

The Administration of Customary Law Estates Post the  
Enactment of the Reform of Customary Law of  
Succession Act: A Case Study from Rural Eastern Cape,  
South Africa



by

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OSMFAT002

This dissertation is submitted for the degree of

DOCTOR OF PHILOSOPHY

in the Department of Private Law

University of Cape Town

October 2019

Word count: 85 304

Supervisor: Prof. Chuma Himonga

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## **PLAGIARISM DECLARATION**

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**Fatima Osman**

## **ABSTRACT**

After years of deliberation and judicial activism, the South African legislature in September 2010 brought into force the Reform of Customary law of Succession and Regulation of Related Matters Act 11 of 2009 (the Reform Act). The Act regulates the devolution of property of individuals who live according to customary law and die intestate. The notorious customary law principle of male primogeniture, according to which males inherited to the exclusion of females, has been abolished and replaced with the common law system of intestate succession. It has been nine years since the enactment of the Reform Act. This thesis investigates the implementation of the Act to understand its application by officials and people's experiences thereof. It is a qualitative study that draws upon doctrinal and empirical research to address its objectives.

The theoretical concepts of deep legal pluralism and the semi-autonomous social field are employed as the analytical prism through which the administration of customary law estates is investigated. The findings are based on a comprehensive case study conducted in a rural village in the Eastern Cape of South Africa. Individuals, the traditional leader, the headman and state officials were interviewed to understand how estates are reported and the devolution of benefits. The interviews were augmented by an analysis of a sample of case files drawn from the Master's Office responsible for the administration of estates.

The findings revealed the resilience of living customary law in the administration of estates, particularly in respect of homes situated in rural areas. In this regard, living customary law has evolved to allow women and daughters greater rights to property but it still displays patriarchal overtones as males are considered the true owners of homes. The Reform Act regulates more effectively the devolution of assets found in the formal sector, such as financial assets. The case study found most estates were valued at less than R250 000, with the result that deceased's surviving spouse and children were the primary beneficiaries of the estate. However, a statutory right of inheritance is no guarantee that beneficiaries enjoy their rights as there is a significant risk of property grabbing. While much has been done to reform the customary law of succession, there is room for improvement in securing the rights of dependents of the deceased, facilitating the reporting of estates and ensuring the implementation of mediated solutions in communities. The thesis thus offers practical recommendations to improve the system of administration. First, the thesis recommends a move towards a functional, fact-based approach to inheritance which extends inheritance rights to individuals supported by the deceased while

alive, regardless of whether they constitute a spouse or a descendant as statutorily defined. This addresses the lack of protection for unmarried partners and the broader notions of family found in customary law. Second, it advocates for the greater leveraging of traditional institutions such as chiefs and families in the reporting of estates and resolution of disputes. Third, the dissemination of information through state and non-state institutions is promoted. Fourth, it advocates for the explicit condemnation of corrupt state practices which exploit vulnerable individuals. Finally, the thesis recommends further research into practices such as the existence of family property and administration of estates in urban areas. Understanding the nuanced manner in which administration is experienced is argued to be necessary for successful reform.

## ACKNOWLEDGEMENTS

First, all thanks to my Creator for making this possible.

Thank you to my supervisor, Professor Chuma Himonga, for her invaluable comments and patience with this task but more importantly throughout my academic career. I was fortunate to have found brilliance and generosity of spirit in a supervisor and mentor.

Professor Himonga held the Department of Science and Technology National Research Foundation Chair in Customary Law, Indigenous Values and Human Rights. My study was conducted under the auspices of the Chair and I wish to thank the Chair for funding my PhD, and the research team at the Chair, in particular Dr Fatima Diallo for her guidance in the early stages of the study.

During my PhD, I was involved, through attachment to the Chair, in a collaborative research project, *The State and Indigenous legal cultures: law in search of legitimacy*, led by Prof Ghislain Otis at the University of Ottawa. I wish to thank the Chair and Prof Otis for the financial support to attend Young Researchers' Workshops on legal pluralism and international meetings on the project as well as for the invaluable opportunity to have presented some of my research to leading international scholars in the field.

Thank you to my family – all of them – who have always indulged my aspirations. This project was only possible because of your sacrifices.

I owe a huge debt of appreciation to my friends and colleagues at UCT and abroad who acted as a sounding board and whose criticisms have greatly refined my thinking. Your time and efforts are sincerely appreciated.

Thank you to my research assistant, Mr Mqwenu Gaqa, and editor, Ms Sally Burt, for their professional service.

Finally, thank you to the individuals in Kwelanga and state officials who taught me so much and who gave so generously of their time.

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## LIST OF ABBREVIATIONS

<b>Term</b>	<b>Definition</b>
Const. Ct. Rev.	Constitutional Court Review
CILSA	Comparative and International Law Journal of Southern Africa
Child & Fam. LQ	Child and Family Law Quarterly
Emory Int’L. Rev.	Emory International Law Review
JS Afr. L.	Journal of South African Law
Law Libr. J.	Law Library Journal
McGill LJ	McGill Law Journal
Mich. J. Gender & L.	Michigan Journal of Gender and Law
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law Journal
Stellenbosch L. Rev.	Stellenbosch Law Review
St. Louis U. L.J	St. Louis University Law Journal
Sydney L. Rev.	Sydney Law Review
THRHR	Journal of Contemporary Roman Dutch Law
Theoretical Inq. L.	Theoretical Inquiries in Law
TSAR	Journal for South African Law
Tul. Eur. & Civ. LF	Tulane European and Civil Law Forum
U. Colo. L Rev.	University of Colorado Law Review

# CHAPTER 1 INTRODUCTION

## 1.1 Introduction

Customary law<sup>1</sup> succession was generally intestate and occurred in accordance with the rules of customary law as opposed to a will.<sup>2</sup> Premised on ensuring the welfare of surviving dependents, customary law succession focused on the identification of a successor who succeeded to the status of the deceased and assumed the rights and responsibilities of the deceased, including care of the deceased's dependent family members.<sup>3</sup> The concept of succession was broader than the notion of inheritance, which referred to the devolution of property.<sup>4</sup> Male primogeniture was a defining characteristic of customary law succession, which was the idea that the eldest male son or the closest male relative succeeded to the position of the deceased.<sup>5</sup> The successor generally inherited the deceased's property in order to discharge his obligations.<sup>6</sup> Women and younger siblings generally did not succeed but were owed a duty of care and in some instances inherited property.<sup>7</sup> Furthermore, primogeniture was not a rigid rule, and succession may have occurred differently to protect the best interests of the family.<sup>8</sup>

The state regulation of customary law during the colonial and apartheid eras distorted customary law by solidifying the application of the rule of male primogeniture and focusing on inheritance to property rather than succession to status.<sup>9</sup> The duty of care owed to dependent family members, central to the customary law of succession, was omitted from legislation. This

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<sup>1</sup> Customary law is defined in the Recognition of Customary Marriages Act 120 of 1998 ('the Recognition Act') as 'the customs and practices observed among the indigenous African peoples of South Africa which form part of the culture of those peoples'. 'Customary law' is the expression used in the South African Constitution, the Constitution of the Republic of South Africa, 1996 ('the Constitution') and is used interchangeably with the term 'indigenous law' in South African law.

<sup>2</sup> C Rautenbach 'Law of succession and inheritance' in C Rautenbach and J Bekker (eds) *Introduction to legal pluralism* (2014) 171 at 173 and TW Bennett *Customary law in South Africa* (2004) 334.

<sup>3</sup> Rautenbach (note 2) 173 and Bennett (note 2) 334–335.

<sup>4</sup> Rautenbach (note 2) 173.

<sup>5</sup> Bennett (note 2) 335 and *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC) at 593.

For a discussion on the general principles of customary law succession, see Rautenbach (note 2) at 174; J Bekker *Seymour's Customary law in Southern Africa* 5ed (1989) 273; AJ Kerr *The customary law of immovable property and of succession* (1976) and RD Coertze *Bafokeng family law and law of succession* (1990) 240.

<sup>6</sup> L Mbatha 'Reforming the customary law of succession' (2002) 18 *SAJHR* 259 at 260.

<sup>7</sup> *Bhe* (note 5) at 617 and Bennett (note 2) 335.

<sup>8</sup> Bennett (note 2) 335.

<sup>9</sup> C Himonga and T Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 167–172.

allowed an exploitation of the law as male heirs opportunistically claimed benefits while jettisoning any responsibility of care towards family members.<sup>10</sup> The most egregious example of such exploitation is found in the facts of *Bhe v Magistrate Khayelitsha*.<sup>11</sup> In this case, the father of the deceased claimed the deceased's property on the basis of the customary rules of succession and made clear his intention to sell the deceased's immovable property, not caring that it would render his granddaughters and their mother homeless.

Guarding against such blatant abuse of the law is a pressing concern given that a significant portion of the population live according to customary law. South Africa has a population of over 51 million people<sup>12</sup> of whom over 16 million are estimated to live under a tribal authority<sup>13</sup> and may reasonably be assumed to live according to customary law. The estimate, however, does not account for the number of people who may live in urban areas but nonetheless practise customary law and thus the number of people who live according to customary law may be much higher.

After much judicial intervention and legislative deliberation in the customary law of succession, the Reform of Customary law of Succession and Regulation of Related Matters Act<sup>14</sup> ('the Reform Act') was brought into force in September 2010. Its purpose was to, as its name aptly states, 'reform the customary law of succession' and address the inadequate protection afforded to women and children under customary law.<sup>15</sup> The Reform Act applies the Intestate Succession Act<sup>16</sup> to regulate the devolution of intestate customary law estates, effectively replacing the customary law of succession with the common law.<sup>17</sup>

This thesis investigates the implementation of the Reform Act and evaluates whether it is effective in practice. It uses a qualitative case study of a rural village in the Eastern Cape of

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<sup>10</sup> SM Weeks 'Customary succession and the development of customary law: The Bhe legacy: Part III: Reflections on themes in Justice Langa's judgments' 2015 *Acta Juridica* 215 at 215–216.

<sup>11</sup> *Bhe* (note 5).

<sup>12</sup> Statistics South Africa *Census 2011: Census in brief* (2012) 18 available at [http://www.statssa.gov.za/census/census\\_2011/census\\_products/Census\\_2011\\_Census\\_in\\_brief.pdf](http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Census_in_brief.pdf) [accessed on 3/10/18].

<sup>13</sup> C Himonga and E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015) 16.

<sup>14</sup> Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 (see Annexure A).

<sup>15</sup> Preamble of the Reform Act.

<sup>16</sup> Intestate Succession Act 81 of 1987 (see Annexure B).

<sup>17</sup> South Africa is a mixed legal system comprising of Roman law, Roman-Dutch law, English law and African customary law. While common law usually refers to judge-made law, it is used in the thesis to refer to the body of law that draws its values from Roman law, Roman-Dutch law and English law in the form of both legislation and precedent.

South Africa to explore the administration of estates from the perspective of state officials, traditional leaders and ordinary individuals who live according to customary law. It scrutinises the administration process to address the research questions.

This chapter sets out the research question and objectives of the thesis. It thereafter provides an overview of the current literature in the field and explains how the thesis contributes thereto. The methodology employed to conduct the empirical research is then explained. Finally, the chapter describes the structure of the thesis and provides the outline of subsequent chapters.

## **1.2 Research question and objectives**

It has been nine years since the enactment of the Reform Act which means that a significant time has elapsed for its implementation. The research question is:

How are customary law estates administered post the enactment of the Reform Act?

To address this question, the research pursues the following objectives:

- 1 Examine the institutions and persons who administer customary law estates.
- 2 Explain the current sources, including repertoires, norms, practices or law used to administer customary law estates.
- 3 Explain how the Reform Act and associated law reforms are given effect to in practice.
- 4 Explain how individuals experience the administration of a customary law estate.
- 5 Identify and understand the factors that hinder or promote compliance with the Reform Act.

## **1.3 Literature review**

### *1.3.1 Historical position*

Historically, the South African customary law of succession was based on the principle of male primogeniture and universal succession. The defining principle of male primogeniture provides that succession is through the male line and that the eldest son or his eldest male descendant

will inherit.<sup>18</sup> Schapera,<sup>19</sup> Kerr,<sup>20</sup> Bekker,<sup>21</sup> and Bennett<sup>22</sup> among others<sup>23</sup> provide rich, detailed accounts of succession practices in customary law by examining, among others, the ritual elements accompanying death, particular tribal customs, universal succession and case law.<sup>24</sup> These accounts provide the background of the customary law of succession in the thesis and ensure a proper understanding of customary law practices.

The principle of male primogeniture was not rigidly applied to preclude women from accessing property. Bekker, de Kock<sup>25</sup> and Mbatha,<sup>26</sup> among others,<sup>27</sup> discuss developments in customary law that allowed women and younger siblings to control property. These developments contrast starkly with the state's entrenchment of the principle of male primogeniture.<sup>28</sup> The ossification

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<sup>18</sup> Bennett (note 2) 337; Kerr (note 5); JC Bekker and PD de Kock 'Adaption of the customary law of succession to changing needs' 1992 25 *CILSA* 366 at 367. See also E Grant 'Human rights, cultural diversity and customary law in South Africa' 2006 (50)1 *Journal of African law* 2 at 10 where the rule of male primogeniture is described.

<sup>19</sup> I Schapera *A handbook of Tswana law and custom* 5ed (1955).

<sup>20</sup> Kerr (note 5) and AJ Kerr 'Customary law, fundamental rights and the Constitution' (1994) 111 *SALJ* 720 at 725.

<sup>21</sup> Bekker (note 5).

<sup>22</sup> TW Bennett *A sourcebook for African customary law for Southern Africa* (1991).

<sup>23</sup> M Hunter *Reaction to conquest: Effects of contact with Europeans on the Pondo of South Africa* 2ed (1961) 119–121 and 227–231; I Maithufi *The customary law of succession and inheritance and internal conflict of laws in South Africa, with special reference to Bophuthatswana* (unpublished LLM thesis, University of Bophuthatswana, 1988); N Olivier, J Bekker and W Olivier *Indigenous law* (1995) 147–173 and C Harries *The laws and customs of the Bapedi and cognate tribes of the Transvaal* (1929) 38–45 and Coertze (note 5). Also see I Moodley *The customary law of intestate succession* (unpublished PhD thesis, University of South Africa, 2012) 17–45 which provides a summary of the principles of customary law intestate succession.

<sup>24</sup> The South African Law Commission discusses the purpose and nature of the customary law rules of succession in South African Law Commission Discussion Paper 93 (Project 90) *Customary law of succession* (2000) 1–5. Also see Mbatha (note 6) at 260–262.

<sup>25</sup> Bekker and de Kock note (18).

<sup>26</sup> Mbatha (note 6) at 268–272

<sup>27</sup> T Weinberg 'Contesting customary law in the Eastern Cape: Gender, place and land tenure' 2013 (1) *Acta Juridica* 100; JC Bekker and DS Koyana 'The judicial and legislative reform of the customary law of succession' (2012) 45(3) *De Jure* 568 at 570 and Bennett (note 2) 341–345.

<sup>28</sup> During the colonial period, the state regulation of customary law succession varied across the country. Generally, however, where an individual died intestate, the property devolved according to customary law. If courts were called to give effect to customary law, they applied male primogeniture as representative of customary law. This was augmented by rules which provided that quitrent property (a system of land tenure where indigenous landowners were taxed by the state) was inherited by one male heir, in accordance with the prescribed table of succession. The order of succession was based on male primogeniture. The approach was consolidated during the apartheid era. See Olivier, Bekker and Olivier (note 23) 167 for an overview of the historical statutory provisions that governed customary law succession. For a general discussion of the historical treatment of customary law in South Africa, see C Rautenbach 'South African common and customary law on intestate succession: A question of harmonisation, integration or abolition' 2008 (3) *J. Comp. L.* 119 at 119–122; Moodley (note 23) 46–52 and Bennett (note 2) 34–44.

Section 23 of the Black Administration Act 38 of 1927 ('the Black Administration Act') and Regulations for the Administration and Distribution of the Estates of Deceased Blacks in GN R200 GG 10601 of 6 February 1987 were critical during the pre-constitutional era to the administration of estates.

of the principle of male primogeniture resulted in the exclusion of women from inheritance and the promotion of males as the sole heirs without any concomitant responsibility to care for the family.<sup>29</sup> The discussions around ossification of the law are used in the thesis to explain the state's distortive role in promoting the patriarchal features of customary law while simultaneously subverting the family and group nature of the law. It also contextualises the pressing need for reform considering the marginalisation of women's rights of inheritance.

Furthermore, the state, in pursuit of its agenda of racial segregation, concurrently created a separate system for the administration of estates of Black persons.<sup>30</sup> The administration of estates of Black persons was governed by the Black Administration Act and regulations thereunder, while the administration of the estates of all other persons was governed by the Administration of Estates Act<sup>31</sup> and the regulations thereunder. The result was a dual, racist system of succession in South Africa that positioned the customary law of succession as an inferior system of law. This dual system of administration is discussed by several authors<sup>32</sup> and contextualises the need for reform.

### 1.3.2 *Impetus for change*

The advent of democracy was a pivotal moment for customary law in South Africa. The South African Constitution recognises customary law and elevates it to the same status and position as the common law.<sup>33</sup> The courts are obliged to apply customary law when applicable, subject

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While the Black Administration Act did not explicitly refer to the principle of male primogeniture, it was interpreted by the courts to refer to it, see *Musefuwa and others NNO v Mathivha and others* 1990 (3) SA 446 (V) at 448; *Mthembu v Letsela* 1997 (2) SA 936 (T) at 938 and *Bhe* (note 5) at 596–597.

Also see KwaZulu Act on the Code of Zulu Law 16 of 1985 and The Natal Code of Zulu Law (Proc R151 of 1987). For a discussion of the Codes see T Bennett and A Pillay 'The Natal and KwaZulu Codes: The case for repeal' 2003 (19) *SAJHR* 217 and JC Bekker and JJJ Coertze 'The KwaZulu Act on the Code of Zulu Law, 1981' 1983 (46) *THRHR* 285.

Rautenbach also discusses the land regulations as a codification of the customary law of succession, see Rautenbach (note 2) 183–185.

<sup>29</sup> Weeks (note 10) at 216. Weinberg also provides an excellent discussion of how state interventions restricted the inheritance of land by women between 1930 and 1960 in Ciskei, being a former homeland in the now Eastern Cape province of South Africa; Weinberg (note 27).

<sup>30</sup> Section 25 of the Black Administration Act defined 'black' as 'any person who is a member of any aboriginal race or tribe of South Africa'.

<sup>31</sup> Administration of Estates Act 66 of 1965.

<sup>32</sup> Maithufi (note 23); TW Bennett 'Legal pluralism and the family in South Africa: Lessons from customary law reform' 2011 (25) *Emory Int'l L. Rev.* 1029 at 1048–1050; Bennett (note 22) and C Rautenbach 'The administration of black estates: Life before and after 5 December 2002' 2004 (2) *THRHR* 216.

<sup>33</sup> Sections 30 and 31 represent the individual and group right to culture respectively which may not be exercised in a manner inconsistent with the Bill of Rights.

to the Constitution and legislation that specifically deals with it.<sup>34</sup> The Constitution further prohibits unfair discrimination based on, among others, race, gender, sex and culture.<sup>35</sup> The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>36</sup> was enacted to give effect to this prohibition and prohibits discrimination arising from, among others, cultural laws and practices.<sup>37</sup>

This new-found recognition of customary law coupled with an obligation to ensure that customary laws and practices do not discriminate against individuals served as an impetus for reform.<sup>38</sup> The customary law of succession characterised by the notorious principle of male primogeniture and inequitable inheritance rights among children would have to be brought into line with the constitutional rights and values. The South African Law Reform Commission<sup>39</sup> ('SALRC') commissioned numerous investigations into the best approach to reform in this arena.<sup>40</sup> Despite a protracted period of investigation that spanned eight years, legislative reform was not forthcoming. The courts were thus unsurprisingly continuously called upon to decide

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Sections 39(2) and (3) recognise customary law alongside the common law in the development and recognition of rights in the law.

Section 181(1)(c) provides for the establishment of a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, section 211(1) recognises the institution of traditional leadership and section 211(2) provides for the functioning of traditional authorities.

For a discussion on the constitutional recognition of customary law, see C Himonga and C Bosch 'The application of African customary law under the Constitution of South Africa: Problems solved or just beginning' 2000 (117) *SALJ* 306 at 312–314; C Rautenbach 'Mixing South African common law and customary law of intestate succession: 'Potjiekos' in the making' in Örüci E (ed) *JCL Studies in Comparative Law: Mixed Legal Systems at New Frontiers* (2010) 222; Bennett (note 2) 76–100; Himonga and Nhlapo (note 9) 17–20; C Rautenbach 'Some comments on the status of customary law in relation to the Bill of Rights' 2003 (14) *Stellenbosch L. Rev.* 107 and Moodley (note 23) 57–71.

<sup>34</sup> Section 211(3) of the Constitution.

<sup>35</sup> Section 9(3) of the Constitution.

<sup>36</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>37</sup> Sections 8(c), (d) and (e) of the Promotion of Equality and Prevention of Unfair Discrimination Act.

<sup>38</sup> Rautenbach (note 33) 226.

<sup>39</sup> In 2002, the name of the South African Law Commission was changed to the South African Law Reform Commission by the Judicial Matters Amendment Act 55 of 2002.

<sup>40</sup> South African Law Commission Issue Paper 4 (Project 90) *Harmonisation of the common law and the indigenous law (The application of customary law: Conflict of personal laws)* (1996); South African Law Commission Issue Paper 12 (Project 108) *Harmonisation of the common law and indigenous law (Draft issue paper on succession)* (1998); South African Law Commission *Customary law of succession* (note 24) and South African Law Commission (Project 90) *The harmonisation of the common law and indigenous law. Report on conflicts of law* (1999).

This process of investigation is also discussed in C Rautenbach and W du Plessis 'South African Law Commission proposals for customary law succession: Retrogression or progression?' (2003) 1 *De Jure* 20 and Moodley (note 23) 73–79.

In 2004, the SALRC released a report on the responses received and making recommendations for reform, see South African Law Reform Commission (Project 90) *Report on the customary law of succession* (2004).

the constitutionality of the substantive and procedural rules governing the customary law of succession.<sup>41</sup>

The judicial interventions proved to be important as the Reform Act is essentially a codification of the most significant court decision in this arena, namely the *Bhe* decision. Thus, the investigations by the SALRC on reform, the piecemeal, judicial interventions and the evaluations thereof by academics are used in the thesis to interpret and evaluate the Reform Act. The analysis of the Act is greatly enriched by the rigorous scholarly engagement with the legislative and judicial history that led to the enactment of the Reform Act.<sup>42</sup>

Furthermore, several authors have critically examined the provisions of the Reform Act.<sup>43</sup> The thesis uses these writings along with a procedure manual issued by the Department of Justice

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<sup>41</sup> See *Mthembu v Letsela* 1997 (note 28); *Mthembu v Letsela* 1998 (2) SA 675 (T) and *Mthembu v Letsela* 2000 (3) SA 867 (SCA) which dealt with a challenge to the principle of male primogeniture. For a discussion of the trio of cases, see A Kerr 'Inheritance in customary law under the interim Constitution and under the present Constitution' 1998 (115) *SALJ* 262; D Koyana 'Customary law and the role of the customary courts today' 1997 *Forum Consultus* 126; AV Rensburg '*Mthembu v Letsela*: The non-decision' 2001 (4) *PELJ* 1; I Maithufi 'The Constitution and the application of customary family law in South Africa' 2002 (35) *De Jure* 207 at 220 and I Maithufi 'The constitutionality of the rule of primogeniture in customary law of intestate succession' 1998 (61) *THRHR* 142.

