

Chapter 12

INTESTATE SUCCESSION

Intestate Succession Act		
81 of 1987		
1	Aim of the Act	1
2	Basic Principles	2
2.1	The spouse as the sole heir	2
2.2	Descendant(s) as sole heir(s)	3
2.3	Spouse and descendant(s) as heirs	4
2.4	Parents as heirs	6
2.5	Parents and descendant(s) of parents as heirs	6
2.6	Descendant(s) of deceased's parents as heirs	7
2.7	Descendants of only one parent of the deceased	9
2.8	Other competent heirs	9
2.9	Adopted children	9
2.10	Born out of wedlock	9
2.11	Child accepted in accordance with customary law as own child	10
2.12	Renunciation if surviving spouse is also entitled to inherit	10
2.13	Disqualification or renunciation if no surviving spouse	11

1 AIM OF THE ACT

- 1.1 The Intestate Succession Act, 81 of 1987, came into operation on 18 March 1988. The aim of this act is to regulate anew the law relating to intestate succession.

- 1.2 Abrie¹ explains the aim of this act as follows: *"When a person dies and no valid will can be found, or if his will or a part of it is invalid for one reason or another, his estate or that part of it that cannot be distributed according to the provisions of a will is distributed according to the principles of intestate succession. A person's estate or a part of it can therefore devolve by virtue of intestate inheritance. When an estate or a part of an estate has devolved by virtue of intestate inheritance, the provisions of the Act automatically become applicable. The Act regulates the shares in which certain persons will inherit from the intestate testator"* (translation).
- 1.3 In common law a person's blood relatives are his natural heirs. This act represents a radical departure from common law, however, in that spouses and adopted children are also elevated to the status of intestate heirs. Intestate heirs are determined at the date of death of the testator.²

2 BASIC PRINCIPLES

*"The broad principle followed is: If the testator is survived only by a spouse, the spouse inherits the intestate estate. If the testator is survived only by descendants, they inherit the intestate estate. If there is a combination of a spouse and descendants (children and grandchildren), they inherit the estate jointly in specific shares. If there is no spouse or descendants, the testator's parents and/or their descendants (collateral relatives of the testator) inherit the estate. If there are no parents or descendants of parents, grandparents and other collateral relatives inherit the estate per capita."*³ (translation)

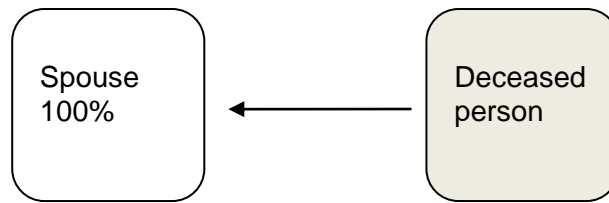
2.1 The spouse as the sole heir

If a deceased person is survived by a **spouse**, but not by any descendants, the spouse or spouses inherit the entire intestate estate - (section 1(1)(a)).

- a) If the deceased and his or her life spouse were married in community of property, the spouse receives one half of the estate by virtue of the marriage in community of property and the other half by virtue of section 1(1)(a) of the Act.
- b) If the deceased and his or her life spouse were married out of community of property, the spouse inherits the entire estate by virtue of section 1(1)(a) of the Act.

1 *Op cit.*, p.9.

