed to introduce a new subsection (1) to section 30 to clearly state that if the separation is due to the fault of the deceased spouse, then the separation should not affect the rights of the surviving spouse.

16. REPEAL OF SECTION 31 OF THE PRINCIPAL ACT.

The principal Act is amended by repealing section 31.

Justification:

Section 31 provides for notice to be given by a customary heir to the personal representative and to the Administrator General upon the appointment of a customary heir of an intestate.

This provision becomes redundant as a result of the proposed amendments to section 27, which makes a customary heir no longer entitled to a portion of the estate by virtue of this position (and there are no constitutionally valid provisions that relate to this role. The proposal is therefore to repeal the section.

17. REPEAL OF SECTION 34 OF THE PRINCIPAL ACT.

Section 34 of the principal Act is repealed.

Justification:

Section 34 provides that if a person whose domicile is not in Uganda marries in Uganda a person whose domicile is in Uganda, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire by the marriage if both were domiciled in Uganda at the time of the marriage.

This section becomes redundant with the proposed amendments to sections 14 and 15. The proposed amendment to section 14 and 15 is to the effect that parties to a marriage should have an equal right to determine their domicile or to each retain their domicile of origin. Section 34 should therefore be repealed.

18. SUBSTITUTION OF SECTION 35 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 35 the following-

“35. Settlement of minor’s property in contemplation of marriage.

The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor with the joint approbation of the minor’s parents or parent, if only one is living or a guardian or, if none are living, with the approbation of court.”

Justification:

Section 35 of the Act provides for the approbation of settlement of the minor's property stating that it can only be done by the father and in his absence, by the High Court. No provision is made for the mothers and yet both parents are of equal standing. This section was declared un constitutional in Law and Advocacy for Women in Uganda vs. Attorney General, Constitutional Petitions No. 13 of 2005 & no. 5 of 2006 because it was not providing for the right of the mother.

The proposed amendment seeks to remove the discrimination and provides for the right of both parents to consent.

19. AMENDMENT OF SECTION 36 OF THE PRINCIPAL ACT.

Section 36 of the principal Act is amended as follows-

- a) in subsection (2) by substituting for the words “married woman” the word “spouse”;

Justification:

Section 36(2) provides that a married woman may, by will dispose of any property which she could alienate by her own act during her life'. This provision as it is currently excluding men and is therefore unconstitutional and gender insensitive. The proposed amendment is to remove the discrimination and is in line with article 26 of the Constitution on right to own property singly or in association with others. If a person can own property, then that person should also have a right to dispose of the property in a valid will.

b) by substituting for subsection (3) the following-

“(3) A person who has a hearing impairment, a speech impairment or a visual impairment is not incapacitated from making a will if he or she is able to know what he or she does by it.”

Justification:

Currently subsection (3) makes reference to persons who are deaf, dumb or blind. These terminologies are derogatory and do not conform to the current international terminologies for persons with disabilities. The proposal is to ensure that more modern terms are used in reference to persons with disabilities.

c) by substituting for subsection (4) the following-

“(4) A person who ordinarily has a mental illness may make a will during an interval in which he or she does not have the mental illness.”

Justification:

Similar to the justification above, subsection (4) makes reference to person who is ordinarily insane. Again, this This terminology is derogatory and does not conform to the current international terminologies for persons with disabilities. The proposal is to ensure that more modern terms are used in reference to persons with disabilities.

d) by inserting immediately after subsection (5) the following-

“(6) Notwithstanding subsection (1) or (2), where a person making a will is married or has children, the principal residential holding or any other residential

holding shall not form part of the property to be disposed of in a will and shall be reserved for the welfare of the testator’s spouse and lineal descendants.”

Justification:

Generally, the Succession Act is being amended to update the treatment of those who lack mental capacity to make succession-related decisions. While the term “lunatic” is not defined, section 17 states that “lunatics” cannot acquire a new domicile independently. Later provisions refer to “insane persons” and “persons of unsound mind” in different contexts. The Succession Act should introduce modern terminology and definitions of those who lack mental capacity and should make clear that such lack of capacity should be either medically diagnosed or determined by a court. Persons of unsound mind are also entitled to a share in the estate of their parents. They have rights to make wills during lucid moments. The amendment to this section is intended to specifically bring out this aspect.

20. AMENDMENT OF SECTION 38 OF THE PRINCIPAL ACT.

Section 38 of the principal Act is amended by substituting for subsection (2) (a) the following-

“(a) subject to subsection (3), where the deceased’s estate produces an income, by way of periodical payments; and the order shall provide for their termination not later than-

- (i) in case of a spouse, until he or she remarries, voluntarily leaves the principal residential holding or misuses the principal residential holding or puts it in disrepute;

- (ii) in case of a minor child, until the child attains the age of eighteen years;
- (iii) in the case of a lineal dependant who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining himself or herself, marriage or the cessation of the disability, whichever comes first;”

Justification:

Currently, subsection (2) (a) provides for different treatment of males and female which is discriminatory and unconstitutional. The support or occupancy should cease on marriage for both male and female children or dependant relative. No limits should be created on the basis of age in light of the present socio-economic realities where children remain dependant on parental support for an extended period of time. The proposed amendment seeks to address this.