See *Zondi v President of The Republic of South Africa* 2000 (2) SA 49 (N) and the discussion thereon in I Maithufi '*Zondi v President of the Republic of South Africa* unreported (NPD)' 2000 (33) *De Jure* 155 at 156.

The case dealt with a challenge to the regulations for the administration of estates of Black persons.

In *Moseneke v The Master* 2001 (2) SA 18 (CC) the magistrate's jurisdiction over the estates of Black individuals which devolved in accordance with the common law was challenged.

Finally, in the landmark case of *Bhe* (note 5), the Constitutional Court declared the principle of male primogeniture unconstitutional and that going forward, the Master's Office and not the magistrate would have jurisdiction over the administration of all customary law estates.

For a discussion of the *Bhe* case, see Grant (note 18); Bekker and Koyana (note 27); C Rautenbach, W du Plessis and G Pienaar 'Is primogeniture extinct like the dodo, or is there any prospect of it rising from the ashes? Comments on the evolution of customary succession laws in South Africa: Notes and comments' (2006) 22(1) *SAJHR* 99; E Knoetze and M Olivier 'To develop or not to develop the customary law: That is the question in *BHE* : Note' (2006) (26)1 *Obiter* 126; C Rautenbach (note 28) and C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' 2005 *Acta Juridica* 82. C Rautenbach 'Modern day impact on customary succession laws in South Africa' (2004) 2(1) *International Journal of the Humanities* 673 discusses the High Court decision of *Bhe v The Magistrate Khayelitsha* 2004 (2) SA 544 (C).

Also see Moodley (note 23) 79–129 for an extensive discussion of the judgments.

<sup>42</sup> For example, Rautenbach and du Plessis (note 40); Rautenbach, du Plessis and Pienaar (note 41); Himonga (note 41) and Maithufi 'The Constitution and the application of customary family law in South Africa' (note 41). Also see S Mnisi *The interface between living customary law(s) of succession and South African state law* (unpublished PhD thesis, Oxford New College, 2009); K Madinginye *Impact of the Intestate Succession [Act] on women and children* (unpublished LLM thesis, University of Pretoria, 2017) and Rautenbach 'Mixing South African common law and customary law of intestate succession' (note 33).

Also see Moodley (note 23) 79–129 for an extensive discussion of the judgments.

<sup>43</sup> A number of basic texts discuss the operation of the Reform Act, see Himonga and Nhlapo (note 9) 176–185; J Jamneck, C Rautenbach, M Paleker, *et al The law of succession in South Africa* (2012) 243–247 and Rautenbach (note 2); R Badejogbin 'Interplay of customary law of testacy and statutory regulation of intestacy with respect

and Constitutional Development<sup>44</sup> on the administration of customary law estates to provide a comprehensive exposition of the current substantive and procedural law governing the administration of customary law estates.

The thesis highlights, in particular, the Reform Act's focus on the notion of a 'spouse' and 'descendant' for the purposes of inheritance. It provides a critique of the preferential treatment of marriage over cohabitant relationships,<sup>45</sup> especially as the new dispensation focuses on the nuclear family which may not be the norm in customary law. Given the declining rates of marriage,<sup>46</sup> the preponderance of cohabitant relationships<sup>47</sup> and the difficulties women experience in proving the existence of their marriage,<sup>48</sup> the thesis questions whether protection should be extended to vulnerable, unmarried partners.<sup>49</sup>

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to the transfer of customary law rights in land in South Africa' 2014/15 (4) *SADC Law Journal* 10; C Rautenbach 'A few comments on the (possible) revival of the customary law rule of male primogeniture: Can the common-law principle of freedom of testation come to its rescue?' 2014 *Acta Juridica* 132; Rautenbach, du Plessis and Pienaar (note 41) and Bekker and Koyana (note 27).

<sup>44</sup> M Meyer and M Rudolph *Policy and procedure manual: Administration of intestate deceased estates at service points* (2016).

<sup>45</sup> L Schafer 'Marriage and marriage-like relationships: Constructing a new hierarchy of life partnerships' 2006 (123) *SALJ* 626.

<sup>46</sup> C Mhongo and D Budlender 'Declining rates of marriage in South Africa: What do the numbers and analysts say?' 2013 *Acta Juridica* 181 at 196; South African Law Reform Commission Project 118 *Report on Domestic Partnerships* (2006) 4 and V Hosegood 'Women, marriage and domestic arrangements in rural KwaZulu-Natal, South Africa' 2013 *Acta Juridica* 143 at 144. In the 2001 Census, just over 2.3 million people described themselves as living together like married partners without being married, which constituted approximately 8 per cent of the adult population at the time, Statistics South Africa 'Census 2001: Primary tables South Africa census '96 and 2001 compared' (2001) 31 available at [http://www.statssa.gov.za/census/census\\_2001/primary\\_tables/RSAPrimary.pdf](http://www.statssa.gov.za/census/census_2001/primary_tables/RSAPrimary.pdf) [accessed on 9/01/18].

<sup>47</sup> Himonga and Moore (note 13) 15; *Volks v Robinson* (2005) 5 BCLR 446 (CC) para 119; C Lind 'Domestic partnerships and marital status discrimination' 2005 *Acta Juridica* 108 at 111–112. In *Volks v Robinson*, the Constitutional Court refused to extend the benefits of the Maintenance of Surviving Spouses Act 27 of 1990 to a permanent life partner in a heterosexual relationship. For a critique of the case, see L Wildenboer 'Marrying domestic partnerships and the Constitution: A discussion of *Volks NO v Robinson* 2005 5 BCLR 446 (CC): Case note' 2005 (20) *SAPL* 459; B Smith 'Rethinking *Volks v Robinson*: The implications of applying a "contextualised choice model" to prospective South African domestic partnerships legislation' 2010 (13) *PELJ* 238. In the recent Constitutional Court case of *Laubscher N.O. v Duplan* 2017 (2) SA 264 (CC), Froneman J agreed with the criticisms of the *Volks* and stated that it was not inclusive enough in the current social circumstances. He advocated a departure from the decision on the basis that it was clearly wrong (para 84 and 86).

<sup>48</sup> South African Law Commission *Customary law of succession* (note 24); M De Souza, 'When non-registration becomes non-recognition: Examining the law and practice of customary marriage registration in South Africa' 2013 *Acta Juridica* 239; Himonga and Moore (note 13) 111–127.

<sup>49</sup> For an argument about the need to protect the cohabitants, see *Volks v Robinson* (note 47) para 163–182 and L Mwambene and H Kruuse 'Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa' 2013 *Acta Juridica* 292; D Meyerson 'Who's in and who's out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa' 2010 (3) *Const. Ct. Rev.* 295 and Lind (note 47).

### 1.3.3 Empirical research

As customary law is acknowledged to be the living practices of people, the thesis examines current empirical research on the matter. As a start, Higgins *et al* and Bekker and Koyana conducted limited investigations into the impact of *Bhe* decision in communities.<sup>50</sup>

Mnisi conducted a more significant research project in her doctoral thesis in which she examined the interaction between living customary law and state law in South Africa through the case study of succession. She conducted field research in 2007–2008 into the state of customary succession in rural South Africa and the impact of the *Bhe* decision on it.<sup>51</sup> Mnisi's empirical research was conducted almost ten years ago prior to the enactment of the Reform Act, and this thesis builds on it to examine how customary law estates are administered post the enactment of the Reform Act. Mnisi's research holds valuable insights into the interaction between the state and customary law of succession. It also highlights the potential for manipulation and exploitation created when there are gaps between the systems, and it is an important resource for understanding the South African customary law of succession.

More recently, in 2015, Himonga and Moore published the results of their socio-legal study of customary marriage, divorce and succession in South Africa.<sup>52</sup> The study was conducted over a period of 20 months from June 2011 and examined, among others, the practical implementation of the *Bhe* decision and the administration of estates.<sup>53</sup> It included an examination of the records of estates administered by the master in two provinces, and interviews with officials at the Master's Office and ordinary individuals on customary law succession. Himonga and Moore's study is a critical source in understanding the administration of small estates as well as individuals' experiences of customary law succession and the devolution of property. A limitation of the Himonga and Moore study is that it focuses on the implementation of the *Bhe* decision and not the Reform Act which regulates customary law succession today. The thesis furthers Himonga and Moore's research to investigate the administration process post the enactment of the Reform Act and the distribution of an estate after the appointment of an administrator.

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<sup>50</sup> TE Higgins, J Fenrich and Z Tanzer 'Gender equality and customary marriage: Bargaining in the shadow of post-apartheid legal-pluralism' 2007 *Fordham International Law Journal* 1651 and Bekker and Koyana (note 27).

<sup>51</sup> Mnisi (note 42) 223.

<sup>52</sup> Himonga and Moore (note 13).

<sup>53</sup> *Ibid* 228–273.

In addition, the thesis builds on the work of Maphalle,<sup>54</sup> Budlender<sup>55</sup> and Burman<sup>56</sup> who discuss particular aspects of succession, access to property and the administration of an estate.

Thus, the thesis draws on the exacting and rigorous research of others to confirm findings, explain variations and provide a deeper understanding of the Reform Act's implementation.

#### 1.3.4 Theoretical framework

In any discussion on customary law it is important to be open and transparent about the legal theory adopted for the comprehension and interpretation of information as it shapes and colours the way in which customary law is presented.

This thesis adopts the theory of legal pluralism, and specifically deep legal pluralism. The concepts of deep legal pluralism, weak legal pluralism and the semi-autonomous social field are basic concepts in the field of legal pluralism discussed by Griffiths,<sup>57</sup> Woodman,<sup>58</sup> Merry,<sup>59</sup> Himonga,<sup>60</sup> Tamanaha<sup>61</sup> and Moore,<sup>62</sup> among others.<sup>63</sup> The discussion of these theoretical concepts is located within a South African context and the thesis draws on the work of Van

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<sup>54</sup> KA Maphalle *Succession in woman-to-woman marriages under customary law: A study of the Lobedu kingdom* (unpublished LLM thesis, University of Cape Town, 2017).

<sup>55</sup> D Budlender 'Women, marriage and land: Findings from a three-site survey' 2013 *Acta Juridica* 28. Also see D Budlender, S Mgweba, K Motsepe and L Williams *Women, land and customary law* (2011).

<sup>56</sup> S Burman, L Carmody and Y Hoffman-Wanderer 'Protecting the vulnerable from 'property grabbing': The reality of administering small estates' 2008 (125) *SALJ* 134. It also examines M Mamashela and T Xaba *The practical implications and effects of the Recognition of Customary Marriages Act No. 120 of 1998* (2003) which examines briefly a widow's rights upon her husband's death.

<sup>57</sup> J Griffiths 'What is legal pluralism?' 1986 (24) *Journal of Legal Pluralism* 1 at 3.

<sup>58</sup> GR Woodman 'Ideological combat and social observation: Recent debate about legal pluralism' 1998 (30) *The Journal of Legal Pluralism and Unofficial Law* 21.

<sup>59</sup> SE Merry 'Legal pluralism' 1988 (22) *Law & Society Review* 869 and SE Merry 'McGill Convocation Address: Legal pluralism in practice' 2013 (59) *McGill LJ* 1.

<sup>60</sup> C Himonga 'State and individual perspectives of a mixed legal system in Southern African contexts with special reference to personal law' 2010 (25) *Tul. Eur. & Civ. LF* 23.

<sup>61</sup> BZ Tamanaha 'Understanding legal pluralism: Past to present, local to global' 2008 (30) *Sydney L. Rev.* 375.

<sup>62</sup> SF Moore 'Law and social change: The semi-autonomous social field as an appropriate subject of study' 1973 17(4) *Law & Society Review* 719.

<sup>63</sup> M Croce 'All law is plural. Legal pluralism and the distinctiveness of law' 2012 (44) *The Journal of Legal Pluralism and Unofficial Law* 1; M Croce 'What is legal pluralism all about?' 2014 *Jura Gentium* 164.

Niekerk,<sup>64</sup> Himonga<sup>65</sup> and Rautenbach<sup>66</sup> to explain how best the South African legal framework may be understood.

The thesis endorses Himonga's view that the state and individuals may have different perspectives of the legal orders.<sup>67</sup> Himonga describes the state as having a compartmentalised view of the legal order where individuals may only choose from one or other legal order at any point in time, with the choice often being guided by judicial determinations or state choice of law rules.<sup>68</sup> In contrast, individuals view the legal orders as a mix and navigate between them, selecting the order that gives them maximum benefit.<sup>69</sup> The thesis builds on this to argue that the discrepancy between the reality of deep legal pluralism and the South African legal landscape which still tends to ignore it, may help to explain the formulation, implementation and impact of the Reform Act.

In light of the foregoing, this research constitutes an original and important contribution to the existing literature which examines how customary law estates are being administered by state and non-state individuals post enactment of the Reform Act.

#### **1.4 Research methodology**

The research was conducted using a combination of desktop and empirical research. Multiple methods of study, investigators and/or data sources were used with the aim of obtaining a convergent or truer understanding of the topic under investigation.<sup>70</sup>

A cautionary note in the use of a mixed methodology for research is that different data sources may have had different research objectives and the use of findings without this context may be

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<sup>64</sup> G van Niekerk 'State initiatives to incorporate non-state laws into the official legal order: A denial of legal pluralism?' 2001 (34) *CILSA* 349; G van Niekerk 'The challenge of legal pluralism: Case note' 2008 (23) *SAPL* 208.

<sup>65</sup> Himonga (note 60).

<sup>66</sup> C Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' 2010 (60) *Journal of Legal Pluralism* 143.

<sup>67</sup> Himonga (note 60) at 24.

<sup>68</sup> *Ibid* at 30.

<sup>69</sup> *Ibid* at 31. This is also discussed in AN Licht 'Social norms and the law: Why peoples obey the law' 2008 (4) *Review of Law & Economics* 715 at 722.

<sup>70</sup> MJ Angen 'Evaluating interpretive inquiry: Reviewing the validity debate and opening the dialogue' 2000 (10) *Qualitative Health Research* 378 at 384; R Kumar *Research methodology a step-by-step guide for beginners* (2014) 28 and MB Miles, AM Huberman and J Saldana *Qualitative data analysis: A methods sourcebook* (2014) 299.

misleading.<sup>71</sup> Furthermore, there may be significant dissonance among the data which may be difficult to reconcile and explain.<sup>72</sup> There is also criticism of the underlying assumption of this methodology, namely, that there is one objective reality which can be reached.<sup>73</sup>

These criticisms have been mitigated in the thesis in the way the various sources have been used. First, certain literature, such as the *Policy and procedure manual: Administration of intestate deceased estates at service points*,<sup>74</sup> speaks directly to the research questions and complements the empirical research. Secondly, the thesis builds on the existing research of Himonga and Moore, and Mnisi-Weeks. While their studies had different research objectives, they contain rich narrations of individuals' experiences of customary law succession and constitute a source of customary law. This thesis draws on these studies, as well as others, as sources of customary law and contributes to the store of the living customary law of succession. The thesis contextualises the findings of the other studies, however, and does not purport to generalise findings as representative of all systems of customary law in South Africa. Finally, variation in the data is not glossed over in the thesis. Differences are highlighted as developments in the law; they are considered to be part of the nuance and variation within various systems of customary law, examples of emerging practical norms<sup>75</sup> or treated as an indicator of the need for further study in this area.

#### 1.4.1 Desktop research

As part of the desktop research, published materials (including statute, case law, policy documents, books, journal articles, dissertations and published findings from other empirical studies) were analysed to formulate the research questions for this study. The desktop research enriched the investigation and ensured the research questions were answered as

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<sup>71</sup> Kumar (note 70) 29.

<sup>72</sup> Ibid.

<sup>73</sup> Angen (note 70) at 384.

<sup>74</sup> Meyer and Rudolph (note 44).

<sup>75</sup> Practical norms generally refer to the practices of officials which do not comply with official norms. They are recurrent, tolerated and relatively predictable practices, which are not regarded as marginal or criminal. See JPO de Sardan 'Practical norms: Informal regulations within public bureaucracies (in Africa and beyond)' in T Herdt and JPO de Sardan JP (eds) *Real governance and practical norms in Sub-Saharan Africa* (2015) 19 at 26.

It accords with Lipsky's theory that state officials' decisions create policy; M Lipsky *Street-level bureaucracy: dilemmas of the individual in public service* (1980).

comprehensively and robustly as possible. The findings of the empirical research were also tested against existing literature to provide a greater understanding of the findings.

#### *1.4.2 Empirical research*

There is no single, universal system of customary law in South Africa.<sup>76</sup> The different indigenous languages<sup>77</sup> are generally taken to represent the various systems of customary law but even within these broad systems, variation exists among different communities and villages. Thus, a comprehensive study of all indigenous communities was unfeasible<sup>78</sup> and the case study method constituted the best available method for research.

The case study entailed understanding the administration process from all stakeholders in the community, such as ordinary individuals who live according to customary law, the traditional authority in the village and the state officials who service the community. This is a valid qualitative research design which allows for a comprehensive exploration of the research topic.<sup>79</sup> This holistic study of how a typical rural community in South Africa experiences the administration of estates provides an understanding and insight into this complex matter.

#### *1.4.3 Authorisation and consent to conduct research*

For the purposes of the research, ethics approval and consent were obtained from all relevant stakeholders. The Faculty of Law Ethics Committee of the University of Cape Town conferred approval with effect from 8 May 2015. As part of the approval, the confidentiality and anonymity of the village and participants were guaranteed. The village is therefore referred to as Kwelanga, which literally means sunshine, to protect the participants' confidentiality. The informed, oral consent of all parties involved in the study to conduct and record interviews was also obtained.

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<sup>76</sup> Himonga and Nhlapo (note 9) 23.

<sup>77</sup> There are eleven official languages in South Africa and nine of them are indigenous languages namely, Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu; see section 6(1) of the Constitution.

<sup>78</sup> The SALRC acknowledged the unfeasibility of a comprehensive study as to the customary law of succession and opted to rather investigate whether areas of customary law succession which raise constitutional issues could be addressed by legislative amendment; South African Law Commission *Customary law of succession* (note 24).

<sup>79</sup> Kumar (note 70) 155.

The Chief Master of the High Court consented to the research in the Master's Office<sup>80</sup> and service points.<sup>81</sup> This entailed the interviews with state officials and the copying of files for analysis which are to remain confidential and for which a personal indemnity against any harm was provided. The fieldwork was enriched by state officials who gave generously of their time to be interviewed and allowed the investigation of records.

#### *1.4.4 Selection of site*

Given the case study method of research adopted, the selection of the community was important to elicit as much information as possible.<sup>82</sup> Initially, one of the villages in the Eastern Cape, where Himonga and Moore conducted their research, was identified as a site for the study to build on existing research.

In May 2015, a preliminary visit to the Eastern Cape revealed the unsuitability of the site for the purposes of the research. In discussions with state officials and a researcher in the community as well as a perusal of records, it was found that the community was 'very poor' and there was scant evidence that individuals from the community reported their estates. While the non-reporting of estates may have been a finding, it would not have adequately addressed the research question regarding the implementation of the Reform Act.

The site was thus changed to the Kwelanga village. A perusal of the estate register at the service point and discussions with state officials confirmed that individuals from the village reported their estates. Furthermore, the chief and individuals from the village demonstrated knowledge regarding the administration process and it appeared that a case study of the village would address the research questions.

The data yielded from the selection of Kwelanga as the research site addressed the research questions. There were nonetheless lacunae in the data which should be addressed in further research. First, some forms of customary marriages, such as polygynous marriages, were almost

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<sup>80</sup> The Master's Office is the administrative body responsible for the administration of deceased estates and is situated at the seat of each High Court. There are currently 15 Master's Offices across the country. There are a number of sub-offices which perform functions on behalf of and under the supervision of the Master's Office. For a full description of the personnel and services of the Master's Office see Chapter 3.

<sup>81</sup> Certain magistrates' courts have been designated as service points which administer deceased estates under the supervision of the Master's Office. The designation of magistrate courts to provide these services is meant to improve the accessibility of services given that there are larger numbers of such courts situated closer to communities. The jurisdiction of service points is limited both in quantum and the complexity of matters they administer. See Chapter 3 for an explanation of these offices.

<sup>82</sup> Kumar (note 70) 155.

non-existent in Kwelanga giving limited insight into the administration of estates involving these marriages. To the extent that polygamous marriages exists, further research on the impact of the Reform Act on the administration of such estates is necessary. Secondly, as the study was confined to a rural area, it did not provide insight into the qualitative experiences of the administration process from the perspective of individuals in urban areas. Thus, the thesis is limited in providing insight into whether individuals in urban areas are better able to navigate the administration process and realise their inheritance rights and the devolution of immovable property situated in urban areas. A case study in an urban area in which people adhere to one or more aspects of customary law would complement this study and contribute to a more comprehensive depiction of the administration process.

#### *1.4.5 Fieldworker*

The fieldwork was conducted with the assistance of a fieldworker who had experience in community research. The local fieldworker's assistance was necessary as the researcher did not speak isiXhosa, the vernacular language of individuals in the village, as well as from a logistical point of view to arrange the interviews and focus groups. The fieldworker recruited participants for interviews and the focus groups and co-ordinated and translated these sessions which I conducted. The use of a single fieldworker who was briefed comprehensively on the aims and objects of the research and the methodology used to elicit the information were meant to minimise distortions in the collection of data.

#### *1.4.6 Selection of sample*

As is necessary with a case study, the sample was strategically and purposively selected rather than randomly to yield the richest results. Gender and age were used as criteria in the selection of interviewees. The sample had to reflect a combination of men and women representing younger and older individuals over the age of 18. In addition, the interviewees had to have personal knowledge of the winding up of an estate post September 2010, being the commencement date of the Reform Act. The focus groups canvassed the general views of the community on the research questions and were not restricted to individuals who had experienced the winding up of an estate.

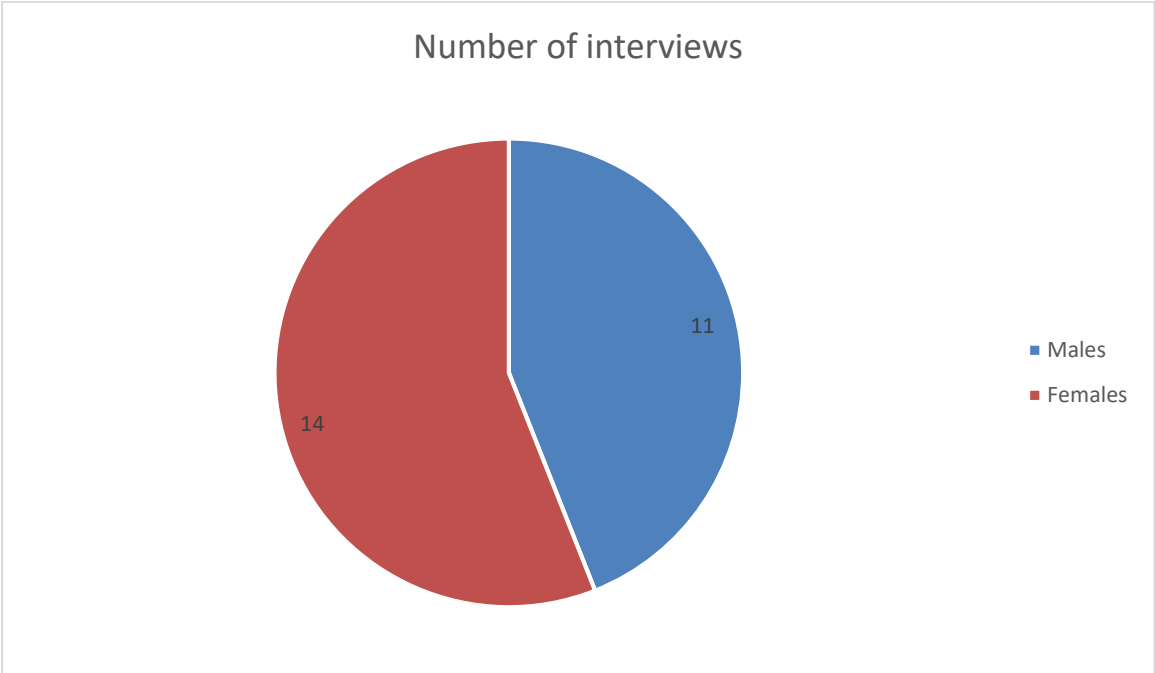
The fieldworker administered a pre-screening questionnaire to identify individuals who satisfied the criteria.<sup>83</sup> The recruitment of individuals was based on a snowballing technique of

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<sup>83</sup> See Annexure C for a copy of the pre-screening questionnaire.

asking individuals to identify other individuals. Later, individuals whose experiences helped to create a more composite understanding of the administration process were identified from the focus groups for interviews.