2 *Ibid.*

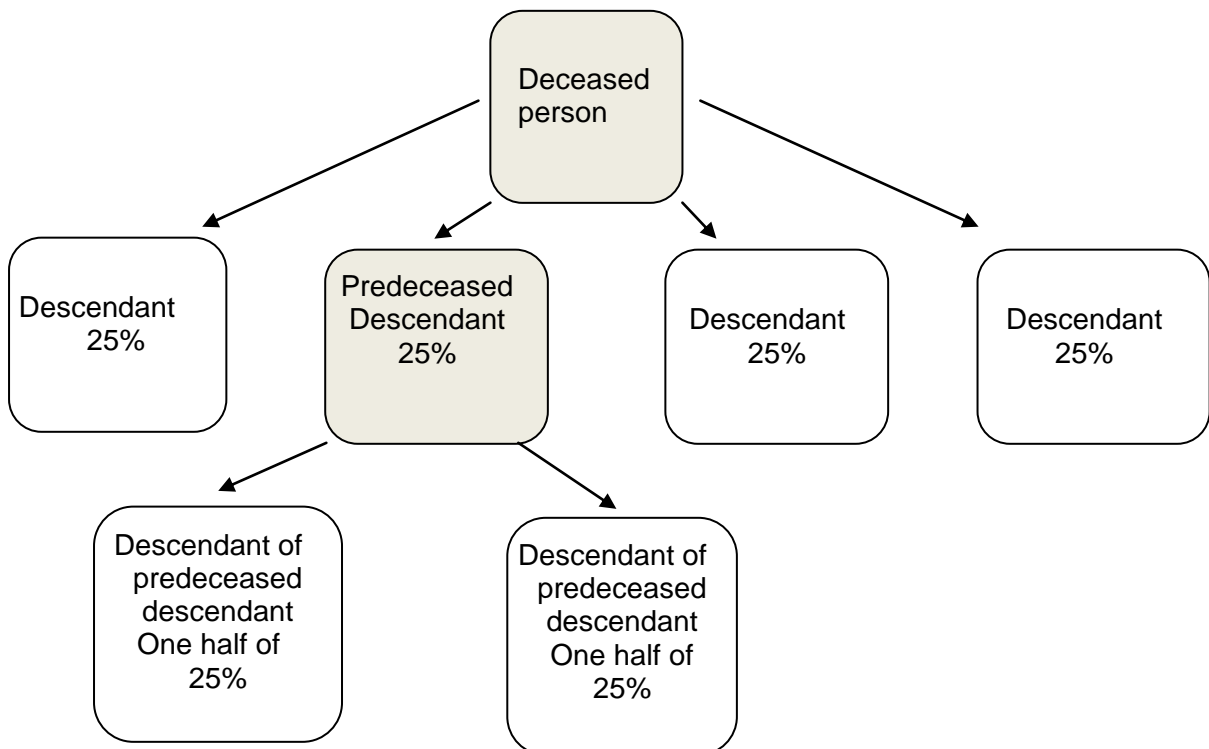


In a **polygamous customary union**, if the deceased is survived by wives but not survived by any descendant, the estate is divided equally between the wives. ⁴

2.2 Descendant(s) as sole heir(s)

If a deceased person leaves **descendants**, but no spouse, the descendant(s) inherit the entire intestate estate - (section 1(1)(b)). Descendants are therefore the sole heirs. They inherit *per stirpes* through representation.

Division of an intestate estate among descendants takes place *per stirpes* and *representation* is permitted - (section 4(a)). A *stirpis* is a *child* of the deceased, or a *predeceased child who left living descendants*. A deceased person therefore has as many *stirpes* as he left *living children* or *predeceased children with living descendants*.⁵



3 Abrie, *op cit*, p.18.

4 Deeds Practice Manuals, p. 1-178

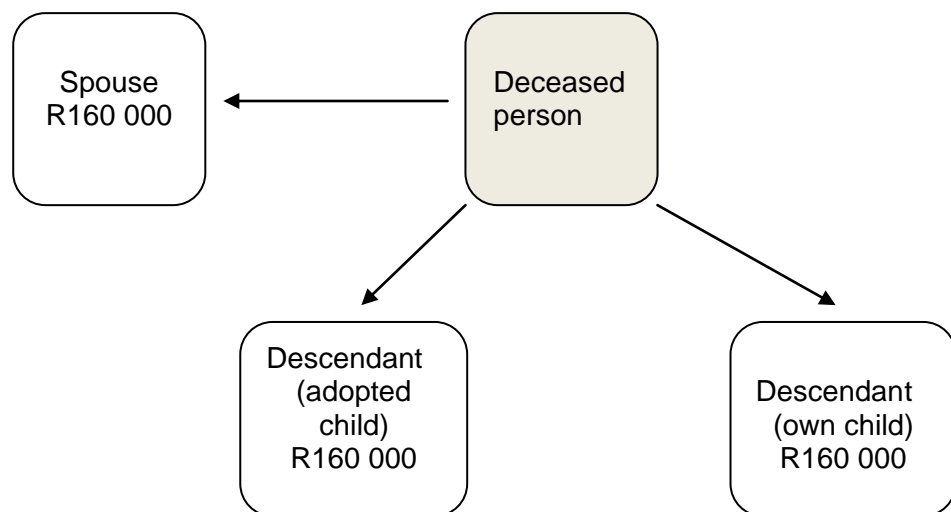
5 Abrie, *op cit.*, p.13.

2.3 Spouse and descendant(s) as heirs

- 1 If a deceased person is survived by both a **spouse** and **descendants**, the spouse inherits the greater of R125,000.00 or a *child's share* of the intestate estate (section 1(1)(c)(i)), and the descendants inherit the *residue* (if any) of the intestate estate - (section 1(1)(c)(ii)).