21. SUBSTITUTION OF SECTION 43 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 43, the following-

- “(1) A parent may by will appoint a guardian for his or her minor child.
- (2) A person shall not, by will deprive another person of parental rights except where the parental rights were removed by court.”

Justification:

Section 43 of the Succession Act governs the appointment of a testamentary guardian. It is only a father who by will can appoint a guardian or guardians for his child during minority. There is no provision for a mother to appoint a guardian for her child who is still a minor. The provision is discriminatory on many fronts. In the first instance, a mother is not equally empowered to appoint a testamentary guardian for her minor children. This section was declared un constitutional in Law and Advocacy for Women in Uganda vs. Attorney General, Constitutional Petitions No. 13 of 2005 & no. 5 of 2006 because it was not providing for the right of the mother.

The proposed amendment seeks to remove the discrimination and provides for the right of both parents to appoint a guardian for their minor children.

22. SUBSTITUTION OF SECTION 44 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 44 the following-

“44. Statutory guardians.

On the death of either a father or a mother of an infant where no guardian has been appointed by the will of the father or mother of the infant or if the guardian appointed by the will of either the mother or father is dead or refuses to act, the following persons shall in the following order of priority, be the guardian or guardians of the infant child of the deceased-

- (a) the father or mother of the deceased except where there is a court order prohibiting the surviving parent from being the guardian to the

- infant;
- (b) if the father and mother of the deceased are dead or where there is a court order, the brothers and sisters of the deceased;
 - (c) if the brothers and sisters of the deceased are dead, the brothers and sisters of the deceased's father and mother;
 - (d) If there is no person willing or entitled to be a guardian under subsection (1) (a) to (c), the court may, on the application of any person interested in the welfare of the infant, appoint a guardian."

Justification:

Section 44 of the Succession Act which governs the hierarchy of people who can be appointed statutory guardians leaves out female relatives. If the father dies without a will the law states that a guardian will be appointed from the following categories in order of priority: the father or mother of the deceased man, brothers or sisters of the deceased, brothers and sisters of the deceased man's father, the deceased man's mother's brothers, or the deceased man's mother's father. There are no provisions for a mother's rights to sole guardianship or appointment of a guardian of her children.

The statutory guardians listed in the subsequent section prioritise the father's family, awarding them the power of guardianship over the children in subsections (a) –(c), while the mothers family is accorded the least priority in which case, only the male relatives are recognised as viable contenders.

This section was declared unconstitutional in Law and Advocacy for Women in Uganda vs. Attorney General, Constitutional Petitions No. 13 of 2005 & no. 5 of 2006 because it was not providing for the right of the mother.

The proposed amendment seeks to remove the discrimination and provides for the right of the mother's relatives as well to act as guardians.

23. INSERTION OF NEW SECTION 44A TO PRINCIPAL ACT.

The principal Act is amended by inserting immediately after section 44 the following-

“44A. Relationship between a surviving parent and appointed guardian.

- (1) A guardian appointed under section 43 shall act jointly with the surviving parent of the minor unless the court otherwise directs.
- (2) A guardian of a child may by will appoint another person as the guardian of the minor upon his or her death.
- (3) Where more than one guardian is appointed or different guardians are appointed by both parents, the persons appointed shall act jointly, after the death of the last surviving parent.
- (4) Where the surviving parent objects to joint guardianship, or where the appointed guardian considers that the surviving parent is unfit to act as a guardian of the child, the guardian or the parent of the child may apply to the court and the court may-
 - (a) reject the application and the parent and guard-

- ian shall continue to act jointly; or
- (b) order that the parent or guardian is unfit to act as a guardian and appoint a relative of the child or a person who is willing to act as a guardian of the child to act jointly with the parent or guardian or both of them.”

Justification:

The proposed section 44A makes provision for a guardian appointed by the deceased parent to act jointly with the surviving parent unless the court directs otherwise. Currently, the law is silent on the role of the surviving parent in case a guardian is appointed. The section seeks to make provision empowering a guardian to also appoint another person by will as the guardian of the minor upon his or her death. Currently there is a lacuna in the law for these issues.

24. AMENDMENT OF SECTION 45 OF THE PRINCIPAL ACT.

Section 45 of the principal Act is amended by deleting the words “other than a court presided over by a magistrate grade III.

Justification:

Section 45 of the Act provides for the power of the court to remove a guardian stating that; “Any court, other than a court presided over by a magistrate grade III, may, if it is satisfied that it is for the welfare of the infant. The reference to Magistrate grade III is redundant since they were phased out and therefore should be repealed from the law.