The saturation point was initially set at 20 but the sample was extended to 25 as it was only then that no additional information was obtained. The 25 interviews comprised 11 males and 14 females. Participants narrated personal accounts of how relatives' estates had been wound up. The relationship between the participant and deceased was that of a spouse, child, parent, sibling or grandparent.



**Figure 1: Graphical representation of participants' gender**

The interviewees' ages ranged from 25 to 85 but tended to be skewed towards individuals over the age of 40. The average age of female participants was 55, while the average age of male participants was 59. The sample reflects the demographics of the predominantly elderly population in the village. Furthermore, many younger individuals were not available to participate in the study, having left to seek work, and some indicated in preliminary interviews that they lacked knowledge of these matters which were dealt with by elders in the family. Thus, fewer younger individuals were interviewed and their views were canvassed more generally in

the focus groups. Despite this, the data may not represent younger individuals' experiences of the administration process in totality.<sup>84</sup> This is an acknowledged limitation of the study.

Thirteen focus groups were conducted, eight with women and five with men. The groups comprised four to six individuals. With men, there were three over 40 and two under 40 groups. With women, there were five over 40 and three under 40 groups. While there were more female focus groups, with eleven individual interviews and five focus groups, the experiences of men were adequately canvassed.

The domination of women in the focus groups and interview sample must be understood in light of the broader gender demographics of the Eastern Cape province in which the study was conducted. First, there are more females than males in the district with a female population of approximately 55 per cent, which demographic appeared to be reflected in the village with there being a greater availability of female participants.<sup>85</sup> Poor participation in one of the female focus groups also necessitated an additional female focus group. Himonga and Moore furthermore note the tendency for women's voices to dominate in these sort of research projects.<sup>86</sup> Finally, women report estates more frequently and tend to be more susceptible to property grabbing<sup>87</sup> during the administration process and thus their experiences had to be comprehensively investigated.

Key informants, such as the chief and sole headman in the village, were also interviewed. Finally, five state officials were interviewed in various positions ranging from the clerk to the most senior official at the service point and Master's Office to understand the state perspective of administration.

#### *1.4.7 Data collection*

The data was collected over four years from 2015–2018. The bulk of the data was collected during the first field trip in 2015 in which 24 interviews and 5 focus groups were conducted.

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<sup>84</sup> Child-headed households were not encountered in the study nor were they actively sought out as ethics clearance was only obtained for interviews with individuals over 18 years of age. This is an avenue for further research.

<sup>85</sup> Statistics South Africa 'Census 2011 Provincial profile: Eastern Cape (2014) 22 available at <http://www.statssa.gov.za/publications/Report-03-01-71/Report-03-01-712011.pdf> [accessed on 5/10/18].

<sup>86</sup> Himonga and Moore (note 13) 36.

<sup>87</sup> This refers to the phenomenon by which rightful heirs may be usurped of their property rights, and in the context of the study specifically movable property. The phenomenon and its risk factors are discussed in detail in Chapter 7.

After a preliminary analysis of the data, a follow up trip was made in 2016 to supplement the data and conduct strategic follow-up interviews with several selected individuals. A further nine focus groups and one additional interview were conducted. Telephonic follow-up interviews were also conducted with state officials during the data collection period. The data was collected using a combination of semi-structured interviews<sup>88</sup> and focus groups of individuals in the community.<sup>89</sup> One-on-one interviews were used with the state officials,<sup>90</sup> the chief<sup>91</sup> and the headman.<sup>92</sup> The interviews were conducted at the interviewee's home while the focus groups were conducted at a central location. Participants were not paid for their participation, but refreshments were served and transport costs reimbursed.

The data was further augmented by an analysis of files from the Master's Office and the service point. A random sample of 30 files per year for the period of 2011–2017 were requested from officials, being 210 files, from the Master's Office and eleven files from the service point that had yet to be transferred to the Master's Office, were analysed. The Master's Office does not distinguish between estates administered in terms of common law or customary law, either in an annotation on the file or in record keeping.<sup>93</sup> Himonga and Moore in their research assumed all estates of Black people were subject to customary law.<sup>94</sup> However, in the sample of files analysed, the deceased's race was not always indicated. Thus inferences regarding the deceased's race would have to be drawn from the deceased's name to apply Himonga and Moore's assumption that the estates of Black individuals are subject to customary law. To avoid unwanted inferences and assumptions, the sample constitutes a randomised sample of files from the Master's Office.

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<sup>88</sup> See Annexure D for a copy of the Individual interview questions.

<sup>89</sup> See Annexure E for a copy of the Focus group questions.

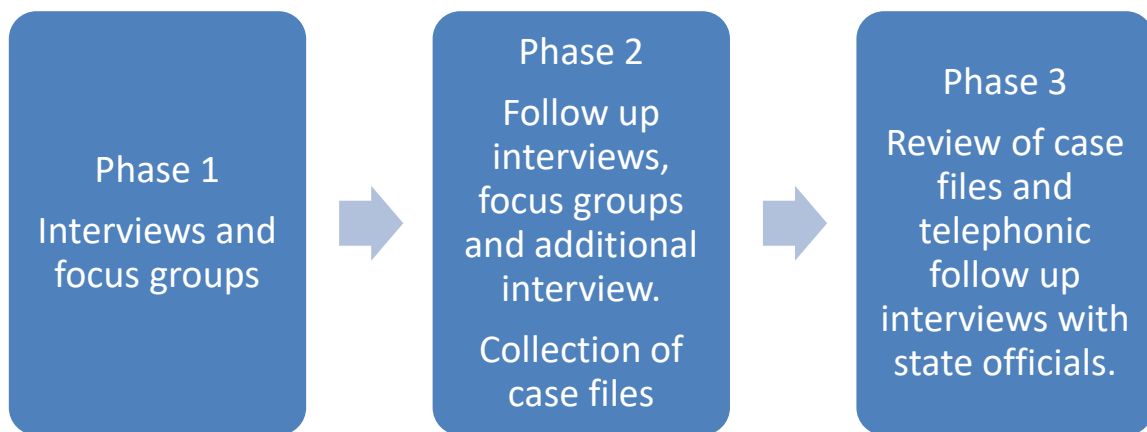
<sup>90</sup> See Annexures F, G, H and I for a copy of the questions for the interview with the service point official, office manager at the service point, officials at the Master's Office and the Master.

<sup>91</sup> See Annexure J for a copy of the Chief's interview questions.

<sup>92</sup> See Annexure K for a copy of the Headman's interview questions.

<sup>93</sup> For a further discussion regarding the creation of a unitary system of succession by officials, see Chapter 3.

<sup>94</sup> Himonga and Moore (note 13) 230.



**Figure 2: Phases of data collection.**

In addition to the formal data collection methods, the study benefited from many informal conversations with individuals. Individuals were eager to discuss their experiences on an informal basis and the discussion provided real insight into the nuances and complexities of the administration of estates. The discussions were conducted in English or through a translator, recorded in a field journal and used as part of the data for analysis.

As already indicated, the fieldwork was conducted through a case study of a single village in the Eastern Cape Province. This was thought to be the best available means of research to answer the research questions and provide insights into the administration process. There are obvious limitations to the study which are addressed below.

#### *1.4.8 Limitations of study*

The limitations to the study were addressed as well as possible to ensure the integrity of the data and to allow meaningful conclusions to be drawn from it.

An obvious limitation is that as a case study, findings cannot be generalised to the larger South African population. However, the case study does not purport to make representations about the number of individuals reporting their estates across South Africa or extrapolate these practices to other communities. Rather it provides a qualitative understanding of people's experiences in winding up an estate and insights into the motivation for reporting an estate. In conjunction with existing literature, it provides much needed insight into the implementation of the Reform Act.

Furthermore, most of the formal interviews were conducted in isiXhosa, the vernacular language of the participants, through a translator. The interviews were digitally recorded and transcribed and this transcription along with the field notes were the basis of the analysis. A

translator presents the palpable danger that critical information is lost in translation. Himonga and Moore note that the potential to overlook ‘changes in tone, emphasis, or the specific features of the language’<sup>95</sup> risks failing to truly understand an individual’s experience. This risk will always be present, but it was mitigated by comprehensively briefing the facilitator to ensure he understood the research objectives. The translated transcriptions were furthermore not the sole source of data and were analysed against interviews with state officials, which the researcher conducted personally, as well as the existing literature. Several randomly selected interviews were also translated by an independent third party as verification of the fieldworker’s translation and no significant variation was found.

The research was also conducted from an outsider point of view. As a non-indigenous, Muslim woman who wore a scarf, I was often stopped in the village and questioned on my presence and purpose of my research. This outsider status may have affected the extent of information provided by the local community. However, the willingness of community members to informally discuss the research, as mentioned above, suggests this was not an issue. Another obvious danger of an outsider conducting research in a community is that the researcher may lack the insider knowledge to understand terms and practices in the community. While this was mitigated by conducting a comprehensive literature review and using other sources, it constitutes a limitation of the study and must be borne in mind. The outsider perspective nonetheless offered a degree of objectivity from which the research benefited.

A further issue in this study is the personal nature of the information which required individuals to talk about the death of a loved one and the distribution of money to a stranger. This was best addressed by pre-discussions to interviews in which the research objectives were explained, and people were encouraged to ask questions to settle their doubts. Individuals who remained uncomfortable or reluctant were excused from the interviews. Generally, individuals appeared at ease and spoke honestly and openly about their experiences.

Therefore, there are clear limitations to the study, and while every effort has been made to mitigate them, they must be borne in mind throughout the thesis.

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<sup>95</sup> Ibid 50.

#### 1.4.9 *Data analysis*

The data was analysed manually without the use of software tools. After a legal analysis of existing literature, the following themes were identified as the most pertinent to answering the research questions:

- the communal nature of the customary law of succession;
- the patriarchal nature of the customary law of succession;
- beneficiaries of inheritance; and
- property grabbing.

The data was analysed for how it addressed the themes and the findings are presented in subsequent chapters. Furthermore, to avoid researcher bias,<sup>96</sup> similarities and differences between answers to questions and common themes in answers were identified by reading the interviews<sup>97</sup> (along with the field notes) sequentially and then by reading answers to specific questions across the interviews to identify other issues and themes. Other general findings are presented in the general analysis in Chapter 8.

Data analysis presents the most important aspect of fieldwork. It was conducted with an open mind to present the findings and answer the research questions as authentically as possible. Lacunae in the data are highlighted and arguably point to the need for further research in this important area of the law.

#### 1.4.10 *Validation of data*

The thesis sets out the truest understanding and interpretation of the data. Validation was meant to ensure that the study and analysis of the data was authentic and credible. Given the nuance and variation in customary law and the nature of the law which changes over time, it was never expected that there would be unqualified confirmation of the findings. Validation was rather about ensuring that the study was carried out with the requisite rigor and that the interpretation and presentation of the data was as sound as possible.

Triangulation was employed as a verification process to ensure the credibility and validity of the data. The use of multiple sources of data instils greater confidence in the observations, interpretations and conclusions reached in this study. Interviews with individuals were analysed

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<sup>96</sup> I Dey *Qualitative data analysis a user-friendly guide for social scientists* (1993) 65.

<sup>97</sup> Ibid 87.

in light of interviews with state officials, the analysis of files from the Master's Office and existing literature to obtain both confirmation of research findings and a more comprehensive understanding of data found.

Given that this was a qualitative and not a quantitative study, confirmation by numbers was not a goal. Nonetheless, where participants were unanimous in stating a position, such as the widow assumes the control of the property upon her husband's death, this was highlighted and interpreted as a reliable indicator of the social reality. Where accounts varied, as inevitably they did, given the nature of customary law, they were analysed in terms of, among others, gender, age, social standing and education with the variation explained and presented as accurately as possible.

The methodology and findings were also presented for peer review at numerous points. They were presented to academics and ordinary individuals who live according to customary law generally and more specifically those who come from the greater Eastern Cape area. This was done at various workshops, conferences and general lectures in the African Customary law course at the University of Cape Town. Where the interpretation and understanding of the data was questioned, the data was re-examined and in some cases the variation was noted. Outlier cases were also noted and presented to provide the most accurate and realistic assessment of the research questions.

In sum, validation of the data was important to ensure its credibility and authenticity. Various methods were used for validation and it is submitted that, through the case study in Kwelanga, this thesis provides important credible insights into the administration of customary law estates in South Africa.

## **1.5 Structure of thesis and chapter outline**

Chapter 1 Introduction: This chapter outlines the problem and sets out the research question and objectives. It provides the literature review which contextualises the thesis and its contribution to the existing knowledge. It details the methodology used to conduct the case study and analysis of the data. It further provides an overview of the thesis and outline of the forthcoming chapters.

Chapter 2 Theoretical framework: Chapter 2 sets out the theoretical frameworks of weak and strong legal pluralism as well the concepts of official and living customary law. It explores the classification of the South African legal system in terms of the concepts of legal pluralism.

Chapter 3 Socio-economic context and overview of state process: Chapter 3 sets out the context of the study generally and provides a detailed description of the socio-economic context of Kwelanga. The description includes a discussion of the state offices with jurisdiction over the community, the services they provide and their operations.

Chapter 4 The communal nature of the customary law of succession: Chapter 4 examines the communal or group nature of the customary law of succession, its distortion during the pre-constitutional era and its continued persistence as evinced by empirical research.

Chapter 5 The patriarchal nature of the customary law of succession: Chapter 5 explores patriarchy in the customary law of succession and its ossification during the pre-constitutional era. It uses current empirical research to argue that there has been an emergence of greater egalitarian practices in succession but that the rights of women remain circumscribed in relation to men.

Chapter 6 Beneficiaries under the Reform Act: Chapter 6 explores the rules of inheritance and beneficiaries under the Reform Act. It analyses the modifications to the Intestate Succession Act to accommodate customary law practices and evaluates whether women and children are adequately protected under the new framework.

Chapter 7 Property grabbing and risk factors: Chapter 7 explores property grabbing, including in its less violent forms, which are used more frequently to usurp a beneficiary's property rights. It identifies the risk factors for property grabbing that act as a hindrance to the realisation of inheritance rights.

Chapter 8 Findings and recommendations: This chapter answers the research question and summarises the findings in relation to the research objectives as articulated in Chapter 1. It makes recommendations for reform and further investigation into this subject.

Chapter 9 Conclusion: The chapter provides a short summary of the thesis and is the conclusion to the thesis.

## **1.6 Conclusion**

This chapter sets out the scope of the thesis. It articulates the research question and objectives and provides the literature review to contextualise the thesis and explain the thesis's novel contribution. Importantly, it provides the methodology for the collection and analysis of data. The thesis follows the structure set out in this chapter to answer the research question.

## CHAPTER 2 THEORETICAL FRAMEWORK

### 2.1 Introduction

The thesis investigates the administration of customary law intestate estates in South Africa and this chapter explains the theoretical framework underlying the thesis. It discusses the concepts of weak legal pluralism, deep legal pluralism and the semi-autonomous social field, being the basic building blocks in discussions around legal pluralism. The chapter further explains the concept of ‘practical norms’ and argues that awareness of these norms is important to understand the administration of estates.

The chapter then describes the South African legal framework. It examines the distinction between official and living customary law and argues that despite constitutional recognition of living customary law, official customary law occupies a pre-eminent role in the legal system.

In light of the foregoing, the chapter concludes that the classification of the South African legal system, in terms of the concepts of weak or strong legal pluralism, is difficult and undesirable. Rather, the chapter argues that a proper understanding of the formal construction of the legal system and the social reality in which it is embedded is necessary as an analytical tool to understand the administration of estates.

### 2.2 Theoretical framework

The theory of legal pluralism, and in particular, deep legal pluralism along with the concept of the semi-autonomous social field are prominent theories in the customary law discourse.

Legal pluralism is a much-debated concept<sup>1</sup> but is generally understood as the co-existence of multiple legal orders within a society. It acknowledges that people may act in accordance with

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<sup>1</sup> See for example, BZ Tamanaha ‘The folly of the “social scientific” concept of legal pluralism’ 1993 (20) *Journal of Law and Society* 192; BZ Tamanaha ‘Understanding legal pluralism: Past to present, local to global’ 2008 (30) *Sydney L. Rev.* 375; G Woodman ‘Legal pluralism in Africa: The implications of state recognition of customary laws illustrated from the field of land law’ 2011 *Acta Juridica* 35 at 39; M Croce ‘All law is plural. Legal pluralism and the distinctiveness of law’ 2012 (44) *The Journal of Legal Pluralism and Unofficial Law* 1; M Croce ‘What is legal pluralism all about?’ 2014 *Jura Gentium* 164; F von Benda-Beckmann ‘Who’s afraid of legal pluralism?’ 2002 (34) *The Journal of Legal Pluralism and Unofficial Law* 37; T Bennett ‘The contribution of legal theory and judicial practice to the future development of customary law’ in G Glover (ed) *Essays in honour of AJ Kerr* (2006) 181 at 181–185; and C Himonga ‘State and individual perspectives of a mixed legal system in Southern African contexts with special reference to personal law’ 2010 (25) *Tul. Eur. & Civ. LF* 23.

a range of normative orderings and that the state does not have exclusive jurisdiction in regulating people's lives.<sup>2</sup> It is positioned as a countervailing notion to the dominant theories of positivism and legal centralism which initially monopolised the conceptualisation of law. Pluralism rejects the state-centric approach of legal centralism and the idea that the law is and should be the law of the state, a single system of law applied to all persons in the same manner.<sup>3</sup> Pluralism is often divided into two strands, namely weak and strong legal pluralism.

### 2.2.1 *Weak (or state) legal pluralism*

Weak legal pluralism is akin to diversity within a legal system and is where the state recognises and administers different systems of law for different people.<sup>4</sup> This is an acknowledgment that the law is not a single, uniform system, but the authority and force of law depends on state recognition and regulation. It accords with the positivist approach that law is found in tangible sources such as legislation, case law and custom.<sup>5</sup> The need for state recognition and administration means that this is considered a weak form of legal pluralism.<sup>6</sup>

### 2.2.2 *Deep legal pluralism*

Deep legal pluralism, on the other hand, is the idea that there are multiple legal orders that govern people's lives and do not depend on the state for authority.<sup>7</sup> It is positioned as the factual existence of multiple legal orders in a social group with focus shifted away from the state and state enacted law.<sup>8</sup> It echoes Popsil's early work in which he rejected the exclusive recognition of state law as law and advocated that norms emanating from other fields which regulate people's behaviour should also be regarded as law.<sup>9</sup> It essentially posits that non-state law may

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<sup>2</sup> J Griffiths 'What is legal pluralism?' 1986 (24) *Journal of Legal Pluralism* 1 at 3; SE Merry 'Legal pluralism' (1988) 22(5) *Law and Society Review* 869 at 870; and GR Woodman 'Ideological combat and social observation: Recent debate about legal pluralism' 1998 (30) *The Journal of Legal Pluralism and Unofficial Law* 21 at 23.

<sup>3</sup> Griffiths (note 2) at 3 and TW Bennett *Customary law in South Africa* (2004) 27–30.

<sup>4</sup> Merry (note 2) at 871; Himonga (note 1) at 25 and Woodman (note 2) at 23.

<sup>5</sup> C Rautenbach 'The phenomenon of legal pluralism' in C Rautenbach and J Bekker (eds) *Introduction to Legal Pluralism* (2014) 3 at 6.

<sup>6</sup> G van Niekerk 'State initiatives to incorporate non-state laws into the official legal order: A denial of legal pluralism?' 2001 (34) *CILSA* 349 at 351.

<sup>7</sup> Woodman (note 1) at 39; Griffiths (note 2) and Himonga (note 1) at 26.

<sup>8</sup> Rautenbach (note 5) at 7.

<sup>9</sup> Woodman provides a very useful account of legal pluralism by examining prominent writings on the subject, see Woodman (note 2); see also Tamanaha 'Understanding legal pluralism: Past to present, local to global' (note 1).

regulate and direct people's lives and allows for a multifocal analysis of the way the law works.<sup>10</sup>

### 2.2.3 *Semi-autonomous social field*

Moore's concept of the semi-autonomous social field is used in conjunction with deep legal pluralism to understand the broader conception of law. According to Moore, societies are not homogenous totalities but comprise several semi-autonomous social fields that intersect and overlap one another.<sup>11</sup> Individuals are often members of more than one social field and in such instances are subjected to conflicting and contradictory rules and forced to choose to which rules they will adhere.

The defining characteristic of the semi-autonomous social field is that it generates its own rules and induces compliance with these rules but is nonetheless subject to the rules and decisions of the outside social matrix.<sup>12</sup> The outside legal system penetrates and influences the social field which also retains a degree of autonomy and the ability to resist outside rules and decisions in some instances.<sup>13</sup> Internal mechanisms of the social field ensure compliance with internally generated rules but also determine the level of compliance with state rules.<sup>14</sup> According to Croce, Moore's valuable contribution to legal theory is the notion that state mechanisms alone are too weak and poor to induce compliance with state rules.<sup>15</sup> The state must work with the social field's internal mechanisms to induce compliance with state rules.<sup>16</sup> The fields in turn are shaped and influenced by their interactions with state institutions.<sup>17</sup>

Moore's contribution regarding the use of a social field's internal mechanisms to induce compliance with state rules offers useful insights into the implementation of the Reform of Customary Law of Succession and Regulation of Related Matters Act<sup>18</sup> ('the Reform Act'). In accordance with the notion of using a field's internal mechanisms to implement state law, the Reform Act incorporates chiefs into the dispute resolution process. This is presumably meant

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<sup>10</sup> Croce 'What is legal pluralism all about?' (note 1) at 166 and Bennett (note 1) at 182–183.

<sup>11</sup> SF Moore 'Law and social change: The semi-autonomous social field as an appropriate subject of study' 1973 17(4) *Law & Society Review* 719 at 720; Croce 'What is legal pluralism all about?' (note 1) at 169.

<sup>12</sup> Moore (note 11) and van Niekerk (note 6) at 351.

<sup>13</sup> Moore (note 11) at 720.

<sup>14</sup> *Ibid* at 721.

<sup>15</sup> Croce 'What is legal pluralism all about?' (note 1) at 169.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid* at 169–170.

<sup>18</sup> Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

to generate solutions that reflect customary law norms and values that are thus more likely to be implemented by individuals. Unfortunately, however, there has been scant implementation of these provisions at the Master's Office. The chief's role is limited to confirmations regarding the existence of a marriage or relationships between parties.<sup>19</sup>

The reason for the exclusion of chiefs from the state dispute resolution process is unclear. It may be that state officials perceive themselves as more objective, impartial and better trained than chiefs to deal with disputes. In contrast, typically, chiefs are not impartial in resolving disputes and the use of personal knowledge regarding the parties is regarded as advantageous.<sup>20</sup> Nonetheless, the omission of chiefs from the state dispute process represents a loss. First, the involvement of the chief allows the matter to be interrogated by someone familiar with the parties and the immediate social context of the dispute. Secondly, the chief may inspire greater trust in individuals than unknown state officials and his recommendations which are consonant with the values of the community are more likely to be followed.