Balance for distribution: R480 000,00

The greater of
R125 000,00 or a
child's share =



- 2.1 Section 2(1) of the **Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009**, provides that the estate or part of the estate of any person who is subject to customary law and who died after 20 September 2010, and who did not leave a will, must devolve in accordance with the Intestate Succession Act, ***subject to the provisions set out in section 2(2)***.
- 2.2 According to **section 2(2)** of Act 11 of 2009, where the deceased is survived by a spouse as well as a descendant, such spouse inherits the greater of R125,000.00 or a *child's share* of the intestate estate - (section 2(2)(a) of Act 11 of 2009);

- 2.3 In Section **2(2)(b) & (c)**, reference is made to two types of “**women**”, namely -
- a) **a woman**, (other than the spouse of the deceased) with whom the deceased entered into a union in accordance with customary law for the purpose of providing children for his spouse’s house; and
 - b) **a woman** who was under customary law married to the deceased (who also was a woman), for the purpose of providing children for the deceased’s house.

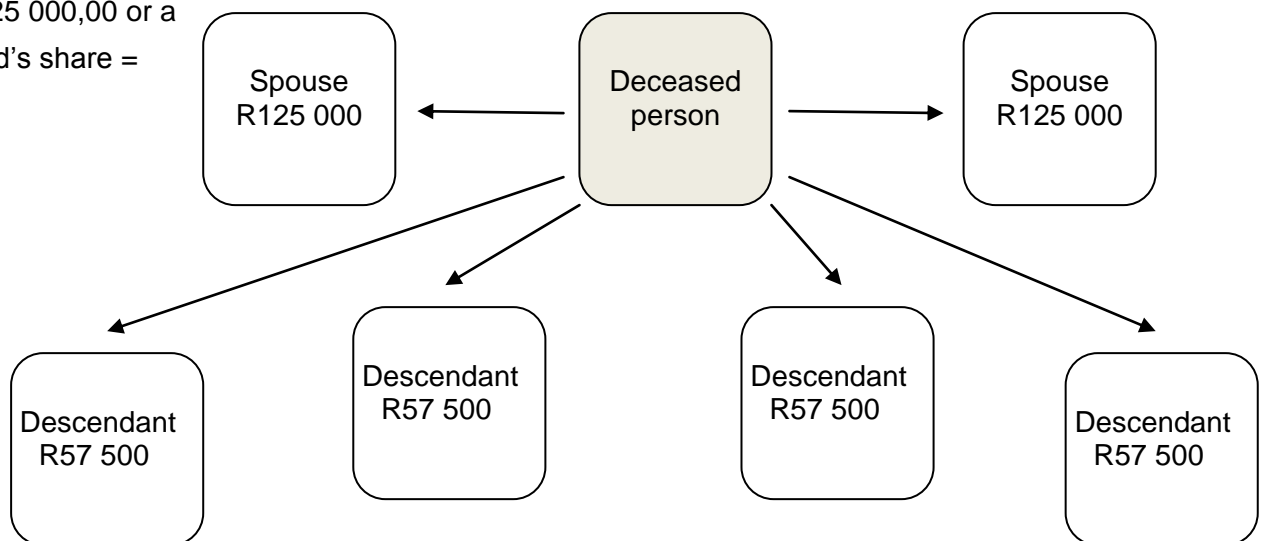
These two types of women, is deemed to be descendants of the deceased person upon the application of the Intestate Succession Act.

- 2.4 Although these women are descendants, they are deemed to be “spouses” in the interpretation of section 1 of the Intestate Succession Act – (section 3(1) of Act 11 of 2009).

- 2.5 Where the deceased is survived by spouses (and women) as well as descendants, each surviving spouse (and woman) is entitled to a child’s share or R125 000,00, whichever is the greater.