25. SUBSTITUTION OF SECTION 46 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 46 the following-

“46. Powers and duties of a guardian.

Where a guardian is appointed under this Act, the guardian may apply to court to exercise any of the following powers and duties-

- (a) to have custody of the minor;
- (b) to administer the property of the minor and in particular to receive, recover or invest the property for the benefit of the minor;
- (c) to take all reasonable steps to safeguard the property of the minor from loss or damage; and
- (d) to annually account in respect of the minor’s property to the parent, court or custodian of the minor or to any other person as the court may direct.

Justification:

The proposed amendment to section 46 is to clearly spell out the powers and duties of statutory guardians under the Act. Currently, the provision just provides that every guardian acting by virtue of section 44 or appointed under section 45 shall, subject to the provisions of the law relating to trusts, have all such powers over the estate and the person of an infant as a testamentary guardian has under the law for the time being in force in Uganda. This is vague and needs to be clarified.

26. SUBSTITUTION OF SECTION 47 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 47 the following-

“47. Will obtained by fraud, undue influence, duress, coercion, mistake of fact or importunity.

A will or any part of a will, the making of which has been caused by fraud, undue influence, duress, coercion, mistake of fact or by such importunity which takes away the free will of the testator, is void.”

Justification:

The purpose of this amendment is to broaden the circumstances under which will is void including undue influence, duress and mistake of fact. Currently a will can only be void if the making of the will was caused by fraud, coercion or importunity.

27. SUBSTITUTION OF SECTION 55 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 55 the following-

“55. Witness not disqualified by interest or by being executor or executrix.

- (1) A person shall not by reason of interest in or by his or her being an executor or executrix of a will be disqualified as a witness to prove the execution of a will or to prove the validity or invalidity of a will
- (2) Subsection (1) shall not apply to a person who participated in the writing or preparation of the will.”

Justification:

The purpose of this amendment is to introduce a new subsection (2) to disqualify a person who participated in the preparation a will from being a witness to prove the validity or invalidity of the will. This is to ensure that there is no conflict of interest.

28. SUBSTITUTION OF SECTION 87 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 87 the following-

“87. Implied inclusion of children of the deceased including adopted children.

In the absence of any intimation to the contrary in the will, “child”, “son” or “daughter” or any word which expresses those relationships is to be understood as including any child whom the deceased parent has acknowledged as his or her child either while he is still living or in a will or a declaration has been made to that effect by a competent court.”

Justification:

Section 87 currently provides that in the absence of any intimation to the contrary in the will, “child”, “son” or “daughter” or any word which expresses those relationships is to be understood as including an illegitimate child and an adopted child.

The purpose of the amendment is to remove reference to an illegitimate child. There is no illegitimate child under the Constitution. The effect of the amendment is to protect all children whom the deceased parent has acknowledged as his or her child either while he is still living or in a will or a declaration has been made to that effect by a competent court.”

29. SUBSTITUTION OF SECTION 179 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 179 the following-

“179. Property transferable by gift made in contemplation of death.

- (1) Subject to sections 26, 29 and 30, a person may dispose, by gift made in contemplation of death, of any movable property which he or she could dispose of by will.
- (2) A gift is said to be made in contemplation of death where a person who is ill and expects to die shortly of his or her illness delivers to another the possession of any movable property to keep as a gift in case the donor shall die of that illness.
- (3) A gift made in contemplation of death may be resumed by the donor.
- (4) A gift made in contemplation of death does not take effect if the donor recovers from the illness during which it was made nor if he or she survives the person to whom it was made.”

Justification:

Section 179 currently provides that a man may dispose, by gift made in contemplation of death, of any movable property which he could dispose of by will. There is no provision made for a woman to dispose property by gift. Secondly, there is need to exempt principal and other residential holding from being disposed under this section. The purpose of the amendment

therefore is to remove reference to “man” and instead used “person” which is gender sensitive and exempt gift of principal and other residential holding in contemplation of death.

30. AMENDMENT OF SECTION 200 OF THE PRINCIPAL ACT.

Section 200 of the principal Act is amended by substituting for the words “next of kin” the words “the spouse and lineal descendants of the deceased person”.

Justification:

This is a consequential amendment to use the term “the spouse and lineal descendants of the deceased person” which has been proposed in the Bill.

31. INSERTION OF NEW SECTION 201A TO THE PRINCIPAL ACT.

The principal Act is amended by inserting immediately after section 201 the following-

“201A. Priority of surviving spouse to administer the estate of a deceased person.

- (1) The surviving spouse shall have first priority to administer the estate of the deceased spouse.
- (2) The priority of the surviving spouse under subsection (1) may be disregarded by an order of court and administration is granted to another person other than the spouse of the deceased where he or she -

mismanages the estate; or
is mentally impaired and unable to manage the
estate.”