Finally, the incorporation of the chief into the formal dispute resolution process provides an invaluable opportunity to train chiefs in the knowledge and implementation of the formal law. It enables chiefs to disseminate this knowledge within the community over time to impact the community's practices and align them with the intentions of the Act. This allows legislative reform to shape customary law practices from the ground up and guarantee better implementation of the provisions. The omission of chiefs from the process is thus a significant lost opportunity. Moore's insight that the internal mechanisms of a social field can ensure compliance with state rules means that chiefs should be better leveraged in implementing the Reform Act. The dangers of the incorporation of chiefs, however, for women's rights are acknowledged and canvassed in greater detail in Chapter 8.

Nonetheless, a critique of legal pluralism is that it does not explain the nature and relationship of the normative orders and equates them all as having equal force.<sup>21</sup> State law is given no precedence and all normative orders are treated as having the same legitimacy and force. This

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<sup>19</sup> Interview with senior official at the Master's Office, 23 June 2017. This was confirmed by the chief and the analysis of case files which revealed no such engagement by chiefs generally.

<sup>20</sup> Bennett (note 3) 170.

<sup>21</sup> Himonga (note 1) at 26–27.

is criticised as a weakness as it does not reflect the reality that individuals vest certain norms with greater authority and legitimacy than others.<sup>22</sup>

In countenance of the suggestion that we can distinguish between state and non-state law, Merry, Croce and Woodman note that there is no bright line separating the legal orders.<sup>23</sup> Merry notes that often the non-state law mechanisms adopt the forms and procedures of state law with the result that people view the non-state mechanisms, with no formal authority, as having state sanction.<sup>24</sup> Croce argues further that distinguishing between law and social rules is futile as the conceptual analysis of the law does not explain the priority given to state law in the legal order.<sup>25</sup> Woodman reiterates the difficulty in drawing distinctions between non-state law and other non-legal social orders and argues persuasively that if no division between social orders exists in reality then to invent them in theory is ‘irrational and unscientific’.<sup>26</sup>

However, as Benda-Beckmann notes, drawing these distinctions may be useful in certain instances such as when judges or teachers seek to apply the law as understood in a narrow sense.<sup>27</sup> Depending on the focus of the analysis, it may be important to understand the source of the law and the source of its effective inducement and coercion.<sup>28</sup> While both state and non-state law may be able to induce compliance, they may do so for very different reasons. In understanding how and why the law induces compliance, it may be necessary to understand the source of the law. Furthermore, Roberts argues that state law enacted by an arm of government may have different characteristics to other normative orders and caution should be had in imposing these characteristics on other normative orders.<sup>29</sup> Thus, from an analytical point of view, there may be good reasons not to conflate all normative orders. For these reasons, the thesis distinguishes generally between state law, customary law and other norms and repertoires such as practical norms and customs. The classifications are used to understand what promotes

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<sup>22</sup> Bennett (note 1) at 192. S Roberts ‘After government? On representing law without the state’ 2005 (68) *The Modern Law Review* 1 at 13–17. For a discussion of the difficulties with legal pluralism, see S Roberts ‘Against legal pluralism: Some reflections on the contemporary enlargement of the legal domain’ 1998 (30) *The Journal of Legal Pluralism and Unofficial Law* 95 and Tamanaha ‘The folly of the ‘social scientific’ concept of legal pluralism’ (note 1).

<sup>23</sup> SE Merry ‘McGill Convocation Address: Legal pluralism in practice’ 2013 (59) *McGill LJ* 1; Croce ‘All law is plural.’ (note 1) at 20 and Woodman (note 2). This argument is also supported by Himonga (note 1) at 24.

<sup>24</sup> Merry (note 23) at 3–4.

<sup>25</sup> Croce ‘All law is plural.’ (note 1) at 20.

<sup>26</sup> Woodman (note 2) at 45.

<sup>27</sup> von Benda-Beckmann (note 1) at 38.

<sup>28</sup> Moore (note 11) 745.

<sup>29</sup> S Roberts ‘Law and dispute processes’ in T Ingold (ed) *Companion encyclopaedia of anthropology: Humanity, culture and social life* (1994) 962 at 978.

or hinders compliance with the Reform Act. The thesis, however, does not make normative judgments about the hierarchy and status of these orders.<sup>30</sup>

In summation, legal pluralism and the semi-autonomous social field are popular constructs used to understand customary law and the interaction between state and customary law. This thesis adopts these concepts as analytical tools to understand the South African legal framework generally and more specifically the administration of customary law estates.

#### 2.2.4 Different normative orders

The thesis aims to understand how estates subject to customary law are administered. Other than state law, living customary law, official customary law and practical norms appear as the most pertinent laws or normative orders that govern the administration of estates and are explained in this section.

##### 2.2.4.1 Living customary law

The distinction between official and living customary law is well-known and much has been written about it in recent times.<sup>31</sup> Living customary law has its roots in the early work of Ehrlich who defined living law to encapsulate the customs and habits of individuals and institutions that are not regulated by statute and precedent.<sup>32</sup> Hamnett further described it as the law that ‘emerges from what people do, or – more accurately – from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe.’<sup>33</sup>

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<sup>30</sup> The thesis avoids the debate as to what law is though Croce intimates that the early work of Malinowski on this subject paved the way for the theorisation of legal pluralism, see Croce ‘What is legal pluralism all about?’ (note 1) at 166 and B Malinowski *Crime and custom in savage society* (1932).

<sup>31</sup> C Himonga and C Bosch ‘The application of African customary law under the Constitution of South Africa: Problems solved or just beginning’ 2000 (117) *SALJ* 306 at 319–331; AC Diala ‘The concept of living customary law: A critique’ 2017 (49) *The Journal of Legal Pluralism and Unofficial Law* 143; T Bennett ‘“Official” v “living” customary law: Dilemmas of description and recognition’ in A Claassens and B Cousins (eds) *Land, power and custom: Controversies generated by South Africa’s Communal Land Rights Act* (2008) 138; AJGM Sanders ‘How customary is African customary law’ 1987 20 *CILSA* 405; C Himonga and T Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 27; and J Bekker and I Maithufi ‘The dichotomy between “official customary law” and “non-official customary law”’ 1992 (17) *Journal for Juridical Science* 47.

The distinction is also widely acknowledged in case law, see *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC) para 87 and *Mabena v Letsoalo* 1998 (2) SA 1068 (T) at 1074.

<sup>32</sup> E Ehrlich *Fundamental principles of the sociology of law* (1936) 493. Nelken interprets Ehrlich’s work as explaining the factual existence of law in the practices of society with no judgment on whether it should be accommodated by the state; D Nelken ‘Eugen Ehrlich, living law, and plural legalities’ 2008 (9) *Theoretical Inq. L.* 443 at 466–467.

<sup>33</sup> I Hamnett *Chieftainship and legitimacy: An anthropological study of executive law in Lesotho* (1975) 6.

Essentially, living customary law is understood to be the actual, unwritten practices of people and thus Woodman refers to it as ‘people’s customary law’ or ‘practised customary law’<sup>34</sup> – a system of broad norms and principles with no distinct boundaries, which can be found in the minds of people.<sup>35</sup> It tends to be described as a set of flexible principles, rather than rigid rules, which are applied differently depending on the circumstances with change being considered inherent to the nature of living customary law.<sup>36</sup> The Constitutional Court in *Bhe* defined it as a system which evolves and develops to meet changing communal needs.<sup>37</sup> It is often considered to be the genuine and true reflection of African culture.<sup>38</sup> Stylistic and social controls as well as mnemonics and links to topographical features, for example marking rights to land by reference to trees or other physical features, confer on it structure and certainty as it is typically an oral and unwritten system of law.<sup>39</sup>

Diala recently challenged the traditional understanding of living customary law and defined it ‘as the law that emerges from people’s adaptation of customs to socio-economic changes’.<sup>40</sup> Socio-economic is defined as the ‘legal, religious, political, economic, and cultural changes’ and ‘[l]iving customary law emerges from the ways existing customs are applied to meet these changes’.<sup>41</sup> As the emergent practice spreads, it acquires a sense of obligation that gives it the character of law.<sup>42</sup>

Closely analysed, this proposed definition accords with current understandings of living customary law. The South African courts have repeatedly defined living customary law with reference to its evolving nature and ability to adapt to changing needs.<sup>43</sup> Himonga and Bosch described it as ‘dynamic and constantly adapting to changing social and economic conditions’<sup>44</sup>

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<sup>34</sup> Woodman (note 1) at 45.

<sup>35</sup> *Alexkor Ltd v the Richtersveld Community* 2004 (5) SA 460 (CC) 480 para 53 and *Bhe* (note 31) para 86–87.

<sup>36</sup> JL Comaroff and S Roberts *Rules and processes* (1986) 71–86 and Bennett (note 31) at 139.

<sup>37</sup> *Bhe* (note 31) para 81.

<sup>38</sup> T Bennett and J Bleazard ‘The re-invention of customary law: South African courts as constitutional law makers’ 2009 (12) *Recht in Afrika* 1 at 2.

<sup>39</sup> Bennett (note 31) at 139.

<sup>40</sup> Diala (note 31) at 155.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.* at 158.

<sup>43</sup> In addition to *Bhe* discussed above, see *Pilane v Pilane* 2013 (4) BCLR 431 (CC) para 34 where it was described ‘as a living body of law, active and dynamic, with an inherent capacity to evolve in keeping with the changing lives of the people whom it governs’.

<sup>44</sup> Himonga and Bosch (note 31) at 319. Also see A Claassens and G Budlender ‘Transformative constitutionalism and customary law’ 2017 (VI) *Const. Ct. Rev.* 75 at 79 for a similar definition.

and Sanders remarked on its capacity to adapt to external influences.<sup>45</sup> Diala's definition is consonant with the notion of living customary law as an adaptable system of law found in the practices of people and thus the definition endorsed for the purposes of this thesis.

#### 2.2.4.2 Official customary law

Official customary law, on the other hand, refers to the customary law perceived by observers outside of the community and which often differs from the actual customary law practised in the community.<sup>46</sup> It is created by the state and legal profession and thus is referred to by Woodman as 'lawyer customary law'.<sup>47</sup> It encapsulates the codified, static versions of customary law found in legislation, judicial precedent, commissions of inquiry, codifications, restatements, academic writings and textbooks.<sup>48</sup> These versions are often 'interpreted through an Anglo-Saxon or Roman Dutch law procedural and substantive law filter' distorting the nature and substance of the law.<sup>49</sup> The state version of customary law is detached from the actual practices of people and thus is considered an artifice of customary law.<sup>50</sup>

The official version is often out of sync with current practices and in South Africa is criticised as a reflection of the apartheid and colonialist policies.<sup>51</sup> The South African state selected the law, organised the codification, removed nuances, shifted the emphasis to rights rather than duties and re-interpreted the law in accordance with European legal concepts and understanding.<sup>52</sup> Codification served the colonial and apartheid state agenda of controlling the content of the law and ultimately the indigenous population rather than accurately reflecting customary law practices. Distortions were compounded by poor translations of concepts,

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<sup>45</sup> Sanders (note 31) at 409. Also see T Nhlapo 'Customary law in post-apartheid South Africa: Constitutional confrontations in culture, gender and 'living law' 2017 (33) *SAJHR* 1 fn 1 where living customary law is defined as the 'authentic set of norms governing the actual day-to-day relations of a community and adapted to changed social and economic circumstances.'

<sup>46</sup> Himonga and Bosch (note 31) at 328.

<sup>47</sup> Woodman (note 1) at 45–47. Also see GR Woodman 'Unification or continuing pluralism in family law in Anglophone Africa: Past experience, present realities and future possibilities' 1988 4(2) *Lesotho Law Journal* 33 at 37.

<sup>48</sup> In *Bhe* (note 31) para 152 the court distinguished between customary law practised by people, written versions of the law and academic law used for teaching purposes. The distinction is also made in Sanders (note 31) at 405.

Generally, the written versions of the law and the law used for teaching purposes are conflated and treated as official customary law, see Bennett and Bleazard (note 38) at 1–2 and Bennett (note 3) 6–7.

<sup>49</sup> JE Stewart 'Why I can't teach customary law' 1997 *Zimbabwe Law Review* 18 at 18.

<sup>50</sup> Himonga and Bosch (note 31) at 328 and Sanders (note 31) at 406.

<sup>51</sup> Bennett and Bleazard (note 38) at 2 and Bennett (note 31) at 140–141.

<sup>52</sup> Bennett (note 31) at 139.

attempts at standardisation of the law, the application of the law by non-indigenous officers imposing their own understandings of the law and the acceptance of inaccurate versions of the law provided by individuals with vested interests in the matter.<sup>53</sup>

Official customary law is problematic as it generally purports to provide a one-size solution for all customary law systems. This is challenging given that there is rich variation among customary law systems and even within the same system based on geographical location. The difficulty in legislating for this variation is highlighted in the Reform Act. For example, the Reform Act provides that property held by a traditional leader in his official capacity is excluded from the ambit of the Act.<sup>54</sup> Property held in the traditional leader's personal capacity devolves in terms of the Reform Act. Bekker and Koyana criticise the Reform Act for treating a traditional leader as an ordinary person whose property devolves as any other person's would to his common law heirs.<sup>55</sup> They state that succession to office and inheritance of property are intertwined and that the Intestate Succession Act<sup>56</sup> could not regulate the devolution of a traditional leader's estate, in particular his family home.<sup>57</sup> A traditional leader's family home is argued to be a socio-political unit, a meeting place of the elders, the seat of the court and the place from where the traditional leader governs his nation.<sup>58</sup> Thus it is unrealistic to expect his property to be liquidated and distributed among his common law heirs.<sup>59</sup>

Bekker and Koyana may well be right regarding the enmeshment of succession to the office of a traditional leader and inheritance of property but with the nuances and variation in customary law, it may not be true in all customary law communities or of all traditional leaders. The chief in the case study explained that succession to chieftaincy in the village is not hereditary and a successor is chosen by the ruling king. Regardless of whether his son assumes the position of chieftaincy, the chief maintained that his property, including his home and livestock, would

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<sup>53</sup> Diala (note 31) at 146. For a discussion of the distortion of official customary law see Woodman (note 1) at 44–45.

<sup>54</sup> Section 6 of the Reform Act. This was also discussed in the deliberations preceding the Act, see Justice and Correctional Services Committee 'Meeting report on Floor Crossing legislation & Reform of Customary law of Succession and Related Matters Bill: Deliberations' 30 July 2008 available at <https://pmg.org.za/committee-meeting/9408/> [accessed on 29/11/18].

<sup>55</sup> J Bekker and D Koyana 'The judicial and legislative reform of the customary law of succession' 2012 (45) *De Jure* 568 at 576.

<sup>56</sup> Intestate Succession Act 81 of 1987.

<sup>57</sup> Bekker and Koyana (note 55) at 576.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

pass on to his family members upon his death and not to the new chief. It was clear that succession to office and inheritance of property were not intertwined in this case.

This account was further supported by the analysis of the files from the Master's Office and discussions with state officials. Officials conveyed that a chief's property devolves in the same manner as any other individual's property.<sup>60</sup> The devolution would not encapsulate the chief's family home in the village. The exclusion of the chief's home from the administration process accords with the state's approach that immovable property in the village does not fall under the supervision of the state and devolves in accordance with customary law.<sup>61</sup> Thus it appears from the state's and chief's perspective in Kwelanga that the chief's personal property devolves like any other person's property despite Bekker and Koyana's intimation otherwise.

This variation in practice elucidates the danger of legislating in this arena: it purports to offer a one-size fits all solution when there may be rich variation in practice. While a provision may reflect the experience of certain communities, it may be wholly inappropriate in others, as mentioned by Bekker and Koyana, with the result that it is ignored.

Nonetheless, it must be borne in mind that there is no strict separation between the two versions of customary law as official customary law may reflect living customary law at a point in time and once living customary law is recorded, it assumes some of the features of official customary law.<sup>62</sup> Official customary law may also change the practices of people and thus influence the development of living customary law.<sup>63</sup> Thus the difference between official and living customary law should not be overstated. Furthermore, given the dearth of empirical research on customary practices, the thesis relies on official customary law as the best available information. This is an acknowledged limitation and highlights the need for further research.

#### 2.2.4.3 Practical norms

Practical norms are also relevant in the administration of estates. Practical norms emerge in the dissonance between official state policy and the practical implementation of policy by officials, which may either positively or negatively affect service delivery.<sup>64</sup> The notion of practical

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<sup>60</sup> Interview with official at service point, 19 October 2016.

<sup>61</sup> This is discussed in detail in Chapter 5 at 97–103.

<sup>62</sup> Bennett (note 1) at 193.

<sup>63</sup> Ibid.

<sup>64</sup> JP Olivier de Sardan 'Practical norms: Informal regulations within public bureaucracies (in Africa and beyond)' in T Herdt and JP Olivier de Sardan (eds) *Real governance and practical norms in Sub-Saharan Africa* (2015)

norms has been used to describe this divergence and the conduct of officials which does not adhere to official policy.<sup>65</sup> Practical norms are defined as ‘the various informal, *de facto*, tacit or latent norms that underlie the practices of actors which diverge from the official norms (or social norms)’.<sup>66</sup> These norms may not be explicit or taught but are nonetheless used by officials in fulfilling their duties.<sup>67</sup> They are the recurrent, tolerated and relatively predictable practices of officials that are not regarded as marginal or criminal though they are not state-sanctioned.<sup>68</sup>

The notion of practical norms is congruent with Lipsky’s theory in the context of public welfare bureaucracies that public officials exercise an undeniable discretion in the implementation of policies.<sup>69</sup> Lipsky coined the term ‘street-level bureaucracy’ and argues that policy is made in the decisions of officials and routines they establish rather than by legislatures in a top-down approach.<sup>70</sup> While Lipsky’s analysis has been critiqued in the context of social care organisations,<sup>71</sup> his arguments regarding the discretion of public officials in the implementation of policy generally accords with the notion of practical norms and is used as an analytical tool to understand the administration of estates. Thus, Lipsky’s theory on street-level bureaucracy and the notion of practical norms enables an investigation into whether officials use other norms, besides state law and customary law, to administer customary law estates.

Practical norms or street level bureaucracy is usually used to explain officials’ conduct that deviates from state law. In the thesis, the notion of practical norms is used broadly to include the conduct of ordinary individuals which does not accord with state or customary law. People live according to a combination of laws, including their own modifications thereof, and repertoires which may represent the practices of people without constituting law. This was exemplified in Kwelanga where participants explained that funerals had evolved into costly and extravagant events in recent times. This was not considered to be a cultural practice or required in terms of customary law. Rather it was explained as a practice that evolved due to societal

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19 at 21. Also see JP Olivier de Sardan *Researching the practical norms of real governance in Africa* (2008) and JG Galaty ‘Official and practical norms in theoretical context: A commentary on Olivier de Sardan’ 2010 (31) *Canadian Journal of Development Studies* 21.

<sup>65</sup> de Sardan ‘Practical norms’ (note 64) at 21.

<sup>66</sup> *Ibid* at 26.

<sup>67</sup> *Ibid* at 21.

<sup>68</sup> *Ibid* at 26–27.

<sup>69</sup> M Lipsky *Street-level bureaucracy: Dilemmas of the individual in public service* (1980).

<sup>70</sup> Also see P Hupe and M Hill ‘Street-Level bureaucracy and public accountability’ 2007 (85) *Public administration* 279 for a discussion thereon.

<sup>71</sup> T Evans ‘Professionals, managers and discretion: Critiquing street-level bureaucracy’ 2010 (41) *The British Journal of Social Work* 368 and T Evans and J Harris ‘Street-level bureaucracy, social work and the (exaggerated) death of discretion’ 2004 (34) *The British Journal of Social Work* 871.

pressure and maintaining appearances. In this regard, the behavioural norms that regulate people's social conduct do not always constitute customary law and would not attract constitutional protection; these are referred to as practical norms in the thesis.

The evolving nature of customary law means that it may be hard to distinguish between customary law practices and practical norms. In respect of the extravagant nature of funerals, younger individuals in the community explained the larger funerals as a customary law practice and part of their culture and it was evident that they considered it the norm. However, older individuals were adamant that this was not necessitated by culture but rather it was a practice that had seeped into the community due to individuals trying to keep up with each other. Given the evolving nature of customary law, the practice may eventually embed itself as part of customary law, but it would be hard to determine the exact point in time this occurs.

## **2.3 South African legal framework**

It is difficult to classify the South African legal system strictly in terms of the concepts of weak or deep legal pluralism. This section analyses the recognition and application of customary law in the constitutional era, both theoretically and in reality, and explores the difficulties in classifying the South African legal system.

### *2.3.1 Constitutional recognition of customary law*

The advent of the Constitution was a milestone in the history of customary law in South Africa. Constitutional recognition was expected to end the years of non-recognition, suppression and general attitude of disdain displayed towards customary law.<sup>72</sup> However, under the interim Constitution, the recognition of customary law was tepid and its exact status remained unclear.<sup>73</sup>

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<sup>72</sup> In terms of the Native Administration Act 38 of 1927 (subsequently renamed the Black Administration Act), customary law was only applied where both litigants were Black, in specialised courts and provided it was not contrary to the principles of public policy or natural justice. Even when the specialised courts were abolished, the application of customary law remained subject to the repugnancy clause: Indigenous law was not to conflict with the principles of public policy and natural justice; section 11(1) of the Black Administration Act 38 of 1927. For a discussion of the historical treatment of customary law, see Himonga and Bosch (note 31); Bennett (note 3) 34–42; Himonga and Nhlapo (note 31) 3–17 and J Church 'The place of indigenous law in a mixed legal system and a society in transformation: A South African experience' 2005 *Australia and New Zealand Law and History E-journal* 94 at 94–99.

<sup>73</sup> C Rautenbach 'Some comments on the status of customary law in relation to the Bill of Rights' 2003 (14) *Stellenbosch L. Rev.* 107 at 107. Sections 181(1) and (2) of the Constitution of the Republic of South Africa, Act 200 of 1993 ('the interim Constitution') provided for the recognition of a traditional authority which observes a system of indigenous law and for indigenous law to be subject to regulation by law but did not directly recognise indigenous law. There were also a set of constitutional principles with which the final Constitution had to

The 1996 Constitution corrected the ambiguous recognition of customary law.<sup>74</sup> Customary law as a component of culture is protected in sections 30 and 31 of the Constitution, which also establishes the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.<sup>75</sup> The Constitution recognises the existence of any other rights and freedoms in customary law to the extent that they do not conflict with the Bill of Rights and provides that in the development of customary law courts must promote the spirit, purport and objects of the Bill of Rights.<sup>76</sup> The newly elevated status of customary law was emphasised by the Constitutional Court in *Alexkor* which held that indigenous law is an integral part of our legal system whose ultimate force and validity depends on the Constitution.<sup>77</sup> Thus customary law in the constitutional era is no longer to be treated as an inferior and subordinate system of law but as Himonga opines as an original system of law with its own character, rules, rights and values.<sup>78</sup>

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comply to be certified by the Constitutional Court. Constitutional principle XIII provided that indigenous law was to be recognised in the Constitution and like the common law applied by the courts, subject to the rights in the Constitution and to legislation dealing specifically therewith – see Schedule 3 of the interim Constitution. For a discussion on customary law under the interim Constitution, see Himonga and Nhlapo (note 31) 17–18; Bennett (note 3) 76–78 and 113–114 and Himonga and Bosch (note 31) at 309–312.

<sup>74</sup> The reference to ‘indigenous law’ was changed to ‘customary law’ in the final Constitution, the Constitution of the Republic of South Africa, 1996 (‘the Constitution’) and the terms are generally treated as synonymous Rautenbach (note 73) fn 6. For a discussion on the constitutional recognition of customary law under the Constitution, see Bennett (note 1) at 185–188.