Balance for distribution: R480 000,00

The greater of R125 000,00 or a child’s share =

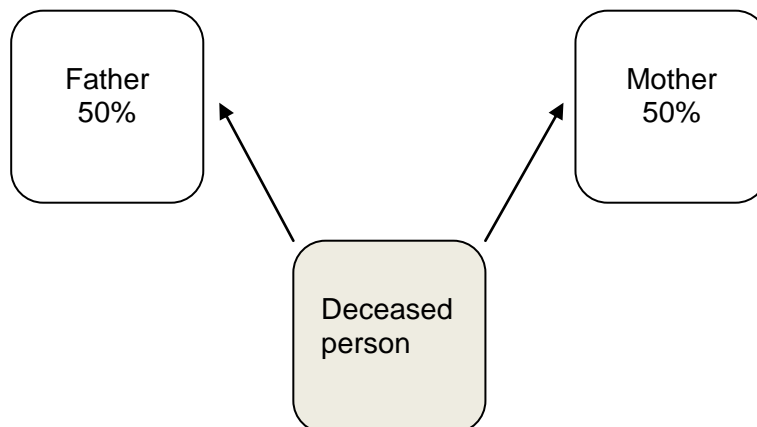


- 2.5 Where the intestate estate is not sufficient to provide **each surviving spouse and woman referred to in section 2(2)(a),(b) and (c) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2008, with R125 000,00**, the estate shall be divided equally between such spouses and women - (section 1(1)(c) of the Intestate Succession Act read together with section 3(2) of Act 11 of 2009).

- 3 A *child's share* is calculated by dividing the monetary value of the estate by a number equivalent to the number of *living children* of the deceased or *predeceased children who left living descendants*, plus -
- one (the spouse); or
 - the number of spouse(s) and women referred to in section 2(2)(a),(b) and (c) of Act 11 of 2009,
- whichever is applicable - (section 4(f), read together with section 3(3) of Act 11 of 2009).

2.4 Parents as heirs

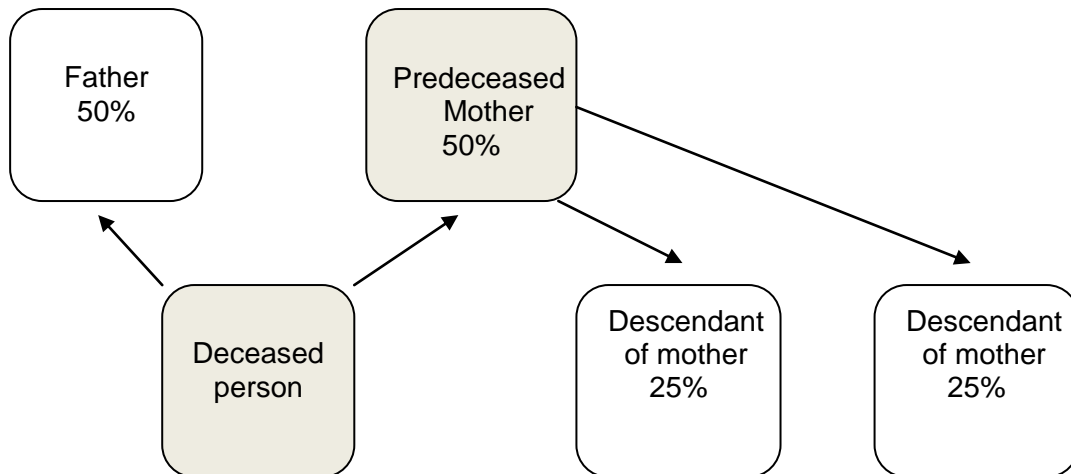
If a deceased person is not survived by a spouse or descendants, but is survived by **both his parents**, his parents inherit the intestate estate in equal shares - (section 1(1)(d)(i)).