Justification:

Section 201 provides that when the deceased has died intestate, those who are connected with the deceased either by marriage or by consanguinity are entitled to obtain letters of administration of his or her estate and effects in the order and according to the provisions hereafter contained and section 202 of the Succession Act provides that subject to section 4 of the Administrator General’s Act, administration shall be granted to the person entitled to the greatest proportion of the estate under section 27.

The courts have held that a widow is the best person to administer an estate as she will take care of it for the benefit of the orphans and herself. In Re Kibiego [1972] E.A.179 the applicant applied for letters of administration intestate to the estate of her husband a Nandi. The application was granted. Madan J. said

“A widow is the most suitable person to obtain representation to her deceased husband’s estate. In the normal course of events, she is the person who would rightly, properly and honestly safeguard the assets of the estate for herself and her children. It would be going back to a mediaeval conception to cling to a tribal custom by refusing her a grant which is obviously unsuited to the progressive society of Kenya in this year of grace. A legal system ought to be able to march with the changing conditions fitting itself the aspirations of the people which it is supposed to safeguard and serve.”

Therefore with the proposed amendment of section 27 which seeks to increase the share of the surviving spouse to 50% and

also the court decisions to the effect that a widow is the most suitable person to obtain letters of administration to the estate of his or her deceased spouse, there is need to introduce a new section 201A to clearly give the surviving spouse priority to administer the property of their deceased spouse.

32. SUBSTITUTION OF SECTION 203 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 203 the following-

“203. Citation of persons entitled in priority to administer.

Subject to section 201A, administration shall not be granted to any relative if there is another relative entitled to a greater proportion of the estate until a citation has been issued and published in the manner prescribed under this Act calling on that other relative to accept or refuse letters of administration.”

Justification:

Section 203 provides that administration shall not be granted to any relative if there is some other relative or an appointed customary heir entitled to a greater proportion of the estate until a citation has been issued and published in the manner hereafter provided calling on that other relative or heir to accept or refuse letters of administration.

The proposed amendment to section 203 is consequential to subjecting the grant to any other relative to the new section 201A which now seeks to give priority to administer to the surviving spouse. There is also need amend the section to remove

reference to customary heir from the section since now the role of the customary heir will remain only ceremonial and does not entitle him or her to share in the property of the decease except in accordance with this Act.

33. SUBSTITUTION OF SECTION 204 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 204 the following-

“204. Entitlement between members of the same class.

Where there are two or more persons who are entitled to the same proportion of the estate, they shall be equally entitled to administration, and a grant may be made to any one or some of them jointly.”

Justification:

Currently, the section provides that if there are two or more persons who are entitled to the same proportion of the estate, those persons are equally entitled to administration, and a grant may be made to any one or some of them without any citation of the others.

The amendment is to provide for grant to be made jointly to persons of the same class. Currently the law allows one or more persons to be granted with letters of administration without notification to all the members of the same class. This has sometimes disadvantaged some of the beneficiaries who are not informed.

34. INSERTION OF A NEW SECTION 204A TO THE PRINCIPAL ACT.

The principal Act is amended by inserting immediately after section 204 the following-

“204A. Citations or notice by persons or entities applying to administer.

- (1) Subject to section 6(3) of the Administrator General’s Act, any person or entity applying for letters of administration must give definite notice in writing in presence of a witness to the spouse, lineal descendants and dependant relatives of the deceased of the person’s intention to apply for letters of administration at least thirty days prior to applying for letters of administration.
- (2) If proving such notice under the terms of subsection (1) is impossible, the applicant shall satisfy the terms of subsection (1) by issuing or publishing such notice clearly and conspicuously in a publication likely to be seen by the dependant relative for a period of at least fourteen days prior to applying for letters of administration.”

Justification:

The purpose of this new section is to ensure that any person or entity applying for letters of administration must give definite notice in writing in presence of a witness to the spouse, lineal descendants and dependant relatives of the deceased of the person’s intention to apply for letters of administration at least thirty days prior to applying for letters of administration. This is to ensure that all the beneficiaries are aware of the process and can protect their interests in the estate of the deceased. Currently this is lacking in the law.

35. SUBSTITUTION OF SECTION 215 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 215 the following-

“215. Administration during minority of sole executor or residuary legatee.

- 1) When a minor is sole executor or sole residuary legatee, letters of administration with the will annexed may be granted to the legal guardian of the minor or to such other person as the court shall think fit, until the minor attains the age of eighteen years, at which period, and not before, probate of the will shall be granted to him or her.
- 2) Notwithstanding subsection (1), where the sole executor or sole residuary legatee is a person under the age of twenty one years, the court may where it deems necessary for the benefit of the widow or widower, grant him or her letters of administration or probate under the supervision of court or the Administrator General until the person attains the age of twenty one years.”

Justification:

Section 215 currently provides that when a minor is sole executor or sole residuary legatee, letters of administration with the will annexed may be granted to the legal guardian of the minor or to such other person as the court shall think fit, until the minor shall have completed the age of twenty-one years, at which period, and not before, probate of the will shall be granted to him or her. This provision is unconstitutional because the age of majority under the Constitution is 18 years and not twenty-one years as provided in the current provision.