<sup>75</sup> Section 30 is the individual right to culture and provides: ‘Language and culture

30. Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.’

Section 31 is the group right to culture which provides: ‘Cultural, religious and linguistic communities

31. (1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.’ For the establishment and regulation of the Commission see sections 181(1), 185 and 186 of the Constitution.

<sup>76</sup> Sections 39(2) and (3) of the Constitution. For a discussion of constitutional legal pluralism, see C Himonga ‘The Constitutional Court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law’ 2017 (2017) *Acta Juridica* 101 at 104–108.

<sup>77</sup> *Alexkor* (note 35) para 51.

<sup>78</sup> Himonga (note 76) at 112. Also see Himonga and Nhlapo (note 31) 18–20; Rautenbach (note 73); T Bennett ‘Application and ascertainment of customary law’ in C Rautenbach and J Bekker (eds) *Introduction to legal pluralism* 4ed (2014) 35 at 38–41 and Himonga and Bosch (note 31) at 312–318.

Nonetheless, the South African Constitution is the supreme law in the country,<sup>79</sup> the Bill of Rights applies to all law in the country, including customary law<sup>80</sup> and discrimination based on culture is prohibited.<sup>81</sup> Customary law is thus subject to the Constitution and may be struck down when it conflicts with constitutional rights and values.<sup>82</sup> Furthermore, while courts are obliged to apply customary law when applicable, customary law is subject to the Constitution and any legislation dealing specifically therewith.<sup>83</sup>

Himonga argues that the subjection of customary law to legislation casts a shadow on the equal existence of customary and common law and creates ambiguity regarding the relationship between the systems of law and application of the Constitution thereto.<sup>84</sup> This is because legislation favours common law values and rules and the regulation of customary law in legislation almost always undermines customary law. Furthermore, if the Constitution is used as a filter for customary law, the value of the constitutional recognition of the law is questionable.<sup>85</sup> Himonga also notes the contradictory approach of the courts in the recognition of customary law and their actual pronouncements which favour common law values and rules.<sup>86</sup> While courts in theory may recognise the flexible and distinctive nature of customary law, they grapple to give it effect in practice. The issues raised by Himonga articulate the difficulties of a legally pluralistic system often hidden behind a veneer of a utopian society celebrating difference and diversity. It brings to the fore the complexities of the South African legal system and why the constitutional provisions and judicial rhetoric cannot be taken at face value and must be scrutinised closely.

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<sup>79</sup> Section 2 of the Constitution.

<sup>80</sup> C Rautenbach 'A commentary on the application of the Bill of Rights to customary law' 1999 (20) *Obiter* 113. For a discussion of the historical lead-up to the constitutional recognition of customary law, see Y Mokgoro 'The customary law question in the South African Constitution' 1996 (41) *St. Louis U. L.J.* 1279.

<sup>81</sup> Section 9(3) of the Constitution.

<sup>82</sup> For a discussion on the subjection of customary law to the Constitution, see J Bekker 'How compatible is African customary law with human rights? Some preliminary observations' 1994 *THRHR* 440.

<sup>83</sup> Section 211(3) of the Constitution. For a discussion on this constitutional obligation see W Lehnert 'The role of the courts in the conflict between African customary law and human rights' 2005 (21) *SAJHR* 241 at 243–246; R Mqoke 'Guidelines for determining the constitutional injunction to apply customary law in the new South Africa' 2009 (126) *SALJ* 689.

<sup>84</sup> Himonga (note 76) at 114–117.

<sup>85</sup> *Ibid* at 116.

<sup>86</sup> *Ibid*.

### 2.3.2 Recognition of living customary law

The Constitution does not explicitly articulate whether it is living or official customary law that is recognised and protected. Scholars argue that the Constitution protects living customary law<sup>87</sup> and explain that the recognition of official customary law constitutes the recognition of ‘state culture’ as opposed to the culture of people recognised and protected in the Constitution.<sup>88</sup> Thus it is living customary law which reflects the practices of people that is protected in the Constitution.<sup>89</sup>

Despite the silence in the Constitution on what form of customary law is protected, courts, in theory at least, recognise the constitutional protection of living customary law. The Constitutional Court in its *Certification* judgment held that the Constitution protects an ‘evolving system of customary law’,<sup>90</sup> has repeatedly defined customary law in terms of its living notions<sup>91</sup> and emphasised that it is this version of the law that must be ascertained and given effect to.<sup>92</sup> Similarly, legislation is drafted broadly to capture living customary law. The Reform Act defines a ‘spouse’ and ‘descendant’ with reference to customary law which in turn is defined as the ‘customs and usages traditionally observed amongst the indigenous African people of South Africa and which form part of the culture of those peoples’.<sup>93</sup> This broad definition is interpreted to refer to living customary law which thus plays an important role in identifying beneficiaries under the Reform Act.<sup>94</sup>

The matter, however, is more nuanced than this. Despite the constitutional recognition of living customary law and the general acknowledgment that it represents a more authentic version of the law, it is often overlooked in favour of official customary law. First, the Constitution

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<sup>87</sup> L Mwambene ‘The essence vindicated? Courts and customary marriages in South Africa’ 2017 (17) *African Human Rights Law Journal* 35 at 37; TW Bennett ‘Re-introducing African customary law to the South African legal system’ 2009 (57) *The American Journal of Comparative Law* 1 at 8; Lehnert (note 83) at 247; Himonga and Bosch (note 31) at 328.

<sup>88</sup> Lehnert (note 83) at 247; Himonga and Bosch (note 31) at 330–331.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744 (CC) para 197.

<sup>91</sup> *Alexkor* (note 35) para 52.

<sup>92</sup> *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC) para 46.

<sup>93</sup> The Reform Act adopted the definition used in the Recognition of Customary Marriages Act 120 of 1998 (‘the Recognition Act’) for the purposes of consistency; see Justice and Correctional Services Committee Meeting on Floor Crossing legislation: Public hearings and deliberations; Reform of Customary Law of Succession Bill: Department Response to submissions 29 July 2008. One minor difference is that the Reform Act uses the word ‘people’ while the Recognition Act uses ‘peoples’.

<sup>94</sup> Rautenbach (note 73) fn 8; Mwambene (note 87) at 39; Bennett (note 1) at 188.

subjects living customary law to official customary law<sup>95</sup> and thus where living customary law conflicts with the Reform Act, the Reform Act takes precedence.<sup>96</sup> This is regardless of whether the living customary law gives better effect to human rights or yields a more satisfactory outcome. Official customary law is prioritised over living customary law even though a significant conflict between the two may hinder implementation of the legislative provisions in communities.

Secondly, ascertaining living customary law in courts entails significant costs and time.<sup>97</sup> Historically, courts relied upon the official accounts of customary law and in some cases applied decisions as precedent from one case to the other with no mention of the system of law in issue.<sup>98</sup> More recently courts have attempted to ascertain the content of living customary law but have been criticised for accepting the litigant's version of the law without interrogation as to whether the alleged rule forms part of the customary law of the community concerned.<sup>99</sup> Despite incorporation of living customary law in legislation, official customary law is promoted by courts in the interpretation and implementation of the legislation.<sup>100</sup>

The incorporation of living customary law into the Reform Act in, among others, the definition of a descendant is thus no guarantee that the practices of communities will be recognised. Whether the living customary law practices are recognised will depend on the officials and courts who interpret and apply the law. Current jurisprudence suggests that courts rely on the official customary law due to time and costs constraints.

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<sup>95</sup> Section 211(3) of the Constitution.

<sup>96</sup> Despite the recognised complexity of the relationship between customary law and common law discussed in this section, this thesis adopts the 'face-value' meaning of s 211(3) *vis-à-vis* the relationship between customary law and common law presented in this section. This constitutes the best way to analyse the interaction of these systems of law with respect to the administration of estates.

<sup>97</sup> For a general discussion of the courts approach to the ascertainment of customary law see J Bekker and I van der Merwe 'Proof and ascertainment of customary law' 2011 (26) *SAPL* 115; Bennett (note 78) 35 and Himonga and Nhlapo (note 31) 49–68.

<sup>98</sup> *Ndlovu v Mokoena* 2009 (5) SA 400 (GNP).

<sup>99</sup> *Mabuza v Mbatha* 2003 (4) SA 218 (C) and *Mabena v Letsoalo* (note 31). For a discussion of the cases see Bennett (note 87).

<sup>100</sup> For example, in the recent case of *Ramuhovhi v President of the Republic of South Africa* 2016 (6) SA 210 (LT), the court was faced with deciding the constitutionality of a provision of the Recognition Act which provided that the proprietary consequences of a polygamous marriage entered into before the Act's commencement was governed by customary law. The court examined the official customary law and not the living customary law on the matter. For a discussion of the treatment of customary law by the court, see F Osman and C Himonga 'The constitutionality of section 7(1) of the Recognition of Customary Marriages Act: *Ramuhovhi v President of the Republic of South Africa*' 2017 (49) *The Journal of Legal Pluralism and Unofficial Law* 166.

### 2.3.3 *Legal pluralism in the South African legal system*

This section examines why any classification of the South African legal system, including that as a legally pluralistic society, requires careful analysis and consideration.

The South African legal system at first glance appears to be a legally pluralistic state. As discussed previously, the South African Constitution recognises common law and customary law and the courts have consistently articulated their commitment to the recognition and protection of living customary law. However, the reality is that court decisions and legislative enactments have not recognised laws and institutions in conflict with Western values and favour common law and its values at the expense of customary law.<sup>101</sup> This is perhaps exemplified by the Constitutional Court's approach in *Bhe* when faced with the question of the constitutionality of the principle of male primogeniture. The court declined to develop the customary law of succession as mandated by the South African Constitution and applied the common law Intestate Succession Act to customary law intestate estates. The decision was highly criticised<sup>102</sup> but typified the approach where the courts seek the answers to customary law problems in the common law. Furthermore, van Niekerk notes that courts often interpret legislation in light of common law values at the expense of customary law.<sup>103</sup> She argues that this jurisprudence reflects a reluctance to accord equal status to customary law and common law and a denial of deep legal pluralism.<sup>104</sup>

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<sup>101</sup> van Niekerk (note 6) at 350 and G van Niekerk 'The challenge of legal pluralism: Case note' 2008 (23) *SAPL* 208 at 210–211.

<sup>102</sup> Ngcobo J wrote a strong dissenting judgment criticising the majority's application of the Intestate Succession Act in *Bhe* (note 31) para 229–239; also see E Grant 'Human rights, cultural diversity and customary law in South Africa' 2006 (50) *Journal of African law* 2; Bekker and Koyana (note 55); C Rautenbach, W du Plessis and G Pienaar 'Is primogeniture extinct like the dodo, or is there any prospect of it rising from the ashes? Comments on the evolution of customary succession laws in South Africa: Notes and comments' 2006 (22) *SAJHR* 99; E Knoetze and M Olivier 'To develop or not to develop the customary law: That is the question in *BHE*: Note' 2005 (26) *Obiter* 126; C Rautenbach 'South African common and customary law on intestate succession: A question of harmonisation, integration or abolition' 2008 (3) *J. Comp. L.* 119.

<sup>103</sup> Niekerk (note 101) at 211. For example in *Nkosi v Bührmann* 2002 (1) SA 372 (SCA), the court would not interpret 'family life' in the Extension of Security of Tenure Act 62 of 1997 ('ESTA') to include the values associated with the customary law burial practices. Similarly, the Land Claims Court in *Serole v Pienaar* 2000 (1) SA 328 (LCC) denied the applicants the right to bury the deceased on the land they were occupying. It was only after an amendment to ESTA in 2001, which allowed an occupier 'to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists;' that the Supreme Court of Appeal allowed occupiers to bury their deceased on the farm owner's land against his wishes in *Dlamini v Joosten* [2005] JOL 16179 (SCA).

<sup>104</sup> van Niekerk (note 101) at 211.

Legislative interventions in the customary law arena mirror the courts' jurisprudence. The Reform Act applies the common law Intestate Succession Act to regulate the devolution of customary intestate estates, essentially displacing customary law succession. Similarly, the Recognition Act imports large portions of common law to regulate customary law marriages to the extent that Himonga describes it as a 'common law African customary marriage'.<sup>105</sup> Thus even in the recognition and application of customary law, the state appears to favour and elevate common law above customary law.<sup>106</sup> The reality being that often the legal framework of legal pluralism is a façade for a legal system dominated by the common law.

Furthermore, it may appear that even the recognition of customary law in South Africa may be positivist in nature. Customary law derives its authority from state law, namely the Constitution, and state law stipulates the criteria for its ascertainment<sup>107</sup> and application.<sup>108</sup> The Constitution may also require certain portions of customary law to be struck down or not recognised when in conflict with the Constitution. As the state sets the parameters for the recognition and application of customary law, the South African legal system reflects a state of weak legal pluralism.

However, the matter is more complex and nuanced than this. The constitutional recognition of living customary law, which can only be ascertained by examining the practices of people, constitutes the recognition and application of law emanating from non-state institutions.<sup>109</sup> The constitutional recognition means that until the living customary law is challenged and struck down in court, it prevails. In this regard, the state has no control over the recognition and application of the law.

This is further complicated by the fact that individuals do not adopt the state's view of the legal system. Individuals follow customary law because it is part of their culture and belief rather than due to any constitutional recognition. Thus, individuals in South Africa lived according to customary law even prior to state recognition thereof.<sup>110</sup> Furthermore, individuals in Kwelanga

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<sup>105</sup> C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: the reform of the customary law of marriage and succession' 2005 *Acta Juridica* 82 at 84.

<sup>106</sup> van Niekerk (note 6).

<sup>107</sup> Sections 1(1) and (2) Law of Evidence Amendment Act 45 of 1988.

<sup>108</sup> The courts have formulated guidelines for determining when to apply customary law for a discussion of which, see Himonga and Nhlapo (note 31) 83–87; Bennett *Customary law in South Africa* (note 3) 53–60; Bennett (note 78) at 42–44; van Niekerk (note 101) at 208.

<sup>109</sup> For a general discussion of deep legal pluralism in South Africa, see C Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' 2010 60 *Journal of Legal Pluralism* 143.

<sup>110</sup> Bennett *Customary law in South Africa* (note 3) 34–42.

never referenced the Constitution as the reason they live according to customary law or that they check their practices against the Constitution. Rather individuals questioned ‘how can the government change our law?’<sup>111</sup>. Even where the community’s practices accorded with the state law on the distribution of property, it is not clear that this was directed by the state law. The distributions were explained as a manifestation of a customary law practice though it is arguable that its development may have been influenced by state law. This accords with the definition of living customary law which evolves and adapts (through the practices of its adherents) to changes in social, economic and political conditions or other legal orders’ influences.

There thus appears to be a divergence in the state’s and individuals’ views of the legal system. While the Constitution and the Constitutional Court view customary law as deriving its authority from and being subject to the Constitution, individuals may live according to laws and norms irrespective of whether they are recognised by the state.<sup>112</sup> Thus, while the state may view the legal system as one of weak legal pluralism, the lived reality is perhaps best explained in terms of the notions deep legal pluralism<sup>113</sup> and the semi-autonomous social field.

The state’s and individual’s divergent perspectives of the legal system are more than just of theoretical importance and impact on the approach of state officials in the administration of estates. The statements below reflect a positivistic approach which ignores that there are other coercive forces that impact on people’s behaviour.

‘We are finished now ... processing all the deceased’s estate.... No, no. It’s not my problem now.... I’ve finished on my side.’<sup>114</sup>

‘Because I am standing here as a Jesus of them.... They have confidence with me.... Yes. I am the mastermind of this section.’<sup>115</sup>

Officials consider their directions on the distribution of an estate as law that cannot be resisted or avoided. This positivist approach ignores non-state norms that regulate conduct. This risks property grabbing going undetected and, more importantly, unaddressed by the state. The danger is that vulnerable parties who experience property grabbing are blamed for not asserting

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<sup>111</sup> Interview with male participant, 8 September 2015.

<sup>112</sup> van Niekerk (note 101) at 209.

<sup>113</sup> Ibid.

<sup>114</sup> Interview with official at service point, 31 August 2015. This was in response to being asked what happens after the letters of authority are issued and whether there is oversight as to the distribution of the money. Some portions of the transcripts presented in the thesis have been slightly edited for ease of understanding.

<sup>115</sup> Interview with official at service point, 19 October 2016. This was in response to the question of whether people comply with their directions.

their rights rather than acknowledging the limitations of the Reform Act and the ability of social fields to resist interference in their sphere of influence.

State officials when asked directly about property grabbing acknowledged that there may be coercion of beneficiaries to forsake their benefits during the administration process. However, such behaviour was considered beyond the domain of the state and the investigative powers of officials. While the lack of investigation was explained based on limited resources and safety concerns for officials, it also reflects the focus on state law and processes rather than an acknowledgement of the range of normative orderings that regulate people's lives.

State officials perceive the system of administration of estates in terms of weak legal pluralism. Social reality, however, reflects deep legal pluralism as estates are administered in accordance with state law, customary law and other practical norms. Given the conflicting perspectives, it is better for analytical purposes to acknowledge the social reality and how it may be treated by the state rather than purport to categorise the system. The thesis proceeds on the basis that there is a range of pertinent laws and normative orderings which govern the administration of estates and among these laws and orderings, state law may not always be effectual or supreme.

## **2.4 CONCLUSION**

This chapter set out the theoretical frameworks of weak legal pluralism, deep legal pluralism and the semi-autonomous social field. In South Africa, customary law derives its authority from the Constitution and state law sets out the parameters of the recognition and application of customary law. This legislative system fits squarely into the theory of weak (or state) legal pluralism, in which the state recognises and gives effect to a plurality of normative orders. The social reality, however, differs from the formal construction of the legal system. Individuals live according to customary law, independent of state recognition thereof, and state law is not always effectual in regulating the application of customary law. In accordance with the notion of the semi-autonomous social field, customary law operates in a manner that interacts with state law but is neither completely subordinate nor independent of it. Customary law is influenced by state law and may in certain instances resist state intrusions into its spheres.

Furthermore, in the context of the administration of estates, there may be other relevant normative orderings in addition to state and customary law. This chapter explains the notion of practical norms as the unofficial practices of state officials in implementing state law. While the practices are not state sanctioned, they are as effective in regulating conduct and are

perceived by individuals as state policy. The thesis investigates the administration of estates cognisant of practical norms and practices adopted by individuals that may not constitute state or customary law, but which may nonetheless determine the administration of an estate.

The chapter further explored the distinction between official and living customary law and explained living customary law to be an evolving system of law found in the practices of people which adapts to changing conditions. It argued that despite the constitutional recognition of living customary law, its incorporation into legislation and judicial rhetoric regarding the importance of living customary law, official versions of customary law are often promoted at the expense of living customary law. This alludes to a system of weak legal pluralism which belies the social reality.

Accordingly, this chapter argued that more important than classification of the South African legal system as a weak or strong pluralistic state is the understanding of the nuanced manner in which the state administers and individuals experience the legal system. These conflicting approaches are difficult to reconcile but provide an analytical lens to investigate the administration of estates and address the research question.

## CHAPTER 3 SOCIO-ECONOMIC CONTEXT AND OVERVIEW OF STATE PROCESS

### 3.1 Introduction

Chapter two explained that living customary law is understood to be the practices of people that adapt to changing conditions. In light of this definition, the thesis uses a case study to gain insights into people's practices, and this chapter provides an overview of the village and state offices that are the subject of the investigation.

First, the chapter provides the socio-economic context of South Africa and the Eastern Cape province generally and then it focuses on the Kwelanga village, the site of the case study to contextualise the findings in the study. Thereafter, the chapter examines the processes of the Master's Offices and service points which administer estates with specific reference to the offices with jurisdiction over Kwelanga. Finally, it provides a brief overview of how state offices apply the Reform of Customary Law of Succession Act ('the Reform Act').<sup>1</sup>

### 3.2 Socio-economic context of the case study

This section examines Kwelanga's socio-economic context in relation to the broader profile of the country and province in which Kwelanga is located.

#### 3.2.1 Socio economic profile of South Africa

South Africa is a country characterised by stark inequalities and elevated levels of poverty and unemployment. Apartheid policies, which favoured a White minority at the expense of the majority Black population, have left the country with one of the highest inequality levels in the world.<sup>2</sup> The inequalities are still largely divided on race with the Black population group

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<sup>1</sup> Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

<sup>2</sup> The Gini co-efficient uses a scale of 0–1 to measure inequality. Total equality is represented by an index of 0, while a state of complete inequality is represented by a scale 1. South Africa has a Gini co-efficient of 0.68 when measured per capita income and 0.64 when measured per capita expenditure, Statistics South Africa *Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015* (2017) 21 available electronically at <https://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf> [accessed on 19/10/18]. According to the World Bank, South Africa is considered to be the most financially unequal country in the world, followed by Namibia and Haiti according to the Gini co-efficient measurement, <https://data.worldbank.org/indicator/SI.POV.GINI> [accessed on 16/10/17].

enduring the highest levels of poverty.<sup>3</sup> As a result of this inequitable distribution of wealth, the country remains steeped in poverty. In 2015, poverty rose with an estimated 30.4 million people, constituting 55.5 per cent of the population, living below the upper poverty line of R992 (approximately 70 US \$)<sup>4</sup> per person per month.<sup>5</sup> Poverty is closely coupled with unemployment and access to education. In 2017, South Africa had an unemployment rate of 27.7 per cent,<sup>6</sup> which increases to 36.4 per cent when discouraged work seekers and those not actively seeking employment are considered.<sup>7</sup> Furthermore, access to quality education remains difficult for Black South Africans. Only 9.1 per cent of Black South Africans have attained post-secondary education, which is below the national average of 12.1 per cent.<sup>8</sup> This is troubling given that poverty and inequality are largely attributed to inequality in qualifications and skills.<sup>9</sup>

The Eastern Cape province is one of the poorest provinces in South Africa.<sup>10</sup> The province was formed in 1994 with the adoption of the South African Constitution and is constituted predominantly from the areas of the former homelands of Transkei and Ciskei. The homelands, or Bantustans, were separate areas in South Africa to which the apartheid state moved the majority of the Black population to prevent them from living in the urban areas.<sup>11</sup> The infrastructure (such as roads, water and telecommunications) of these areas was never developed and the province remains one of the most underdeveloped in the country.<sup>12</sup> In 2016, it was the third most populous province in the country with a population of almost 7 million people, 86 per cent of which are Black South Africans.<sup>13</sup> The province has one of the highest

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<sup>3</sup> Statistics South Africa *Poverty trends* (note 2) 18.

<sup>4</sup> This is based on the average exchange rate of 1 USD = 14 ZAR.

<sup>5</sup> Statistics South Africa (note 2) *Poverty trends* 14.

<sup>6</sup> Statistics South Africa *Quarterly Labour Force Survey* (2017) 1 available electronically at <https://www.statssa.gov.za/publications/P0211/P02111stQuarter2017.pdf> [accessed on 16/10/17].

<sup>7</sup> *Ibid* 9.

<sup>8</sup> Statistics South Africa *Education Series Volume III: Educational Enrolment and Achievement, 2016* (2017) 16 available at <http://www.statssa.gov.za/publications/Report%2092-01-03/Report%2092-01-032016.pdf> [accessed on 2/11/17].

<sup>9</sup> *Ibid* 15.

<sup>10</sup> Statistics South Africa *Poverty trends* (note 2) 18.

<sup>11</sup> <http://www.sahistory.org.za/article/homelands>. The removals were done under the guise that it would give Black individuals greater autonomy as the homelands would constitute separate states with independent governments. In reality, the creation of the homelands was meant to strip the rights of Black individuals within 'White South Africa'.

<sup>12</sup> For a general discussion of the rural area in South Africa, see C Himonga and E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015) 16–18.