2.5 Parents and descendant(s) of parents as heirs

If a deceased person is not survived by a spouse or descendants -

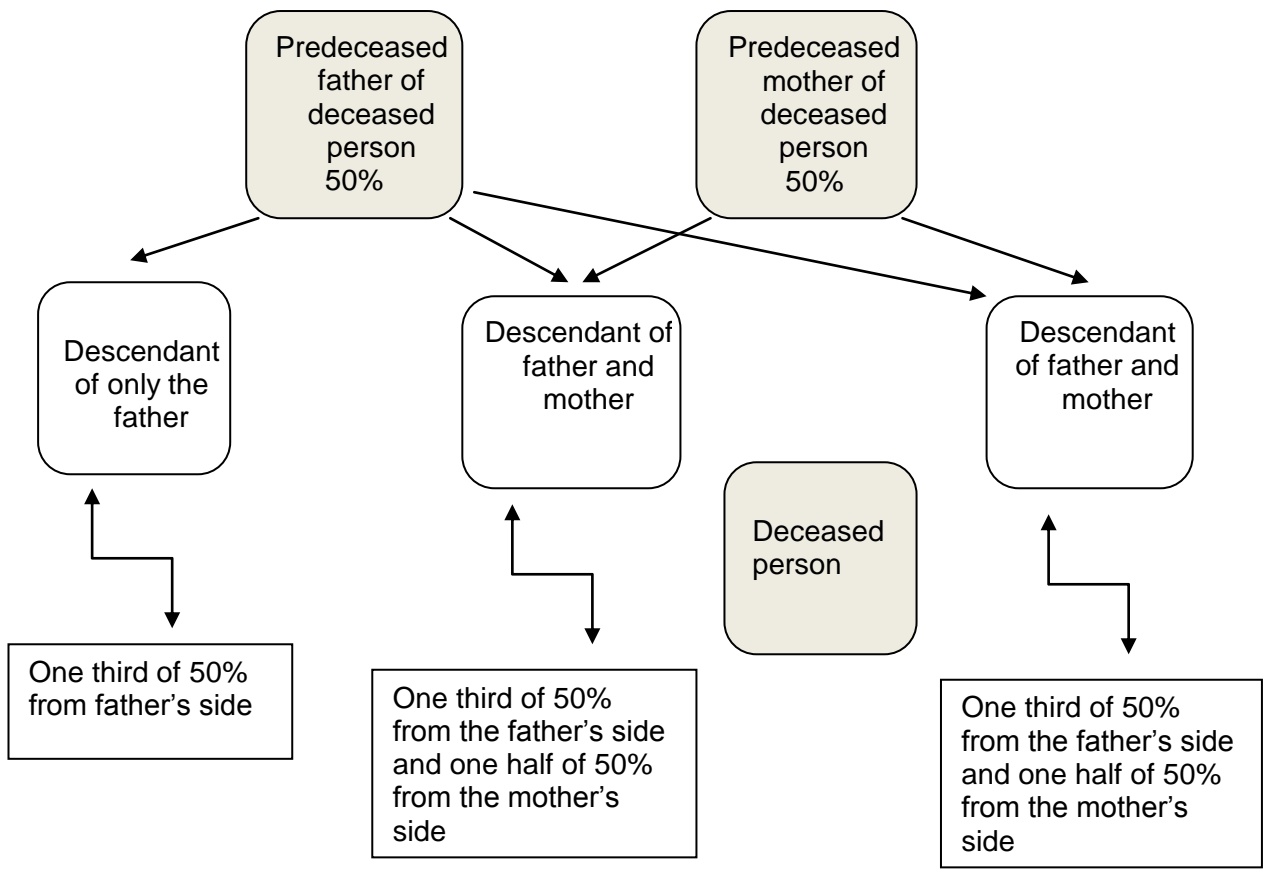
- a) but is survived by **one of his parents**, the *surviving parent* inherits half of the intestate estate and the *descendants* of the deceased parent the other half - (section 1(1)(d)(ii)); or
- b) if there are no such descendants, the surviving parent inherits the entire intestate estate - (section 1(1)(d)(ii)).



2.6 Descendant(s) of deceased's parents as heirs

- 1 If a deceased person is not survived by a spouse or descendant(s) or parents, but is survived by -
 - a) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or
 - b) descendants of his deceased parents who are related to the deceased through both such parents; or
 - c) any of the descendants mentioned in (a) and (b) above, the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother will inherit one half of the estate and the descendants related to the deceased through the deceased father will inherit the other half of the estate - (section 1(1)(e)(i)).

In other words: If both the testator's parents are deceased and the testator does not leave a spouse or children, the descendants of the predeceased parents (collateral relatives of the testator, that is his or her brothers and sisters) inherit the intestate estate in a particular proportion.⁶



2.7 Descendants of only one parent of the deceased

Where only one of the predeceased parents of the deceased person leaves descendants (collateral relatives of the deceased), those descendants inherit the entire deceased estate - (section 1(1)(e)(ii)).

2.8 Other competent heirs

If a deceased person is not survived by a spouse, descendant(s), parents or descendants of parents, the other blood relatives of the deceased who are related to him nearest in degree inherit the entire intestate estate in equal shares - (section 1(1)(f)).

2.9 Adopted children

An adopted child is deemed to be the legal child of his adoptive parent. An adopted child can inherit from his adoptive parents and their blood relatives - (section 1(4)(e)(i)). Similarly an adoptive parent and his or her blood relatives can inherit from an adopted child - (section 1(5)).

An adopted child cannot, however, inherit from his or her natural parents and their **blood relatives** - (section 1(4)(e)(ii)), and they cannot inherit from him or her - (section 1(5)). An adopted child may however inherit from his natural parent who is also his adoptive parent or who was at the time of the adoption married to the adoptive parent of the child - (section 1(4)(e)(ii)).