There is however a proposal to introduce a new subsection (2) to the effect that when a person is under the age of twenty-one years, the court may grant to him or her letters of administration or probate under the supervision of the court until they attain the age of twenty-one years. This proposal is to protect the interest of the person to ensure that they are not taken advantage of by fraudulent people. But the provision is discretionary depending on the assessment of court.

36. REPEAL OF SECTION 216 OF THE PRINCIPAL ACT.

The principal Act is amended by repealing section 216.

Justification:

Section 216 provides that when there are two or more minor executors, and no executor who has attained majority, or two or more residuary legatees, and no residuary legatee who has attained majority, the grant shall be limited until one of them shall have completed the age of twenty-one years. This provision is redundant since letters of administration or probate cannot be granted to a minor but instead to the guardian of the minor under section 215 until they reach the age of majority.

37. AMENDMENT OF SECTION 234 OF THE PRINCIPAL ACT.

Section 234 of the principal Act is amended in subsection (2) by inserting immediately after paragraph (c) the following new paragraph-

“(ca) the person to whom the grant was made has mismanaged the estate or abused the grant;”

Justification:

The purpose of the amendment is to add another ground upon which letters of administration may be revoked or annulled. From consultations and stakeholder engagement, it was stated that mismanagement and abuse of grant is rampant and form one of the grounds for revocation and annulment of grant.

38. SUBSTITUTION OF SECTION 249 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 249 the following-

“249. Punishment of false averment in petition or declaration.

Where any petition or declaration which is required to be verified contains any averment which the person making the averment, or the verification knows or believes to be false, that person commits an offence is liable on conviction to a fine not exceeding one thousand currency point or imprisonment not exceeding one year or both.”

Justification:

The purpose of the amendment is to expressly create an offence and a penalty for making false averment under the Act. Currently the section provides that the person who makes false averment shall be subject to punishment according to the provisions of the law for the time being in force for the punishment of the offence of giving or fabricating false evidence. There is no express penalty provided in the law at the moment.

39. AMENDMENT OF SECTION 258 OF THE PRINCIPAL ACT.

Section 258 of the principal Act is amended by renumbering the existing provision as subsection (1) and inserting immediately after it, the following new subsections-

- “(2) The grant of probate under subsection (1) shall be valid for a period of three years from the date issue.
- (3) Notwithstanding subsection (2), the court may on such terms and conditions as it may deem necessary, extend the period referred to under subsection (2).”

Justification:

During consultations, it was proposed that limitation on the period of administration be imposed whereby the letters of grant of probate expire naturally unless extended by court upon application by the administrator of an estate should be introduced in the law. Three years of administration was proposed as sufficient. This will minimize abuse of the powers granted. Once an inventory is filed in court indicating how properties have been distributed or managed, the grant should lapse unless the court grants an extension.

40. AMENDMENT OF SECTION 259 OF THE PRINCIPAL ACT.

Section 259 of the principal Act is amended by renumbering the existing provision as subsection (1) and inserting immediately after it, the following new subsection-

- “(2) The letters of administration granted under subsection (1) shall be valid for a period of three years from the date issue.

(3) Notwithstanding subsection (2), the court may on such terms and conditions as it may deem necessary, extend the period referred to under subsection (2).”

Justification:

During consultations, it was proposed that limitation on the period of administration be imposed whereby the letters of grant of letters of administration expire naturally unless extended by court upon application by the administrator of an estate should be introduced in the law. Three years of administration was proposed as sufficient. This will minimize abuse of the powers granted. Once an inventory is filed in court indicating how properties have been distributed or managed, the grant should lapse unless the court grants an extension.

41. INSERTION OF NEW SECTION 267A TO THE PRINCIPAL ACT.

The principal Act is amended by inserting the following new subsection immediately after section 267-

“267A. Powers of the Registrar.

- (1) Where a judge deems an application for grant or revocation of probate or letters of administration can be handled by a registrar, the judge may refer the matter to the registrar with such directions as he or she deems fit and the registrar may make the grant or revocation.
- (2) A person aggrieved by an order made by the Registrar under subsection (1) may appeal to the High Court within fourteen days from the date of the order.
- (3) In this section, “registrar” means a registrar of the High Court or any other person acting in that capacity.”

Justification:

The purpose of this new provision is to empower the judge to refer certain matters relating to application, grant or revocation of probate or letters of administration to a registrar to handle where the judge deems necessary. The intention of this is to promote expeditious disposition of applications made to the High Court in relation to succession matters. A person aggrieved by the decision of a registrar may appeal to the High Court.

42. SUBSTITUTION OF SECTION 268 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 268 the following-

“268. Intermeddling.

- (1) A person who intermeddles with the estate of the deceased or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself or herself an executor commits an offence.