<sup>13</sup> Statistics South Africa *Provincial profile: Eastern Cape Community Survey 2016* (2018) 7 and 15 available at <http://cs2016.statssa.gov.za/wp-content/uploads/2018/07/EasternCape.pdf> [accessed on 24/10/18].

unemployment rates in the country at 32.2 per cent and an expanded unemployment rate of 43.6 per cent.<sup>14</sup> It is also considered to be one of the most dangerous in South Africa with the highest murder rate of 55.9 per 100 000 people.<sup>15</sup>

Kwelanga is located in a municipality that has high levels of unemployment and poverty. The poverty and unemployment levels in the municipality are approximately 65 per cent and 46 per cent<sup>16</sup> respectively, and significantly higher than the national averages of 56 per cent and 28 per cent. The percentage of households dependent upon social grants in the municipality is 38 per cent, which fares better than the greater district which is at 75 per cent.<sup>17</sup> The population is almost exclusively African<sup>18</sup> with poor access to formal education. Half of the adult population in the municipality have not progressed beyond a Grade 8 level of schooling (which corresponds to a 13-14-year-old schooling) and only a mere 4 per cent have passed Grade 12, being the completion of secondary school (which is colloquially known as high school in South Africa).<sup>19</sup>

It is important to bear in mind the over-arching context of the province and the country as slow reform must be understood in light of a state faced with pressing problems of hunger and unemployment.

### 3.2.2 *Kwelanga village*

The case study was conducted in a rural village where individuals live under a traditional authority and according to customary law. While customary law is a personal system of law which may apply to individuals regardless of where they live, it was thought that a case study of a rural area would yield the richest results and provide insights into the devolution of family and house property generally located within rural areas.<sup>20</sup>

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<sup>14</sup> Statistics South Africa *Quarterly Labour Force Survey* (note 6) 9.

<sup>15</sup> 'Factsheet: South Africa's crime statistics for 2016/17' 24 October 2017 *Africa Check* available at <https://africacheck.org/factsheets/south-africas-crime-statistics-201617/> [accessed on 2/11/17].

<sup>16</sup> 'Integrated Development Plan for 2012-2017' 8. The name of the municipality has been omitted to protect the confidentiality of participants.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid* 24, in 2007, Africans constituted 99 per cent of the population.

<sup>19</sup> *Ibid* 28, once again this is lower than the national average of 11 per cent.

<sup>20</sup> However, see *Nedbank Limited v Molebaloa* (377802015) [2016] ZAGPPHC 863 (12 August 2016) para 29 where the court acknowledged that family ownership of property has become common in urban areas though a modern phenomenon.

Kwelanga is governed by a traditional authority and falls under one of the recognised Kingships in South Africa.<sup>21</sup> The king is not involved in the day-to-day happenings in the village and plays no role in the administration of estates. Kwelanga has a resident chief who assumed his position in 1989 and exercises authority over Kwelanga and two neighbouring villages. The chief is assisted by two headmen but at the time of study, one of the headmen had died and a new headman had yet to be appointed.

Kwelanga itself comprises a predominantly elderly population of approximately 900–1 300 people. The elderly population often care for their grandchildren while their children work away from the village or have passed away.<sup>22</sup> Most individuals have at some point worked in the cities, frequently at a mining company, and returned to the village upon retirement or when they were unable to work. Consonant with the demographics of the municipality and the larger province, the population is almost exclusively African.<sup>23</sup> There are some non-isiXhosa persons, such as Sotho and Tswana persons, and foreigners, being non-South Africans, in the village and notably a local shop in the village is operated by foreigners. The general perception is that these individuals have acclimatised into the isiXhosa custom rather than leading to a dilution of isiXhosa customs and practices.

The people of the community observe customary rituals and practices in their daily lives. Individuals adhere to the mourning rituals after the loss of a family member, marriages are celebrated in accordance with customary law and disputes are mediated through traditional structures. Christianity is growing in the village and in some cases clashes with cultural practices. For example, some widows do not adhere to customary mourning rituals of wearing certain clothing or confining themselves to their home for a period on the basis that it does not accord with Christianity. The growth of Christianity, however, has not detracted from the general traditional nature of the village where customary practices permeate individuals' lives.

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<sup>21</sup> There are 14 kingships, queenships and / or principal traditional leaders across South Africa, see 'South Africa has a huge amount of traditional leaders – here's how much they get paid' BusinessTech 6/8/2018 available at <https://businesstech.co.za/news/government/263191/south-africa-has-a-huge-number-of-traditional-leaders-heres-how-much-they-get-paid/> [accessed on 8/10/18].

<sup>22</sup> This social context is obtained from interviews and interactions with the chief, headman, individuals in the village and state officials who service the village.

<sup>23</sup> The population in the district is almost exclusively African, Statistics South Africa *Provincial profile* (note 13) 15.

Polygyny<sup>24</sup> is uncommon in Kwelanga. While there was an acknowledgement that it occurred, it was described as a rarity. Only one female participant from a focus group described herself as being in a polygynous marriage. Of the sample of 210 files analysed, two estates involved polygynous marriages. The scarcity of the practice is consonant with previous descriptions and the general decline of the practice in South Africa.<sup>25</sup>

Access to education, like elsewhere in the country, is difficult in the village. A primary school and a high school are situated within the village, and a new high school was in the process of being built but progress had stalled mid-way due to lack of funds. Individuals appeared to value education and many of them stated the need to access funds of the deceased to educate their children. Young individuals eagerly asked questions about further education opportunities and accessibility but there was a level of resignation that it was beyond them. The data was collected during the ‘Fees must Fall’ movement that racked tertiary institutions in South Africa during 2015–2017 with young individuals lamenting the expensive nature of such institutions.

Most youth seek work after completion or sometimes instead of high school rather than pursuing a tertiary education. Poor results, lack of resources and knowledge regarding further education opportunities, and the need to support themselves and their families are considerations that drive this decision. A few individuals have children who are pursuing further studies, but this is the exception rather than the norm.

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<sup>24</sup> ‘Polygyny’ refers to the practice of a man marrying more than one wife. In South Africa it is sometimes used interchangeably with ‘polygamy’ which is a gender-neutral term that refers to the state of marriage with many spouses. The term ‘polygyny’ is adopted in this thesis.

For a historical discussion on polygynous families, see TW Bennett *A sourcebook for African customary law for Southern Africa* (1991) 401–405.

<sup>25</sup> M Wilson, S Kaplan, T Maki and EM Walton *Social structure. Keiskammahoek rural survey* (1952) 46; C Himonga ‘The advancement of African women’s rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession’ 2005 *Acta Juridica* 82 at 91 fn 46.

In 2001 only 26 651 Africans (0.1 per cent of the population over the age of 15) were recorded in polygynous marriages, Statistics South Africa ‘Census 2001: Primary tables South Africa census ’96 and 2001 compared’ (2001) 31 available at [http://www.statssa.gov.za/census/census\\_2001/primary\\_tables/RSAPrimary.pdf](http://www.statssa.gov.za/census/census_2001/primary_tables/RSAPrimary.pdf) [accessed on 9/01/18]. Bennett describes it as a ‘rare exception’ T Bennett ‘The conflict of personal laws: Wills and intestate succession’ 1993 *THRHR* 50 at 52; *Mrapukana v Master of the High Court* [2008] JOL 22875 (C) para 10 where it is described as not being practised in many years; and D Budlender, S Mgweba, K Motsepe and L Williams *Women, land and customary law* (2011) 72 where the results of an empirical study in three rural communities found none to very few polygynous marriages. Himonga and Moore noted that polygynous marriages are more prevalent in KwaZulu-Natal and amongst individuals over 65. They note, however, that the marriages may be under-reported, see Himonga and Moore (note 12) 132–133.

Also, see J Bekker and G van Niekerk ‘Broadening the divide between official and living customary law’ 2010 (73) *THRHR* 679 at 679–680 where the authors review current studies in polygynous marriages and describe it as a dwindling practice.

Unemployment is rife in Kwelanga. The migrant labour system created during apartheid in which Black individuals left the homelands in search of employment in the cities continues today. Many young people in the village<sup>26</sup> sought work in nearby cities and towns but returned home discouraged by unsuccessful attempts to secure employment. Those who find work do so in unskilled capacities such as domestic workers or labourers. The youth were despondent and bitter about the state of the country and lack of opportunities for them. Many sought to engage in conversations about how the state had failed them.

Crime is on the increase in the village. The researcher was repeatedly cautioned regarding the safety of person and possessions in the village and nearby town. Furthermore, marijuana is grown near the village for sale which has led to an upsurge in its usage and an escalation in violent altercations, some resulting in death. Individuals also return to 'hide' in the village after committing crimes elsewhere, creating the perception that the village has become dangerous.

Most homes are made of brick and mortar and have electricity though many are dilapidated. There is no piped water in the houses. Communal taps are scattered throughout the village from which people collect water. Homes also have jojos, large tanks that collect rain water, which people use for everyday use. There are no flushing toilets in the village and like most individuals in the greater district, individuals use pit latrines.<sup>27</sup>

Kwelanga is generally a poor village. Most individuals live hand-to-mouth and engage in some form of small-scale subsistence farming and/or cattle and small stock farming to survive. Cattle, sheep, chickens and dogs are commonly found in the village. Individuals are either retired or unemployed, and dependent on state grants or pension. Several individuals may sleep in a single room with their staple food being pap.<sup>28</sup> Some individuals were better off with businesses, larger homes and greater comforts but this was the exception rather than the norm.

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<sup>26</sup> These were individuals between 18 and 25 years old.

<sup>27</sup> According to statistics, almost two thirds of the population in the greater district use a pit latrine; Statistics South Africa *Provincial profile* (note 13) 57.

<sup>28</sup> This is a traditional South African dish made of softly ground maize.

### 3.3 State offices

The Master's Office and the service point are the state offices responsible for the administration of estates. This section explains the services offered by these offices and their interactions with the community.

#### 3.3.1 Master's Office

The administrative body responsible for the supervision of the administration of all deceased estates is the Master of the High Court.<sup>29</sup> The Master of the High Court consists of:

- the office of the Chief Master;
- the Master's Offices;
- sub-offices of the Master; and
- service points.<sup>30</sup>

The Chief Master is the executive officer of the Master's Office<sup>31</sup> and does not play a role in the day-to-day administration of estates. This is carried out by the individual Master's Offices overseen and co-ordinated by the Office of the Chief Master.<sup>32</sup> The Master's Offices are situated at the seat of each High Court and there are currently 15 Master's Offices across South Africa.<sup>33</sup> The Master's Office has jurisdiction over the estates of deceased individuals ordinarily resident within their jurisdiction and has exclusive jurisdiction over, among others, estates larger than R250 000, which are considered to be large estates.<sup>34</sup>

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<sup>29</sup> W Abrie, Bd Clerq, C Graham, *et al Deceased estates* 10ed (2015) 81. The Master's Office is also responsible for the regulation and supervision of insolvent estates, administration of the Guardian's Fund, registration and supervision of trusts, supervision of curators, tutors and administrators and the appointment of executors, trustees, curators and liquidators.

<sup>30</sup> M Meyer and M Rudolph *Policy and procedure manual: Administration of intestate deceased estates at service points* (2016) 6.

<sup>31</sup> Department of Justice and Constitutional Development *Office of the Master of the High Court: A guide 2016* (2016) 3.

<sup>32</sup> Meyer and Rudolph (note 30) 7.

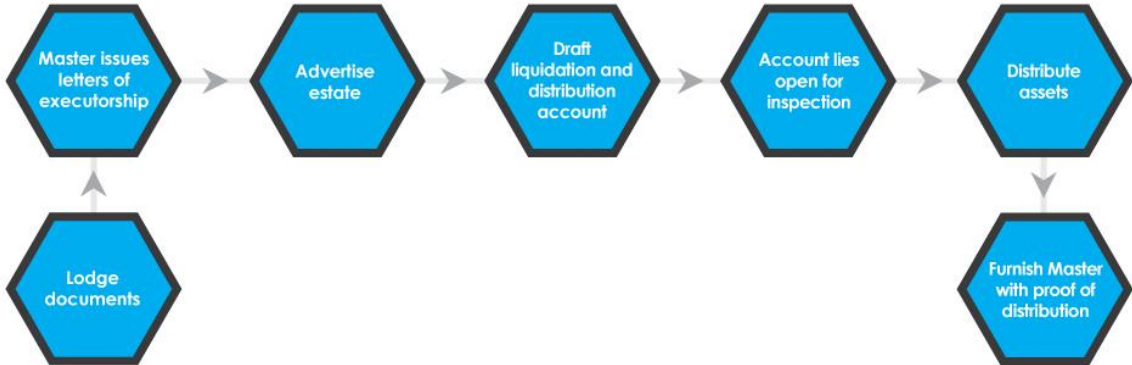
<sup>33</sup> Section 3(1) of the Administration of Estates Act 66 of 1965 ('Administration of Estates Act'). These offices are situated at Bisho, Bloemfontein, Cape Town, Durban, Grahamstown, Johannesburg, Kimberley, Mafikeng, Mthata, Nelspruit, Pietermaritzburg, Polokwane, Port Elizabeth, Pretoria, Johannesburg and Thohoyando.

<sup>34</sup> Section 4(1)(a) of the Administration of Estates Act. The exclusive jurisdiction of the Master's Office was increased from R125 000 to R250 000, see Determination of amounts for purposes of sections 18(3), 80 and 90 of the Administration of Estates Act, 1965 (Act 66 of 1965) in GN R920 GG 38238 of 24 November 2014.

The administration of a large estate may be cumbersome, protracted and costly. The person reporting the estate must lodge several documents such as the death notice, death certificate, marriage certificate, original will (if applicable), next of kin form, inventory form, nomination and acceptance as executor and undertaking of bond of security.<sup>35</sup>

The forms are in English and Afrikaans but not in any of the vernacular languages and officials spend between 20–40 minutes with clients to complete the forms. However, officials maintained that the translation of the forms into isiXhosa would not facilitate the process as most individuals were illiterate and would still require the forms to be explained to them.

After the lodgement of the required forms, the Master issues a letter of executorship to the executor who takes charge of the administration process.<sup>36</sup> The executor advertises the estate to allow creditors to lodge claims, drafts a liquidation and distribution account and then re-advertises the account, allowing it to lie open for inspection and objections. Only then will the estate be distributed, and the Master furnished with proof thereof.



**Figure 3: Graphical representation of administration process at the Master’s Office**

The processes are meant to safeguard the estate’s creditors and beneficiaries but result in a protracted administration process with estates generally only being wound up within 12–18 months. It is a costly process with the estate having to pay, among others, advertising fees, a

<sup>35</sup> Department of Justice and Constitutional Development (note 31) 10–12.  
<sup>36</sup> Ibid 97–98.

The nearest closest relative, usually the surviving spouse, is appointed as the executor of the estate. This means the widow is usually placed in control of the administration process. Only in very few instances in the case study was the widow overlooked as the executor. Chapter 5 discusses the appointment of the executor more fully.

Master's fee and an executor's fee.<sup>37</sup> Furthermore, as the duties of the executor are administratively burdensome, the Master requires an executor to be assisted by an attorney or to furnish a satisfactory amount of security.<sup>38</sup> These requirements protect the rights of beneficiaries but add to the costs of administration. Nonetheless, the process is advantageous as the executor is held accountable<sup>39</sup> and the Master has oversight over the final distribution of the estate. Beneficiaries have to confirm receipt of benefits and errant executors may be removed,<sup>40</sup> have their remuneration disallowed<sup>41</sup> or have criminal action instituted against them.<sup>42</sup> The sample of files reveals that the Master's Office exercises its supervisory functions and calls recalcitrant executors to account.

The Master's Office also exercises a supervisory function over estates administered at service points. The Master's Office checks the documents lodged before a service point issues a letter of authority – the document an administrator requires to administer a small estate of less than R250 000. In 2000, the supervisory function was facilitated by the adoption in certain offices of the paperless estates administration system ('PEAS') where the reporting and administration of estates is done online. PEAS has been implemented in all 15 Masters' Offices and in 2016 was reported to have been implemented in approximately 96 service points.<sup>43</sup> All the information is captured and supporting documents scanned on the Integrated Case Management System.

Where PEAS has been implemented at a service point, the file does not have to be physically sent to the Master's Office and the assistant Master can review the file electronically to ensure it is in order. The assistant Master approves and signs the letter of authority electronically which is then printed and handed to the client at the service point. The system efficiently confers on officials at the Master's Office instantaneous oversight over matters. Documents are stored electronically and there is more record keeping accuracy.

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<sup>37</sup> Abrie, Clerq, Graham, *et al* (note 29) 138–139.

<sup>38</sup> Meyer and Rudolph (note 30) 21. The assistance of an attorney may also be required where the estate is insolvent.

<sup>39</sup> In terms of section 36 of the Administration of Estates Act, the Master (or any person with an interest therein) may apply to court for an order to compel the executor to lodge an account or comply with duties.

<sup>40</sup> Section 54 of the Administration of Estates Act.

<sup>41</sup> Section 51(3)(b) of the Administration of Estates Act.

<sup>42</sup> Section 102 of the Administration of Estates Act.

<sup>43</sup> Department of Justice and Constitutional Development (note 31) 6. The figure may increase as more service points are added to the PEAS system on a continuous basis.

An unintended drawback of the online system is that when the system or electricity is down, the estate cannot be reported and clients are sent away. During the fieldwork, the service point and Master's Office frequently encountered power outages which resulted in unavailable services. Thus, while the electronic system appears advantageous, resource limitations may hinder implementation.

The Master's Office is also part of an integrated system with the Department of Home Affairs which allows the Office to extract the deceased's details, such as his or her marital status and details of children, directly from the Home Affairs database where it is captured.<sup>44</sup> This combats fraud as it ensures that the existence of the spouse and children cannot be concealed, and it prevents distribution of the estate to the exclusion of these rightful beneficiaries.<sup>45</sup> However, Chapter 7 discusses how customary marriages are frequently unregistered and men are not recorded as the father of children conceived out of wedlock. Thus, estates may continue to be reported without the disclosure of the spouse and children and distributed to their exclusion.

The Master's Office with jurisdiction over Kwelanga has jurisdiction over several districts, but it is described by officials as a small office in comparison to offices in the bigger cities of Johannesburg, Pietermaritzburg or Bloemfontein. The office operates on the online PEAS system and sees 20–50 people reporting estates per day. The office has a staff complement of almost 30 officials involved in the administration process. Two assistant masters are based at service points elsewhere in the province enhancing the services provided by allowing the assistant Masters to deal with matters that are solely within the jurisdiction of the Master's Office at the service point.

The Justice College offers training to officials on new laws such as the Reform Act to ensure its understanding and correct implementation. There is intercommunication among the service point, the Master's Office and the office of the Chief Master. Officials who encounter novel or complex problems seek assistance from their supervisors or request direction from the office of the Chief Master.

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

### 3.3.2 *Service point*

Master's offices, situated in town, are not easily accessible to individuals in deep rural areas. To assist with accessibility of services, certain magistrate's courts act as service points that administer estates.<sup>46</sup> Service points have limited jurisdiction and may not administer estates where:

- there is a will;
- the estate is insolvent;
- there are minors not represented by their guardians;
- the value of the estate is more than R125 000 and PEAS has not been fully implemented;
- the value of the estate is more than R250 000; or
- PEAS has not been implemented and one or more of the beneficiaries is a minor and the entire estate or part thereof consists of cash exceeding R20 000.<sup>47</sup>

Essentially, the service points administer simple estates smaller than R250 000 and follow an abridged administration process. Estates smaller than R250 000 are referred to as a small estate or a section 18(3) appointment.<sup>48</sup> An individual lodges, among others, the death notice, the original death certificate, proof of marriage, the next-of-kin affidavit, the inventory form, nomination of Master's representative and acceptance of the Master's directions.<sup>49</sup> If the documents are in order, the service point issues a letter of authority to the Master's representative to enable him/her to collect the money and administer the estate. The matter is then considered closed and the Master's representative does not account for the estate's distribution.

The Master's Office has concurrent jurisdiction with the service points and where small estates are reported to the Master's Office, the truncated process set out above is followed with no additional costs.

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<sup>46</sup> Section 2A of the Administration of Estates Act and Meyer and Rudolph (note 30) 7. There has not been an express delegation of magistrates' courts as service points.

<sup>47</sup> Chief Master's Directive 3 of 2015.

The reduced jurisdiction in quantum where PEAS has not been implemented appears to reflect concerns over supervision of the administration of large estates.

<sup>48</sup> Abrie, Clerq, Graham, *et al* (note 30) 38.

<sup>49</sup> *Ibid.*

However, obtaining the letter of authority is not an end in itself. Individuals must still submit their claims to the relevant institution to receive the estate benefit. Individuals often experienced this process as complex and difficult and requested advice from the researcher as to the submission of claims. Financial institutions were perceived as using sophisticated language and processes and while the procedures are meant to guard against fraud, they hinder ordinary individuals from accessing benefits. Thus, while the administration of estates from a state perspective has been simplified, the process of submission of claims needs to be investigated as it fell beyond the scope of the study.

There is no state oversight of the distribution of small estates and the onus rests on individuals to report fraud or an incorrect distribution of an estate. In such instances, the letter of authority may be cancelled, and financial institutions informed of the cancellation. This is often futile, however, as the funds have frequently been withdrawn by this time. As the Master’s representative does not furnish security, beneficiaries have to institute civil claims against the representative to reclaim money or for wrongful conduct. The costs, ignorance regarding the legal process and difficulty locating the fraudulent party render this an unrealistic solution.<sup>50</sup>



**Figure 4: Graphical representation of administration process at the service point**

According to state officials most reported estates are small and dealt with in terms of the section 18(3) procedure.<sup>51</sup> Most estates in Kwelanga were small and administered in terms of the section 18(3) procedure or not reported at all to any state offices because they contained no assets in the formal economy. Furthermore, of the sample of 210 files examined at the Master’s

<sup>50</sup> S Burman, L Carmody and Y Hoffman-Wanderer ‘Protecting the vulnerable from ‘property grabbing’: The reality of administering small estates’ 2008 (125) *SALJ* 134 at 144.

<sup>51</sup> Interview with official at service point 19 October 2016 and interview with official at Master’s Office, 7 July 2017.

Office, only 14 were above the R250 000 threshold, constituting 6.67 per cent of the sample, further suggesting the preponderance of small estates.<sup>52</sup> The forthcoming Chapter 6 explains that the surviving spouse, if present, is the sole beneficiary in a small estate and thus the thesis focuses on the surviving spouse's experience of the administration of an estate.

Individuals frequently circumvent the lengthy and costly full administration process in favour of the section 18(3) procedure by under-reporting assets in the estate. The surviving spouse may also undervalue the estate to ensure she is the sole heir and avoid sharing the estate with the deceased's children to whom she may be unrelated.<sup>53</sup> Himonga and Moore explain that officials rely solely on individuals for the declaration of value of the estate and cannot verify the content and accuracy of the estate reported.<sup>54</sup> This allows for manipulation of the assets reported as part of an estate. In the sample of files analysed, the assets reported in an estate often fluctuated and while some changes may be due to uncertainty regarding the estate, officials explained that individuals often conceal assets and report them piecemeal to utilise the section 18(3) procedure. This under-reporting of estates was similarly found by Mnisi Weeks<sup>55</sup> and Burman<sup>56</sup> who found that individuals tend only to report assets in the formal economy or to undervalue assets.

Kwelanga is approximately 15 km from the nearest service point. There are no tarred roads in the village and a gravel road links the village to the service point. This means that, despite the relatively short distance, it takes between 20–30 minutes to travel by vehicle to the service point from the village. A taxi for a one-way trip from the village to the service point costs between R10–R15 and from the service point to the Master's Office another R20–R25. The distance between the service point and Master's Office is approximately 30 km via a tarred road but due to road construction at the time, it took 30–40 minutes to travel the distance. Many individuals walk to the service point and hitchhike along the way because of a lack of cash.