2.10 Born out of wedlock

Having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation - (section 1(2)).⁷

⁷ This is the case notwithstanding the provisions of any law or the common law or customary law, but subject to the provisions of the Intestate Succession Act and sections 40(3) and 297(1)(f) of the Children's Act 38 of 2005.

2.11 Child accepted in accordance with customary law as own child

- 1 A person who is not a descendant in terms of the Intestate Succession Act, but, who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child,⁸ shall be deemed -
- i) to be the descendant of the deceased person who has accepted such child as his or her own;
 - ii) not to be a descendant of his or her natural parent or parents, except in the case of a natural parent who is also the parent who accepted that person in accordance with customary law as his or her own child, or was, at the time when the child was accepted, married to the parent who so accepted the child - (section 1(4)(eA) of the Intestate Succession Act)
- 2 If a person who is not a descendant in terms of the Intestate Succession Act, but, who, during the lifetime of the deceased person, was accepted by the deceased person in accordance with customary law as his or her own child⁹ –
- is deemed to be a descendant of the deceased person, or
 - is deemed not to be a descendant of his or her natural parent,
- the deceased person shall be deemed to be an ancestor of such child, or shall be deemed not to be an ancestor of that child, as the case may be - (section 1(5A) of the Intestate Succession Act).¹⁰

2.12 Renunciation if surviving spouse is also entitled to inherit

If a descendant¹¹ of a deceased, who, together with the surviving spouse of the deceased, is entitled to a benefit from an intestate estate, renounces his right to receive such a benefit, such benefit shall vest in the surviving spouse - (section 1(6)).

8 This person forms part of the definition of “descendant” in Section 1(a) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009.

9 This person forms part of the definition of “descendant” in Section 1(a) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009.

10 Sections 1(4)(eA) and 1(5A) was inserted by the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

2.13 Disqualification or renunciation if no surviving spouse

If a person is -

- a) disqualified from being an heir of the intestate estate of the deceased; or
- b) renounces his right to be an heir of the intestate estate of the deceased

any benefit which he would have received

- a) if he had not been so disqualified; or
- b) if he had not so renounced his right

shall devolve

- a) as if he was not so disqualified; or
- b) as if he had died immediately before the death of the deceased - (section 1(7)).

Note however that this devolution is subject to the provisions of section 1(6) as set out in paragraph 2.12 above.

Question:

A died on 15 April 2008 intestate. Who will be entitled to inherit his estate in the following instances and what will the division be: -

- 1.1 he is survived by his wife and three children. The marriage was out of community of property and the balance for distribution is R335 000,00 [4]
- 1.2 he was a bachelor and is survived by his father, two brothers and two children of his sister who died three years ago. The balance for distribution is R300 000,00. [4]
- 1.3 he was married out of community of property and is survived by his wife, one child born of that marriage, an adopted child and a stepchild, being the child of his wife from her previous marriage. The balance for distribution is R480 000,00. [4]

Answer 1.1

Answer 1.1

The surviving wife will receive R125 000,00.
Each child will receive R70 000,00.

Answer 1.2

A's father will receive 50% of his estate, i.e. R150 000,00.
A's two brothers will receive each R50 000,00.
The two children of A's sister will each receive R25 000,00.

Answer 1.3

The surviving wife will get R160 000,00.
The child from the marriage with the deceased will receive R160 000,00.
The adopted child will receive R160 000,00.

Note on question 1.3

If the parties were married **in community of property**, the answer is as follows, namely: -
The surviving wife is entitled to R365 000,00, consisting of: -
R240 000,00 (50% of the estate due to the community of property); and
R125 000,00 (the R125 000,00 is greater than a child's share).

11 Excluding a minor or mentally ill descendant.

The child from the marriage with the deceased as well as the adopted child are each entitled to R57 500,00, being the residue of the estate

(R480 000,00 - R365 000,00 = R115 000,00) divided by two. The stepchild is not entitled to anything.

Examination questions on Chapter 12

The short questions quoted in this chapter, come from previous years' examination papers. These questions are listed below for those who would like to examine the old examination papers.

Page 11-12

Question 8 (Part 2) September 2008	[12]
Also asked in	
Question 11 (Part 2) May 2007	[12]
Question 2 (Part 1) September 2001	[10]
Question 2 (Part 2) May 1998	[12]