- (2) Subsection (1) shall not apply in cases where-
the intermeddling with the perishable goods of the deceased is for the purpose of preserving them, providing for the deceased’s funeral or for the immediate necessities of the deceased’s family or property; or

the dealing is in the ordinary course of business with goods of the deceased received from another.
- (3) A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding

one thousand currency points or imprisonment not exceeding one year or both.

- (4) A person who evicts or attempts to evict the occupants of the principle residential holding or any other residential holding commits an offence and is liable on conviction to a fine not exceeding five thousand currency points or imprisonment not exceeding seven years or both.”

Justification:

The Succession Act is quiet about a penalty for intermeddling with the estate of the deceased. The amendment seeks to introduce an offence and a penalty for intermeddling. The stringent punishment will discourage property grabbing where widows and orphans are chased away from the land and left destitute.

43. SUBSTITUTION OF SECTION 270 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 270 the following-

“270. Disposal of property.

An executor or administrator may, with the consent of the surviving spouse and all other beneficiaries of the estate, dispose of the property of the deceased either wholly or in part.”

Justification:

Currently the law empowers the executor or administrator to dispose of the property of the deceased, either wholly or in part, in such manner as he or she may think fit, subject to section 26 and the Second Schedule. This position has been abused by some

executors and administrators. The proposal seeks to mandate the executor or administrator to obtain consent of the surviving spouse and all other beneficiaries of the estate before disposing of the property of the deceased.

44. SUBSTITUTION OF SECTION 272 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 272 the following-

“272. Powers of several executors, executrixes or administrators to be exercised jointly.

Subject to section 270, where there are several executors, executrixes or administrators, the powers of the executors or administrators granted to them, shall be exercised jointly unless otherwise directed by court.”

Justification:

Currently, section 272 provides that when there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration. The proposed amendment seeks to require that the powers shall be exercised jointly by all the executors or administrators unless the court otherwise directs. The argument is that there is always a reason why a person appoints several executors and it is not fair to grant probate to only one of them unless court deems that there is a reason to do so.

45. SUBSTITUTION OF SECTION 273 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 273 the following-

“273. Survival of executors, executrixes or administrators.

Upon the death of one or more executors, executrixes or administrators, the survivor shall seek the leave of court to act as a sole executor, executrix or administrator with the consent of the beneficiaries.”

46. REPEAL OF SECTION 276 OF THE PRINCIPAL ACT.

The principal Act is amended by repealing section 276.

47. AMENDMENT OF SECTION 278 OF THE PRINCIPAL ACT.

Section 278 of the principal Act is amended as follows-

(a) in subsection (1) by substituting for the word “six”, the word “three”;

(b) by inserting immediately after subsection (5) the following-

“(6) A person who contravenes this section commits an offence and is liable on conviction to a fine not exceeding five hundred currency points or imprisonment not exceeding six months or both.

Justification:

This amendment seeks to create an offence and penalty for failure by the executor or administrator to submit to the court inventory and accounts of the deceased’s estate within the period

prescribed in the law. Currently there is no penalty which has hindered enforcement and compliance monitoring.

48. SUBSTITUTION OF SECTION 279 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 279, the following-

“279. Property of the deceased.

- (1) An executor, executrix or administrator shall collect, with reasonable diligence, the property of the deceased, and the debts that were due to him or her at that time of his or her death.

- (2) Debts incurred by the deceased against the principal residential holding or any other residential holding during marriage without written consent of the spouse who, prior to the deceased’s death shared that principal residential holding or any other residential holding with the deceased, shall be void and excluded from payment from the deceased’s estate.

Justification:

Currently, section 279 provides that an executor or administrator shall collect, with reasonable diligence, the property of the deceased, and the debts that were due to him or her at the time of his or her death.

The proposed amendment seeks to insert a new subsection (2) as a consequential amendment to protect the principal residential holding or other residential holding from debts acquired by the deceased prior to his or her death without the express consent of the surviving spouse.

49. SUBSTITUTING OF SECTION 331 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 331 the following-

“331. Procedure where deceased has left property in a foreign country.

- (1) Any person applying to the High Court for a grant of probate or letters of administration shall, if at that time or at any time after he or she has reason to believe that the deceased has left property in a foreign country, notify the court to that effect.
- (2) The court may at the time of granting probate or letters of administration, or at any time after that, on being notified of the existence of property belonging to the deceased in a foreign country, order that no claims other than claims entitled to priority be paid until the expiration of a period not exceeding eighteen months from the making of the order.
- (3) A statement duly certified by the competent court in the foreign country and filed in the High Court of Uganda within the period ordered under subsection (2), showing the assets and liabilities of the estate of a deceased person within the respective jurisdictions of those courts, may be taken into account by an executor or administrator in Uganda, and the court may order that the assets be distributed in such manner as to secure the payment of all claims, other than those entitled to priority, rateably with those certified by the courts of the foreign country as under this subsection.
- (4) The court may order that any balance remaining in the hands of an executor or administrator after

payment of claims in Uganda, whether in full or rateably under the provisions of this section, may be transmitted in whole or in part to an executor or administrator of the estate in the foreign country.