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<sup>52</sup> This was also found to be the case by Himonga and Moore who found that all the estates they examined were small estates, see Himonga and Moore (note 12) 243.

<sup>53</sup> Burman, Carmody and Hoffman-Wanderer (note 51) at 144.

<sup>54</sup> Himonga and Moore (note 12) 242. To address this, it is suggested that notice be given to all potential heirs of the declaration of assets to allow them to lodge an objections thereto; see Burman, Carmody and Hoffman-Wanderer (note 50) at fn 28.

<sup>55</sup> S Mnisi *The interface between living customary law(s) of succession and South African state law* (unpublished Phd thesis, Oxford New College, 2009) 310–311.

<sup>56</sup> Burman, Carmody and Hoffman-Wanderer (note 50) at 146–147.

The service point with jurisdiction over Kwelanga has one official from court services attending to the administration of estates. A concern of the Master's Office is that court services do not prioritise estate matters and delegate them to officials who are rotated through the position and lack the expertise to deal with the matter.<sup>57</sup> The official at the service point had been in court services since 1996 and had been transferred extensively; it was unclear when she started her current position.

The service point is a relatively quiet office with a load of between 8–15 estates for the month. Estates are usually only dealt with on two days a week. Where the attending official is sick or the office does not have electricity, as is frequently the case,<sup>58</sup> the office is closed and individuals are referred to the Master's Office which has concurrent jurisdiction with service points. The sporadic nature of the service and limited jurisdiction may explain why, despite the accessibility of service points, many individuals report their estates to the Master's Office. The service point utilises the manual system of completing the requisite forms to report an estate – not PEAS – and thus its jurisdiction is limited to R125 000 and not the R250 000 it would have been had the office used the online PEAS for administration of estates.

Traditional structures have a limited role in the state administration process. Under the Reform Act, the chief's role is restricted to making recommendations for the resolution of a dispute when asked by the Master to do so.<sup>59</sup> However, these provisions have not been effected. The chief, state officials and sample of files analysed reveal no involvement by the chief in the state mediation of disputes. Chiefs, nonetheless, play an unofficial role in the administration process. Service points require the presence of a chief when an estate is reported to confirm the death of the deceased, his or her residence within the village, marital status or existence of children. The chief in Kwelanga generally travels to the service point at his own expense but in some cases, individuals may pay the costs of travel and food. This is not the norm and may be burdensome when it occurs. The Master's Office, mindful that the assistance of the chief is costly for individuals who may have to pay for his travel or services,<sup>60</sup> regards the chief's presence as unnecessary in reporting an estate. The office relies on the marriage and birth certificates to prove dependent relationships.<sup>61</sup> Nonetheless, the process of the chief attending at the service point is often carried over when estates are reported at the Master's Office. Like with travel to

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<sup>57</sup> Department of Justice and Constitutional Development (note 31) 7–8.

<sup>58</sup> Power outages were encountered on several occasions during the study.

<sup>59</sup> Section 5(1) and (2) of the Reform Act.

<sup>60</sup> The potential costs of the chief's services are discussed in Chapter 7 of this thesis at 152–153.

<sup>61</sup> This is discussed in Chapter 7 of this thesis at 161–163.

the service point, the costs of travel are usually borne by the chief but in some case individuals may contribute.

The state offices exhibit divergent approaches in their interactions with traditional structures. The service point regards chiefs as authoritative over individuals who reside in their jurisdiction and utilises them to wind up estates. In contrast, the Master's Office adheres strictly to the statutory administration process and does not confer on chiefs any role in the administration process. There may be several reasons for the differing approaches. First, the Master's Office is staffed by legally trained individuals which may explain its closer adherence to the legislative provisions. Secondly, the service point is situated closer to the ground and services fewer communities. This may facilitate a relationship with local chiefs which is not possible at the larger Master's Office. Finally, the service point administers small estates which may constitute only a few hundred rand. In these small estates, confirmation by a chief of the deceased's surviving spouse is more practical and efficient than requiring the registration of the marriage before access to the funds is granted.

The Master's Office is the central institution in the administration of estates. While situated further from communities, many individuals prefer its services and it plays a key role in the administration of estates. Traditional structures have no formal role in the administration process but the practical norms of the service point mean that they assist by confirming personal details of the deceased. At the Master's Office, however, the chief's presence is discouraged but often carried over.

### **3.4 Application of the Reform Act**

Section 2 of the Reform Act provides for the application of the Intestate Succession Act<sup>62</sup> as read with the Reform Act. It states that the Intestate Succession Act applies to the estate of any person:

- who is subject to customary law;
- who dies after its commencement date;
- whose estate does not devolve in terms of their will.

The criteria are discussed separately below.

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<sup>62</sup> Intestate Succession Act 81 of 1987 ('Intestate Succession Act').

### 3.4.1 *Applicability of customary law*

A prerequisite for the application of the Reform Act is that an individual be ‘subject to customary law’. This criterion is not explained but as customary law is a voluntary, personal system of law, it presumably means someone who lives according to customary law.

Rautenbach argues that this requirement maintains legal dualism in South Africa as it indicates circumstances where customary law of succession is applicable.<sup>63</sup> The degree of dualism is questionable though given that the Reform Act replaces customary law succession with the common law of succession. Nonetheless, Rautenbach opines that ‘choice of law’ rules apply to determine which system of law is applicable.<sup>64</sup>

Historically, the determination of how an estate devolved was regulated by section 23 of the Black Administration Act,<sup>65</sup> the regulations thereunder<sup>66</sup> and the Intestate Succession Act.<sup>67</sup> Property devolved in accordance with the common law when the deceased was resident outside South Africa,<sup>68</sup> had been issued a letter of exemption in terms of the Black Administration Act<sup>69</sup> or had concluded a common law marriage.<sup>70</sup> In all other instances, property devolved in accordance with the customary law of succession. The rules were repealed by the *Bhe*<sup>71</sup> decision which held that the Intestate Succession Act would apply to all estates going forward.

The Reform Act does not specify who is subject to customary law creating uncertainty with regards to the application of the Act.<sup>72</sup> The lacuna may be addressed by treating it as a conflict

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<sup>63</sup> C Rautenbach ‘A few comments on the (possible) revival of the customary law rule of male primogeniture: Can the common-law principle of freedom of testation come to its rescue?’ 2014 *Acta Juridica* 132 at 137–140. ES Nwauche ‘Affiliation to a new customary law in post-apartheid South Africa’ 2015 (18) *PELJ* 568 at 585 endorses Rautenbach’s argument. For a discussion on the importance of the retention of legal dualism see South African Law Commission Discussion Paper 93 (Project 90) *Customary law of succession* (2000) 13.

<sup>64</sup> Rautenbach (note 63) at 139.

<sup>65</sup> Black Administration Act 38 of 1927 (‘Black Administration Act’).

<sup>66</sup> Regulations for the Administration and Distribution of the Estates of Deceased Blacks in GN R200 GG 10601 of 6 February 1987 (‘the Regulations’).

<sup>67</sup> Section 1(4)(b) of the Intestate Succession Act defined an intestate estate to exclude any estate to which section 23 of the Black Administration Act applied.

<sup>68</sup> Regulation 2(a) of the Regulations.

<sup>69</sup> Regulation 2(b) of the Regulations. In terms of the repealed section 31 of the Black Administration Act, the President could exempt an African from the operation of customary law.

<sup>70</sup> Regulation 2(c) of the Regulations.

In terms of Regulation 2(d) of the Regulations, the Minister could also determine an equitable distribution of property if he believed the partial or full application of customary law would lead to inequitable or inappropriate circumstances.

<sup>71</sup> *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC).

<sup>72</sup> This view is supported by Rautenbach, see Rautenbach (note 63) at 140.

of laws and using the choice of law factors developed by courts to determine whether to apply the common law or customary law. Historically, courts treated a conflict of laws as a question of fact and exercised a discretion as to which system was the most reasonable and appropriate to apply.<sup>73</sup>

Himonga *et al*<sup>74</sup> and Bennett<sup>75</sup> discuss the general factors used by courts to resolve a conflict of laws issue. The factors were:

- the agreement and intention of the parties;
- the nature of the transaction;
- the subject matter of the transaction; and
- the lifestyle of the parties.<sup>76</sup>

The agreement and intention of parties is uncontroversial but unlikely to be relevant where an individual dies without a will and does not explicitly state which system of law is to be applied. Unfortunately, the remaining factors reflect a general disdain for customary law. For example, according to case law ownership of property in an urban area, marriage by civil or Christian rites, a high school education and membership of a Christian church suggests a Western lifestyle and point to the application of common law.<sup>77</sup> Himonga *et al*, however, rightly question why this is the case.<sup>78</sup> The reasoning carries the intimation that customary law applies in the rural areas to uneducated individuals, which is deeply troubling. The factors and judgments originate prior to the constitutional dispensation and it is arguable that the associated prejudices should not be perpetuated today.<sup>79</sup>

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<sup>73</sup> Ibid at 140–141.

<sup>74</sup> C Himonga C and T Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 83.

<sup>75</sup> TW Bennett *Customary law in South Africa* (2004) 53–56.

<sup>76</sup> An additional factor discussed is exemption from customary law which referred to Africans applying ‘for exemption from customary law provided they were sufficiently civilised to be allowed to enjoy the benefits of the common law.’ Today the rule is considered obsolete because of its discriminating and condescending nature. Himonga and Nhlapo (note 74) 83 and Bennett (note 75) 56–57. See also *Bhe* (note 71) para 225.

<sup>77</sup> *Ramothata v Makhote* 1934 NAC (N & T) 74. See also *Sawantshi v Magidela* 1944 NAC (C & O) at 47 where the court considered important the fact that parties stayed in a homeland and the transaction entailed home-grown mealies.

<sup>78</sup> Himonga and Nhlapo (note 74) 83.

<sup>79</sup> Ibid 84–85.

In succession matters specifically, the form of the marriage was determinative of the administration and devolution of the estate.<sup>80</sup> Using the form of marriage today would undoubtedly simplify matters but it may not truly represent the deceased's intention. The deceased may have married in a church out of religious conviction without an intention to bind him or herself to the common law,<sup>81</sup> under Christian and civil rites,<sup>82</sup> or under both customary and common law. The SALRC noted that the factor may not always be determinative and that allowances would need to be made for exceptional circumstances and unmarried persons.<sup>83</sup> Interestingly, the SALRC recommended consideration of two additional factors, namely the financial position of the surviving spouse and children, and the deceased's lifestyle.<sup>84</sup>

The critique of the consideration of the lifestyle of the parties discussed above applies *mutatis mutandis* here. Customary law cannot be propagated as a system of law applicable to uneducated people situated in the rural areas. With regard to the financial position of the family members, it implies that large estates are more suited to the common law and small estates to customary law which may not always be the case. The common law should not be promoted as the more advanced and developed system better suited to deal with large estates. It perpetuates the stereotype that customary law cannot develop to meet modern socio-economic needs and a more appropriate solution is to be found in the common law.

The case study in Kwelanga reveals that state officials view the current system of administration as imposing a single system of succession with some accommodation for customary law practices, such as polygyny. Where there is a customary law practice such as polygyny, state officials automatically apply the Reform Act to accommodate the practice with no interrogation as to whether the person is 'subject to customary law'. The sample of files analysed evinced no engagement with the question of whether an individual is subject to customary law and state officials maintained that it was a non-issue as there is only one system of law.

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<sup>80</sup> I Maithufi 'The Constitution and the application of customary family law in South Africa' 2002 (35) *De Jure* 207 at 219 and I Maithufi 'The effect of the 1996 Constitution on the customary law of succession and marriage in South Africa: Some observations' 1998 (31) *De Jure* 285 at 286.

<sup>81</sup> South African Law Commission Issue Paper 4 (Project 90) *Harmonisation of the common law and the indigenous law (The application of customary law: Conflict of personal laws)* (1996) 22; Bennett (note 75) 57–60 and Himonga and Nhlapo (note 74) 85–86.

<sup>82</sup> South African Law Reform Commission (Project 90) *Report on the customary law of succession* (2004) 37–38.

<sup>83</sup> *Ibid* 22.

<sup>84</sup> *Ibid*.

The practical norms of state officials in the implementation of the Reform Act render the jurisdictional factor required for the application of the Reform Act irrelevant. This is problematic as it conflicts with the provisions of the Reform Act and pushes South Africa to a unitary system of succession.<sup>85</sup> It undermines legal dualism held to be important to respect legal and cultural diversity as required by the Constitution and for the acceptance of a system by people.<sup>86</sup> It also evinces deep legal pluralism in South Africa and illustrates how practical norms supersede statutory law despite section 211(3) of the Constitution explicitly providing that customary is subject to the Constitution and legislation dealing therewith.

Nonetheless, the lack of engagement with the question of the application of customary law must be understood in context. The state offices in the case study are situated in the former homelands and deal predominantly with individuals who live under a traditional authority and presumably live according to customary law. Their approach reflects a pragmatic response that most individuals in their jurisdiction are subject to customary law and may differ from the practice of other offices situated in urban areas.

The Reform Act is viewed by state officials as modifying certain concepts in the Intestate Succession Act to accommodate customary law practices and not as a separate system of succession. The current system reflects legal dualism in a superficial manner and reform has resulted in very little difference in the administration of common law and customary law estates. State officials overall view the systems as the 'same', simply accommodating customary law practices as the need arises.

### 3.4.2 *'Dies after the commencement of this Act'*

The Reform Act provides that it applies prospectively to the estates of individuals who die after its commencement date, being 20 September 2010. In theory, the estates of individuals who died between 27 April 1994 and 20 September 2010 should be regulated by the *Bhe* decision. In practice, however, the Master's Office and service points apply the Reform Act to all new estates reported, regardless of the date of death of the deceased.<sup>87</sup> The *Policy and procedure manual* explicitly states that the Reform Act is applied and officials explained that they use the

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<sup>85</sup> South African Law Commission (note 63) 13.

This unitary system is also reflected in the record-keeping at the Master's Office in which there is no distinction between customary and common law estates.

<sup>86</sup> South African Law Commission (note 63) 13.

<sup>87</sup> Meyer and Rudolph (note 30) 6. The estate of an individual who died before 27 April 1994 but has not been reported is referred to the Master.

Reform Act in all matters. They view the rules articulated in the *Bhe* decision and the Reform Act as one and the same and see no reason to distinguish between people based on the date of death. Once again, the implementation of the law by state officials creates new practical norms that override the provisions of the Reform Act.

The approach, however, may address a potential constitutional challenge to the Reform Act. As it currently stands, the protection of the Act is limited to individuals who died after the commencement of the Act. In *Gumede v President of the Republic of South Africa*,<sup>88</sup> the Constitutional Court found that the provisions of the Recognition of Customary Marriages Act<sup>89</sup> which distinguished between marriages for the purposes of protection based on the date of the marriage were unconstitutional. Thus, the officials' approach in applying the Reform Act to all estates, regardless of the date of death of the deceased, accords with the current tenor of the Constitutional Court's jurisprudence.

### 3.4.3 *'Estate does not devolve in terms of that person's will'*

The Reform Act provides for the application of the Intestate Succession Act when an individual dies without a will. A will is defined as a will to which the provisions of the Wills Act<sup>90</sup> apply.<sup>91</sup> The effect of this definition is that the application of the Intestate Succession Act is only precluded by a will that conforms to the statutory requirements of the Wills Act. Oral dispositions of property typical in customary law, and still prevalent today as discussed in Chapter 4, are not recognised nor would they be given effect to in the formal law. Most interviewees in Kwelanga were unaware of the legal ineffectiveness of the verbal dispositions but even when informed of it maintained that they could dispose of their property in such a manner. In a clear illustration of strong legal pluralism; individuals do not depend on the state for recognition, nor does non-recognition deter their behaviour. They induce compliance with these dispositions without state sanction. Notably, Badejogbin questions the constitutionality of the abolishment of these oral dispositions which are a form of testate succession under customary law.<sup>92</sup>

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<sup>88</sup> *Gumede v President of the Republic of South Africa* (2009) 3 SA 152 (CC).

<sup>89</sup> Recognition of Customary Marriages Act 120 of 1998.

<sup>90</sup> Wills Act 7 of 1953 ('Wills Act').

<sup>91</sup> Definition in the Reform Act.

<sup>92</sup> R Badejogbin 'Interplay of customary law of testacy and statutory regulation of intestacy with respect to the transfer of customary law rights in land in South Africa' 2014/15 (4) *SADC Law Journal* 10 at 19.

In Kwelanga, oral dispositions are used to select an heir to ensure the well-being of the family and prevent conflict and property grabbing after the death of the family head.<sup>93</sup> While the discussion papers preceding the enactment of the Reform Act raised the issue of whether these dispositions should be allowed, there was no firm recommendation on the matter.<sup>94</sup> The abolishment of customary testate succession without consideration of the purpose it serves, its cultural significance or identification of any infringement of rights which necessitated its abolishment is thus surprising. Customary law testate succession is beyond the scope of this thesis and the thesis argues, like Badejogbin,<sup>95</sup> that further research on this practice is required to understand and regulate the practice.

Rautenbach further argues that the jurisdictional factor of the absence of a will extends freedom of testation to all people including those who live according to customary law.<sup>96</sup> She argues that this section along with the repeal of section 23 of the Black Administration Act lifts the restrictions on freedom of testation on those living according to customary law.<sup>97</sup> Individuals now enjoy freedom of testation to dispose of their property as they see fit. Given the different classifications of property under customary law, depending on the interests the property serves, it is unclear whether freedom of testation extends to all forms of property, including property which attracts group or family interests.<sup>98</sup>

Despite the extension of freedom of testation to all people, formal wills are rarely used to devolve property. The SALRC previously reported that there was limited knowledge regarding the execution of a will, which is generally only executed by the literate, educated and wealthy.<sup>99</sup> In Kwelanga, most individuals had not heard of a will and officials confirmed that most estates are intestate. Those with knowledge of wills regarded them as being for ‘rich people’. In testament to this, only two individuals had a will in the village. One was a wealthy man who had been advised by the bank to draft a will.<sup>100</sup> He had schooled until Grade 10, operated a ‘bottle shop’ in the village and owned property in an urban area outside of Kwelanga. The will secured his daughter’s rights to the urban property. The man also demonstrated a real

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<sup>93</sup> See Chapter 4 of this thesis at 83–84.

<sup>94</sup> South African Law Commission (note 63) xxii–xxiv and 56.

<sup>95</sup> Badejogbin (note 92) at 25.

<sup>96</sup> Rautenbach (note 63) at 141.

<sup>97</sup> *Ibid.*

<sup>98</sup> See Chapter 4 of this thesis at 79–81 for a discussion on the classifications of property.

<sup>99</sup> South African Law Commission (note 64) 45–46.

<sup>100</sup> Interview with male participant, 1 September 2015.

knowledge of the administration process and substantive law which he had gleaned when his brother passed on. It appeared that the individual's economic position and ownership of titled immovable property were important factors for the execution of the will. Similarly, the other individual with a will was advised by the bank to draft one primarily to distribute the money in his bank account.<sup>101</sup>

However, wealth alone is not determinative of the execution of a will. Another wealthy individual in Kwelanga had not executed a will though advised to do so and noted that it was a matter of procrastination.<sup>102</sup> He explained that his property would devolve to his son and expressed his faith in his son to care for the family and resolve disputes. Thus, while the assets of an individual need to be sufficiently large to prompt the drafting of a will, an individual's ignorance regarding the need for a will, belief in the customary law system and general apathy may counteract the execution of a will. In support of this, only two estates in the sample of files devolved in terms of a will, with only one being an estate of more than R250 000. In both cases the driving factor for the execution of the will appeared to be the devolution of the testator's business. In one instance the testator devolved his livestock operation while in the other, the testator distributed his shares in his company. In several larger estates in the sample in which these concerns were not present, the estate devolved intestate.

In light of the above, most estates are likely to devolve in accordance with the Reform Act as read with the Intestate Succession Act.

### **3.5 CONCLUSION**

This chapter provided the socio-economic context of the case study. First, it examined the broad social and economic considerations, such as high unemployment, poverty and crime in South Africa generally to contextualise the study. Secondly, it provided a detailed analysis of Kwelanga, the location of the case study. The socio-economic context of Kwelanga, such as impoverishment in the village, its rural location and the persistence of the migrant labour system explain certain findings and the recommendations for reform.

The chapter thereafter investigated the Master's Office and service points as the offices responsible for the administration of estates. To promote an accessibility of services, certain magistrate's courts have been designated as service points in an effort to bring services to

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<sup>101</sup> Interview with male participant, 8 September 2015.

<sup>102</sup> Interview with male participant, 10 September 2015.

people. The Master's Office has concurrent jurisdiction with service points and has sole jurisdiction over large estates – over R250 000. The service point with jurisdiction over Kwelanga administers estates up to a quantum of R125 000. These small estates follow an abridged administration process and while this is speedy and cost-effective, there is no accountability regarding distribution of the estate, which risks the under or piecemeal reporting of an estate to use the abridged process and defraud beneficiaries.

Finally, the chapter discussed the required jurisdictional factors for application of the Reform Act; namely that the person is subject to customary law and dies after the commencement of Act without a will. The study underscored the importance of the application of law by officials and how through this process, policy that may not accord with statutory provisions is created. This was exemplified in the way officials apply the Act without any interrogation as to whether individuals are subject to customary law. The approach favours individuals – as customary law practices are protected as a matter of course – but moves South Africa closer to a unitary system of succession. It reflects the view of state officials who perceive there to be only one system of succession in South Africa. In addition, the Act applies to all new reported intestate estates regardless of the deceased's date of death. Once again, these practical norms are out of kilter with the statutory provisions but confer greater protection on individuals. Finally, the Act applies in the absence of a written will. Customary law testate succession; namely oral dispositions of property that take effect upon the deceased's death are rendered ineffectual. The abolishing of customary law testate succession by implication may in future give rise to a constitutional challenge given its continued centrality in many people's lives as was found in Kwelanga.

## CHAPTER 4 THE COMMUNAL NATURE OF THE CUSTOMARY LAW OF SUCCESSION

### 4.1 Introduction

The investigation into the administration of customary estates is premised on a case study of the actual practices of people. The methodology for conducting the case study and its socio-economic context have previously been set out along with the theoretical framework underlying the thesis. The data from the case study is now presented through the prism of the communal nature of the customary law of succession, being one of the distinctive features of the law, common across indigenous groups. A brief background of the communal nature of the customary law of succession is provided followed by an examination of its distortion through the codification of the law during the pre-constitutional era and the socio-economic changes of the time. Finally, the current practices that continue to manifest the communal nature of the law are presented.

### 4.2 Background to the communal nature of the customary law of succession

Customary law is generally described as a communal or group-orientated system of law.<sup>1</sup> The focus on the preservation of group interests and peace within the group<sup>2</sup> is often highlighted and contrasted to civil systems and their emphasis on individual rights.<sup>3</sup> The framing of interests is reversed, with customary law systems defining interests in terms of duties and not rights, as is typical in most human rights instruments.<sup>4</sup> This section discusses the reflection of the family and group nature of the law in the customary law of succession.

#### 4.2.1 Succession to status of family head

Customary communities were initially agrarian, occupied with farming and herding.<sup>5</sup> The description of land tenure is complex and the subject of much debate beyond the scope of this

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<sup>1</sup> J Church 'The place of indigenous law in a mixed legal system and a society in transformation: A South African experience' 2005 *Australia and New Zealand Law and History E-journal* 94 at 99.

<sup>2</sup> Ibid and N Olivier, J Bekker and W Olivier *Indigenous law* (1995) 147.