- (5) An executor, executrix or administrator acting in good faith under an order of the court as under subsection (4) shall not be liable to be sued in respect of that action.”

Justification:

The current provision is obsolete and outdated in so far as it only made reference to property of the deceased in Kenya or Tanzania only. The rationale for choosing these two countries only is not known because even if it were that they were the other East African countries, then it is out of date as Rwanda, Burundi and South Sudan are now part of East African Community.

The proposed amendment seeks to substitute reference to “Tanzania or Kenya” the words with “foreign country”.

50. INSERTION OF A NEW SECTION 311A IN THE PRINCIPAL ACT.

The principal Act is amended by inserting immediately after section 311 the following-

“311A. Appointment of personal representative in respect of shares of a minor in intestacy.

- (1) Where court appoints a personal representative in respect of share of a minor in intestacy, it must take into consideration the following factors-
- a) the minor’s wishes if he or she is of sufficient maturity to form an intelligent preference;

- b) the existence or nonexistence of an established relationship between the minor and the personal representative;
 - c) the best interests of the minor.
- (2) The following categories of persons may be appointed personal representatives in respect of a share of a minor in intestacy-
- a) surviving spouse; or
 - b) guardian.
- (3) The minor’s share in intestacy shall only be used for the benefit of the minor.
- (4) The duration of the personal representative in respect of share of a minor in intestacy shall terminate when the minor attains the age of eighteen years.
- (5) The personal representative shall transfer all remaining assets to the minor upon termination.”

Justification:

The proposal seeks to introduce a new section to specify the factors to be taken into account by court in appointing a personal representative in respect of share of a minor in intestacy, persons who can be appointed as personal representative i.e. surviving parent or guardian, use of a minor’s share only for the benefit of the minor and duration of the personal representation. Currently, the law is silent on these issues which has disadvantaged the minors.

51. SUBSTITUTION OF SECTION 321 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 321 the following-

“321. Refund when legacy has become due on performance of condition.

When the time prescribed by a will for the performance of a condition has elapsed without the condition having been performed and the executor has thereupon, without fraud, distributed the assets, in such case, if further time has been allowed under section 124 for the performance of the condition, and the condition has been performed accordingly, the legacy cannot be claimed from the executor, but those to whom he or she has paid it are liable to refund the amount with interest of 5 %.

Justification:

The amendment seeks to introduce an interest of 5% on refund when a legacy becomes due on the performance of a condition. Currently the Act provides that refunding of one legatee to another shall be without interest. Where one party has benefited from the estate it is reasonable to charge interest.

The current provision only requires payment of the refund without any interest.

52. SUBSTITUTION OF SECTION 332 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 332 the following-

“332 Liability of executor or administrator for damage or loss to estate.

- (1) Where an executor, executrix or administrator misapplies the estate of the deceased or proceeds from the disposition of the estate, or subjects it to loss or damage, the executor, executrix or administrator commits an offence and is liable on conviction to a fine not exceeding ten thousand currency points or imprisonment not exceeding seven years or both
- (2) The court shall in addition to the penalty under subsection (1) require the person to make good to the estate and beneficiaries for the loss or damage caused to the estate.”

Justification:

Section 332 provides that when an executor or administrator misapplies the estate of the deceased, or subjects it to loss or damage, he or she is liable to make good the loss or damage so occasioned.

The law as it is gives a lot of powers to the administrator or executor without sufficient checks by vesting all property in their hands which has sometimes been abused to the detriment of the beneficiaries. No intervention can be made by the Administrator General to protect the estate unless the period of six months has elapsed and there is clear evidence of plunder.

The Succession Act provides for instances in which grant of probate may be revoked or annulled for just cause. An outstanding lacuna in this instance is the fact that the law does not make provision for revocation for breach of duty but for failure to exhibit an inventory or account or exhibition of an inventory or account that is untrue in a material respect. This creates a potential hurdle for beneficiaries who have to wait six

months to challenge the inventory made by the executor. This would in most instances render their attempts futile.

The purpose of this amendment is to create an offence and penalty for an executor or administrator who misapplies the estate of the deceased or proceeds from the disposition of the estate or subjects it to loss or damage and empowers the court to in addition to the penalty, require the person to make good to the estate and beneficiaries for loss or damage caused.

53. SUBSTITUTION OF SECTION 333 OF THE PRINCIPAL ACT.

The principal Act is amended by substituting for section 333 the following-

“333. Liability of executor or administrator for neglect.

- (1) Where an executor, executrix or administrator occasions a loss to the estate by neglecting to get any part of the property of the deceased, the executor, executrix or administrator commits an offence and is liable on conviction to a fine not exceeding one thousand currency points or imprisonment not exceeding one year or both.
- (2) The court shall in addition to the penalty under subsection (1) require the person to make good to the estate and beneficiaries for the loss or damage caused to the estate.”

Justification:

The purpose of this amendment is to create an offence and penalty for an executor or administrator who occasions loss to the estate of the deceased by neglect and empowers the court to

in addition to the penalty, require the person to make good to the estate and beneficiaries for loss or damage caused to the estate.

54. INSERTION OF NEW SECTION 333A TO THE PRINCIPAL ACT.

The principal Act is amended by inserting immediately after section 333 the following new section-

“333A. Beneficiary’s estate not to form part of any payment.

- (1) A person who acts on behalf of the beneficiaries of an estate in any matter shall not acquire any part of the beneficiary’s interest in the estate as payment for the services rendered.
- (2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding five thousand currency points or imprisonment not exceeding five years or both.

55. AMENDMENT OF SECTION 335 OF THE PRINCIPAL ACT.

Section 335 of the principal Act is amended by substituting for subsection (2) the following –

“(2) A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine not exceeding one thousand currency points or imprisonment not exceeding one year or both.”

Justification:

The purpose of this amendment is to enhance the penalty for failure by the executor or administrator to deliver to court revoked or annulled probate of letters of administration.

Currently the penalty is very minimal and not deterrent enough for the magnitude of the offence.

56. SUBSTITUTION OF THE FIRST SCHEDULE TO THE PRINCIPAL ACT.

The principal Act is amended by substituting for the First Schedule the following new Schedule-

FIRST SCHEDULE

Section 2

CURRENCY POINT

A currency point is equivalent to twenty thousand Uganda shillings

Justification:

The current First Schedule provides for a Table of consanguinity. With the proposed repeal of Part III which provides for the various degrees of consanguinity, the current First Schedule becomes redundant. The proposed new First Schedule provides for the value of a currency point.

57. REPEAL OF THE SECOND SCHEDULE TO THE PRINCIPAL ACT.

The principal Act is amended by repealing the Second Schedule.

Justification

The Second Schedule provides for Rules relating to the occupation of residential holdings. Most of the paragraphs in this Schedule were declared unconstitutional by the Constitution Court for being discriminatory on the basis of sex.

For instance, re-marriage by widow terminated her right of occupancy of the matrimonial home which was not the case for the widower who was allowed to remarry and maintain occupancy of the matrimonial home. At the same time preference was given to the father's side during the appointment of a statutory guardian of minor children.. The application of such

provisions left women in an inferior position to that of the men. Section 26 & Second Schedule to the Succession Act tend to discriminate between male and female children as far as their rights of occupancy and the residential holding is concerned.

The Second Schedule provides under rule (1) and (2) that “.....any children, under eighteen years of age if male, or under twenty one years of age and unmarried if female, who were normally resident in the residential holding shall be entitled to occupy it or who were normally resident with the intestate prior to his or her death, shall be entitled to occupy it.”

Article 257 of the Constitution defines a “child” as a person under the age of eighteen years.

Consequently, different references to children whether male or female under the Succession Act is discriminatory. For a female child she must be under 21 years of age and unmarried. This is also discriminatory.

Second schedule paragraph (1); male to benefit from the residential holding until 18 years and yet girls are enjoying the holding up to 21 years. This disparity in age is against the constitutional provisions on equality and non - discrimination on grounds of sex for example. The same is repeated in paragraph (2) and (3). There is need to be consistent with and uphold the constitutional provisions on equality and non- discrimination. The proposed amendment is to repeal the Schedule since the law must treat females and males equally as pronounced under the articles of the Constitution referred to above.

58. MISCELLANEOUS AMENDMENTS TO THE PRINCIPAL ACT.

The principal Act is amended –

- (a) by substituting, wherever they appear, for reference to-
 - (i) “husband” a reference “spouse;”
 - (ii) “wife” a reference to “spouse;”
 - (iii) “father” a reference to “parent;”
 - (iv) “man” a reference to “person;”
 - (v) “wives” a reference to “spouses;”
 - (vi) “son” a reference to “child;”
 - (vii) “heir” insert “or heiress;”
 - (viii) “his” insert “or hers;”
 - (ix) “him” insert “or her;”
 - (x) “executor” insert “executrix;” and
 - (xi) “lunatic” and “insane” wherever it appears, the words “mentally impaired person”

Justification:

The proposal is to replace all terms that are discriminatory on the basis of sex and those that are derogatory in the treatment of those who lack mental capacity to make succession-related decisions. While the term “lunatic” is not defined, section 17 states that “lunatics” cannot acquire a new domicile independently. Later provisions refer to “insane persons” and “persons of unsound mind” in different contexts. The amendment is to introduce modern terminology and definitions of those who lack mental. Persons of unsound mind are also entitled to a share in the estate of their parents. They have rights to make wills during lucid moments. The amendment seeks to address this anomaly.

Cross References

Administrator Generals Act, Cap 157