<sup>3</sup> Church (note 1) at 99; TW Bennett 'The compatibility of African customary law and human rights' 1991 *Acta Juridica* 18 at 23 and L Mbatha 'Reforming the customary law of succession' 2002 (18) *SAJHR* 259 at 263.

<sup>4</sup> Church (note 1) at 99 and Bennett (note 3) at 23.

<sup>5</sup> TW Bennett *Customary law in South Africa* (2004) 371.

thesis.<sup>6</sup> Generally land was plentiful and not treated as a valued commodity subject to contestation.<sup>7</sup> The death of the family head triggered concerns regarding the well-being of the family from a spiritual and emotional perspective rather than merely raising questions regarding the inheritance of property. Thus, the norms of succession provided support to the family at a vulnerable time and identified a successor to the status of family head to ensure the stability of the family and community.<sup>8</sup> The collective well-being of the family and community was emphasised rather than rights of individual family members.

The identification of a new family head was the central focus of the customary law of succession and was done through the principle of male primogeniture. This meant that the closest male relative succeeded as head of the household.<sup>9</sup> The patriarchal nature of the principle is discussed in Chapter 5 but it is important to note here that the successor stepped into the shoes of the deceased and assumed responsibility for the maintenance and well-being of the deceased's dependents.<sup>10</sup> The identification of a single successor meant that an individual could be held responsible and accountable for the well-being of the family.<sup>11</sup> A successor who failed in his responsibilities faced sanction by the family, whose coercive pressure was usually sufficient to ensure compliance.<sup>12</sup> Where the matter was not resolved by the family, it could be escalated to the chief or customary court and the successor stripped of his status and dispossessed of the property.<sup>13</sup>

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<sup>6</sup> Ibid; B Cousins 'Characterising "communal" tenure: Nested systems and flexible boundaries' in A Claassens and B Cousins (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 109–137 and J Pienaar 'Law of property' in Rautenbach C and Bekker J (eds) *Introduction to legal pluralism* 4ed (2014) 121 at 133.

<sup>7</sup> Bennett (note 5) 371; P Delius 'Contested terrain: Land rights and chiefly power in historical perspective' in Claassens A and Cousins B (eds) *Land, power and custom: Controversies generated by South Africa's Communal Land Rights Act* (2008) 211 at 215 and Mbatha (note 3) at 263.

<sup>8</sup> Cousins (note 6) at 111; for a general discussion of the values underlying the customary law of succession, see Mbatha (note 3) at 260–261 and C Himonga and E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015) 234.

<sup>9</sup> JC Bekker and PD de Kock 'Adaptation of the customary law of succession to changing needs' 1992 (25) *CILSA* 366 at 368. For a good discussion of the principle and how it operates, see C Rautenbach *The legal position of South African women under the law of succession* (unpublished PhD thesis, Potchefstroomse Universiteit vir Christelike Hoër Onderwys, 2001) 280–286.

<sup>10</sup> AJ Kerr *The customary law of immovable property and of succession* (1976) 136; Olivier, Bekker and Olivier (note 2) 160; Bekker and de Kock (note 9) at 368 and M Hunter *Reaction to conquest: Effects of contact with Europeans on the Pondo of South Africa* 2ed (1961) 122.

<sup>11</sup> Mbatha (note 3) at 260.

<sup>12</sup> Kerr (note 10) 136.

<sup>13</sup> Ibid 136 and 138; Bekker and de Kock (note 9) at 368.

The successor also assumed control of the deceased's assets and liabilities.<sup>14</sup> This enabled him to discharge his responsibilities towards the deceased's dependents<sup>15</sup> and settle debts. The inheritance of property ensured the well-being of the family but remained secondary to succession to status. The successor was responsible for the debts of the deceased's estate, even when there were no assets in the estate, or the debt exceeded the value of the estate.<sup>16</sup>

#### 4.2.2 Customary dispositions of property

In addition to the identification of a successor, dispositions of property in anticipation of death ensured the well-being of the family after the family head's death. These were verbal dispositions of property, akin to death bed wishes, rather than a written will which was unknown in customary law.<sup>17</sup> The dispositions were considered sacred as the wishes of the deceased and carried out by the deceased's family members after his death.<sup>18</sup> Publicity was important as it constituted evidence of the dispositions and allowed potential heirs to object, though their approval was not necessary for the deceased's wishes to be carried out.<sup>19</sup>

Dispositions were usually made within family ties,<sup>20</sup> in accordance with the underlying customary law value of the continuation and well-being of the family.<sup>21</sup> Typically allotments of cattle would be made to younger sons to pay their *lobolo* or to help them establish their homes.<sup>22</sup> The allotment was usually done by marking the cattle when they were young with the effect that their progeny also belonged to the son who attained a special interest in the cattle.<sup>23</sup>

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<sup>14</sup> Kerr (note 10) 126; J Church 'The constitutional imperative and harmonisation in a multicultural society: A South African perspective on the development of indigenous law' 2008 (14) *Fundamina: A Journal of Legal History* 1 at 9 and Olivier (note 2) 160.

<sup>15</sup> Church (note 14) at 9.

<sup>16</sup> Kerr (note 10) 132–134; Bennett (note 3) at 29. Highly personal debts such as those relating to adultery and seduction would not be assumed by the heir.

<sup>17</sup> Olivier, Bekker and Olivier (note 2) 147 and 153; R Badejogbin 'Interplay of customary law of testacy and statutory regulation of intestacy with respect to the transfer of customary law rights in land in South Africa' 2014/15 (4) *SADC Law Journal* 10 at 17; A Kerr 'The role of courts in developing customary law' 1999 *Obiter* 41; J Bekker *Seymour's Customary law in Southern Africa* 5ed (1989) 311 and Mbatha (note 3) at 263.

<sup>18</sup> Kerr (note 10) 144.

Verbal dispositions of property were also found in Tswana law; I Schapera *A handbook of Tswana law and custom* 5ed (1955) 230.

<sup>19</sup> Kerr (note 10) 146–147.

<sup>20</sup> Badejogbin (note 17) at 18

<sup>21</sup> Kerr (note 10) 148–149.

<sup>22</sup> Bekker (note 17) 77 and Olivier, Bekker and Olivier (note 2) 154.

<sup>23</sup> Bekker (note 17) 77 and Kerr (note 10) 140–141.

Ownership remained vested in the family head, though he could not wantonly dispose of it or cancel the allotment with no good reason until his death upon which it passed to the son.<sup>24</sup>

The family head's power to dispose of property was limited.<sup>25</sup> The disposition had to be in good faith and could not flagrantly contravene the customary law principles of succession<sup>26</sup> or undermine the interests of the family or they risked not being effected.<sup>27</sup> Furthermore, property allotted to a particular house<sup>28</sup> in polygynous marriages could not be disposed of, though property used by the entire family could be.<sup>29</sup> The main heir could not be deprived of the bulk of his inheritance as it hindered the discharge of his responsibilities.<sup>30</sup> A complete disinheritance was rare and only occurred if the heir was unfit or guilty of some gross misconduct (such as repeated thefts, bad character, refusing to contribute to the debts or maintenance of the family).<sup>31</sup> The result was that the heir lost all status in the family and had no voice in respect of the family and property.<sup>32</sup> Family members and the chief would be informed of the disinheritance to allow the heir to refute the allegations and to ensure family support for the decision made.<sup>33</sup>

In summation, customary law of succession was initially premised on the continuation and well-being of the family. The focus was on succession and the identification of an heir to assume responsibility for the family. Typically, the inheritance of property followed succession so that the heir could discharge his responsibilities. However, the family head also had a limited power to dispose of some property generally to younger sons. This ensured the well-being of these sons and the establishment of their homes. The family, often represented by the elder males of the family, witnessed the customary dispositions and ignored or enforced dispositions to secure the well-being of the family.<sup>34</sup>

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<sup>24</sup> Bekker (note 17) 77.

<sup>25</sup> Badejogbin (note 17) at 18; AJ Kerr *The customary law of immovable property and of succession* 3ed (1990) 113–118.

<sup>26</sup> Olivier, Bekker and Olivier (note 2) 153.

<sup>27</sup> Kerr (note 10) 128 and 148–149 and Schapera (note 18) 230.

<sup>28</sup> Each customary marriage creates its own house.

<sup>29</sup> Bekker (note 17) 311.

<sup>30</sup> *Ibid* 74.

<sup>31</sup> Kerr (note 10) 151–152; Bekker (note 17) 303; Olivier, Bekker and Olivier (note 2) 158 and Hunter (note 10) 121.

<sup>32</sup> Olivier, Bekker and Olivier (note 2) 159.

<sup>33</sup> Kerr (note 10) 155 and Bekker (note 17) 303–304.

<sup>34</sup> Bennett (note 5) 351.

### 4.3 Regulation during the pre-constitutional era

During apartheid, the Black Administration Act<sup>35</sup> was the state's central tool in regulating the lives of Black people including the administration of customary law estates.<sup>36</sup> The regulation of the law through the Black Administration Act distorted the family and group orientation of the law.

#### 4.3.1 *Devolution of property in accordance with 'Black law and custom'*

Section 23 of the Black Administration Act and regulation R200<sup>37</sup> set out the choice of law rules for the application of customary law succession – previously discussed in Chapter 2 – and the substantive and procedural rules for the administration of Black persons' estates.<sup>38</sup> The mere regulation of the law in the Black Administration Act changed the nature of the law. A key feature in the customary law of succession was flexibility in the application of norms.<sup>39</sup> Principles could be relaxed or applied differently in pursuit of the underlying goal of ensuring the well-being of the family.<sup>40</sup> In keeping with this flexibility, the Act provided for the devolution of property in accordance with 'Black law and custom' and did not explicitly refer to the principle of male primogeniture.<sup>41</sup> Magistrates who had jurisdiction over Black estates were further empowered to hold an enquiry to determine the rightful heir when it was in dispute

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<sup>35</sup> Black Administration Act 38 of 1927 ('Black Administration Act').

<sup>36</sup> Langa CJ in *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC) para 61 described the Act as the 'cornerstone of racial oppression, division and conflict in South Africa' that had been specifically designed to separate and exclude Africans from the rest of the population.

<sup>37</sup> *Regulations for the Administration and Distribution of the Estates of Deceased Blacks (GN R200 of 1987)* GG 10601 of 6 February 1987. The regulations were amended by *Amendment of the Regulations for the Administration and Distribution of Estates (GN R1501 of 1987)* GG 24120 of 3 December 2002.

<sup>38</sup> Black was defined in Section 35 of the Black Administration Act:

'Black' – shall include any person who is a member of any aboriginal race or tribe of Africa: provided that any person residing under the same conditions as a Black in a scheduled Black area or a released area, as defined or described in or under the Development Trust and Land Act 18 of 1936, or on any land of which the South African Development Trust is the registered owner, shall be regarded as a Black for the purposes of this Act. The genetic make-up of an individual was thus determinative but where this was uncertain, the court would consider the place of residence and lifestyle of the litigant to make the decision; TW Bennett *A sourcebook for African customary law for Southern Africa* (1991) 66. The Act did not apply in KwaZulu-Natal because the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proclamation R151 of 1987 in GG 10966 of 9 October 1987 were territorial in nature and applied to African people in KwaZulu-Natal regardless of their ethnic group; C Rautenbach 'Law of succession and inheritance' in C Rautenbach and J Bekker (eds) *Introduction to Legal Pluralism* (2014) 171 at 183. As the case study was not located in KwaZulu-Natal, the thesis does not discuss the legislation.

<sup>39</sup> J Bekker and D Koyana 'The judicial and legislative reform of the customary law of succession' 2012 (45) *De Jure* 568 at 570–571.

<sup>40</sup> *Ibid.*

<sup>41</sup> See section 23(1) of the Black Administration Act.

and give directions as to the distribution of the property.<sup>42</sup> This meant that the devolution of property could have differed among groups due to variation in practice and have evolved to meet changing needs.<sup>43</sup> However, in reality, magistrates glossed over the variation and evolving nature of customary law and assumed the principle of male primogeniture represented customary law.<sup>44</sup> There were no investigations into whether the rule had evolved within communities. The provision was interpreted and applied as a rigid rule that property devolved in accordance with the principle of male primogeniture regardless of the outcome.<sup>45</sup> Thus, the inherent strength of customary law to respond to social circumstances and ensure the well-being of the family was lost.

Furthermore, there appeared to be a reluctance to deviate from the customary law position even where authorised by the legislative provisions. According to Regulation 2(d), the Minister was empowered to make an equitable distribution of the property where the application of customary law would have an inappropriate or inequitable outcome.<sup>46</sup> However, the Ministerial discretion was rarely exercised<sup>47</sup> even where it appeared appropriate. For example, in *Mthembu v Letsela*<sup>48</sup> the litigant and her child were urban dwellers who were not maintained by the customary heir, being the deceased's father, who claimed the estate based on customary law and sought to eject the litigant and her child from their home. Maithufi notes that the application of customary law appeared inequitable, but the Minister did not exercise the discretion and the property devolved in accordance with male primogeniture.<sup>49</sup>

The Black Administration Act entrenched the principle of male primogeniture though it was not explicitly provided for in the Act. Magistrates interpreted the concept of 'Black law and custom' strictly to mean male primogeniture with the result that the flexibility of customary norms necessary to secure the well-being of the family was lost.

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<sup>42</sup> South African Law Commission Discussion Paper 95 (Project 90) *Customary law: Administration of estates* (2000) 11.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Mbatha (note 3) at 260.

<sup>46</sup> Regulation 2(d). According to Kerr the discretion was not frequently exercised; Kerr (note 10) 235.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Mthembu v Letsela* 1997 (2) SA 936 (T).

<sup>49</sup> I Maithufi 'The Constitution and the application of customary family law in South Africa' 2002 (35) *De Jure* 207 at 220.

### 4.3.2 *Distortion of rights*

The narration of customary law into common law terms and administration by state officials was also problematic. Ownership of property in customary law was commonly described as belonging to the family head when in reality it belonged to the family as a whole and was administered by the family head.<sup>50</sup> The family head and any successor used the property to care for dependents, such as a wife, children or other family member for whom he was responsible,<sup>51</sup> in consultation with these family members.<sup>52</sup> The family head was required to act reasonably and in the best interests of the family. The protection of the family's interests was paramount, and property could not be unilaterally disposed of. 'Ownership' with its common law connotations would be inappropriate to describe the customary law system of management and control. At most it could be said that the family owned the property as a unit with ownership being described as communal under the supervision and control of the family head.<sup>53</sup>

However, the devolution of property in accordance with the Black Administration Act changed the nature of property ownership to individualistic and alienable.<sup>54</sup> Where family property devolved in accordance with the Black Administration Act, state officials imposed a common law understanding of ownership on the property. The heir became the owner of the property, as owner was understood in the common law, with the right to use and dispose of the property as he saw fit.<sup>55</sup> The introduction of the foreign, common law understandings of concepts such as ownership, absolute rights and alienation arguably distorted the communal nature of the law and shifted it to a more individualised basis.<sup>56</sup>

This was exemplified in the *Bhe* case where the father of the deceased claimed the property based on male primogeniture and intended to evict the deceased's children and their mother

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<sup>50</sup> Bekker (note 17) 74.

<sup>51</sup> Ibid 74–75.

<sup>52</sup> C Cross 'An alternate legality: The property rights question in relation to South African land reform' 1992 (8) *SAJHR* 305 at 317 and Hunter (note 10) 121.

<sup>53</sup> Bekker (note 17) 74.

<sup>54</sup> Mbatha (note 3) at 264.

<sup>55</sup> Himonga and Moore (note 8) 234.

<sup>56</sup> M Mamashela 'New families, new property, new laws: The practical effects of the Recognition of Customary Marriages Act' 2004 (20) *SAJHR* 616 at 622; HWO Okoth-Ogendo 'Some issues of theory in the study of tenure relations in African Agriculture' (1989) 59(1) *Journal of the International African Institute Africa* 6; E Bentsi-Enchill 'Do African systems of land tenure require a special terminology?' 1965 9(2) *Journal of African Law* 114 and TW Bennett 'Terminology and land tenure in customary law: An exercise in linguistic theory' (1985) *Acta Juridica* 173 argue that the use of foreign concepts distorted customary law connotations and nuances.

rendering them homeless.<sup>57</sup> Under customary law, the heir assumed control of the property with an obligation to manage the property in the best interests of the family who retained enjoyment over the property.<sup>58</sup> However, the devolution of the property under the Black Administration Act allowed the heir – as exemplified in the *Bhe* case – to take ownership of the property and to do with it as he pleased with no constraints.

Codification resulted in a distortion of customary law entitlements to reflect common law notions of ownership. The individual interests of the heir were elevated and secured over the family interests in the property thereby shifting customary law succession to a more individualised basis.

#### 4.3.3 *Shift from succession to inheritance*

The substantive provisions of the Black Administration Act and regulations thereunder also significantly changed the focus of the customary law of succession.<sup>59</sup> The provisions regulated the inheritance of property as opposed to succession to status and the assumption of responsibility of care for dependents. Where inheritance of property was historically a secondary concern under customary succession, the Black Administration Act elevated it to the primary matter for resolution. The focus was the devolution of the property.<sup>60</sup> This constituted a significant distortion of the law and marked a shift from the family and group orientation of the law to individualised interests.<sup>61</sup>

#### 4.3.4 *Duty of care*

The Black Administration Act was, furthermore, silent regarding the heir's duty of care towards the deceased's dependents.<sup>62</sup> As previously discussed, under customary law, the heir would have a duty to maintain the deceased's dependents. Initially, the courts enforced the duty, but this waned over time as migration meant that courts grew increasingly removed from the parties and had scant interest in protecting the rights of Black women and children.<sup>63</sup> As a result, the

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<sup>57</sup> *Bhe* (note 36).

<sup>58</sup> Mbatha (note 3) at 264.

<sup>59</sup> See preceding discussion on 'Distortion of rights'.

<sup>60</sup> SM Weeks 'Customary succession and the development of customary law: The Bhe legacy: Part III: Reflections on themes in Justice Langa's judgments' 2015 *Acta Juridica* 215 at 216.

<sup>61</sup> Mbatha (note 3) at 264.

<sup>62</sup> *Ibid* at 261.

<sup>63</sup> Weeks (note 60) at 216.

male heir inherited the property in his individual capacity<sup>64</sup> without any duty of care for dependents creating hardship for widows and children.

In sum, the courts' adherence to the principle of male primogeniture and the omission of the duty of support undermined customary law's ability to ensure succession in the best interests of the family. Unscrupulous heirs assumed the property with none of the responsibility. The focus shifted to the inheritance of property and individual interests were secured over the well-being of the family. The distortions in the legal framework along with socio-economic changes at the time created a more individualised system of succession.

#### **4.4 Socio-economic changes during the apartheid era**

During the apartheid period, significant socio-economic changes impacted the nature of the customary law of succession. The apartheid system confined Black individuals to the homelands and resulted in a migrant labour system in which men left their homes and families to seek work in urban areas. The prolonged absence of husbands and fathers resulted in marital disharmony and breakdowns, economic insecurity and emotional misery.<sup>65</sup> It had a disastrous impact on the fabric of customary law societies and a general break-down in the family unit.<sup>66</sup>

Migration transformed the agricultural subsistence economy to a cash economy.<sup>67</sup> The process of individualisation increased as men worked for wages on an individual basis separate from their families.<sup>68</sup> The demand for cash to buy goods and services meant that goods that were historically shared or exchanged for use on the basis of kinship were bought and sold for cash.<sup>69</sup> This hurt the family group orientation of the past where individuals shared resources and relied on the family or the greater group in the event of misfortune.<sup>70</sup> Individualism strengthened as cash became the primary means of exchange and wage earners were separated from their families. This change filtered into the customary law of succession as the focus shifted to the inheritance of property and securing the interests of an individual heir over the family interests.

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<sup>64</sup> South African Law Commission (note 42) 11.

<sup>65</sup> C Murray 'Migrant labour and changing family structure in the rural periphery of Southern Africa' 1980 (6) *Journal of Southern African Studies* 139 at 140.

<sup>66</sup> Ibid.

<sup>67</sup> BB Brown 'The impact of male labour migration on women in Botswana' 1983 (82) *African Affairs* 367 at 370. The study was in relation to Botswana, but the findings are arguably applicable to South Africa.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid at 378.

<sup>70</sup> Ibid.

## 4.5 Current practice

The administration of customary law estates in accordance with the Reform Act<sup>71</sup> as read with the Intestate Succession Act<sup>72</sup> and the Administration of Estates Act<sup>73</sup> creates a uniform system of administration for all races in the country. The use of the common law to regulate customary law alludes to the dominant position of the common law within the South African legal system.<sup>74</sup> The common law effectively regulates the customary law of succession with slight modifications for a few customary law practices, detailed in Chapter 6. While not apparent at first glance, the group and family orientation of the law continues to manifest itself in a nuanced form in current practices.

### 4.5.1 Focus on inheritance

The common law system of intestate succession is largely individualistic in nature<sup>75</sup> and focuses on the efficient distribution of assets and winding up of the estate. The brief Intestate Succession Act sets out the rules for the distribution of assets primarily to the nuclear family, namely the wife and children.<sup>76</sup> The system regulates the inheritance and devolution of property and does not encompass succession to status, nor do beneficiaries succeed to liabilities. Thus, the Reform Act solidifies the shift towards the individualised acquisition of assets and away from succession to the position of household head.

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<sup>71</sup> The Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009. A number of basic texts discuss the operation of the Reform Act, see C Himonga and T Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 176–185; J Jamneck, C Rautenbach, M Paleker, *et al The law of succession in South Africa* (2012) 243–247 and Rautenbach (note 38) 171.

<sup>72</sup> 81 of 1987 ('the Intestate Succession Act'). For a general discussion on the operation of the Intestate Succession Act, see MJ de Waal and MC Schoeman-Malan *Law of succession* (2016) 13–35; Jamneck, Rautenbach, Paleker, *et al* (note 71) 21–41 and MMG Corbett, G Hofmeyr and E Kahn *The law of succession in South Africa* (2001) 562–577.

<sup>73</sup> 66 of 1965. For a discussion on the administration of estates, see W Abrie, Bd Clerq, C Graham, M Schoeman-Malan, PdW van der Spuy, R Oosthuizen and L van Schalkwyk, *Deceased estates* 10ed (2015).

<sup>74</sup> C Himonga 'Taking stock of changes to customary law in a new South Africa' in G Glover G (ed) *Essays in honour of AJ Kerr* (2006) 215 at 222–223 and C Rautenbach 'South African common and customary law on intestate succession: A question of harmonisation, integration or abolition' 2008 (3) *J. Comp. L.* 119 at 129. For a discussion of the dominance of the common law in the field of marriage and succession, see C Himonga 'The advancement of African women's rights in the first decade of democracy in South Africa: The reform of the customary law of marriage and succession' 2005 *Acta Juridica* 82.

<sup>75</sup> Bekker and de Kock (note 9) at 376.

<sup>76</sup> Section 1 of the Intestate Succession Act; M De Waal 'The social and economic foundations of the law of succession' 1997 (8) *Stellenbosch L. Rev.* 162 at 172–173.

#### 4.5.2 *Duty of support*

The Reform Act is silent on the issue of succession to status and whether the heir has a duty of care as found in customary law succession towards family members. The South African Law Commission recommended that once the Intestate Succession Act was made generally applicable, the customary heir's duty of support should in fairness be abolished as women and children would inherit in their own right.<sup>77</sup> An explicit repeal was deemed necessary as it was unclear whether the Intestate Succession Act repealed the duty of support by implication.<sup>78</sup> While the Reform Act omits the express repeal, state officials do not impute customary law responsibilities to the heir. Individual interests are thus secured over those of the family by focusing on the inheritance of property and omitting the duty of support.

In practice the matter is more nuanced. The heir may or may not fulfil the customary duty of support depending on the nature of the family relationships. In Kwelanga, the death of a family head generally leaves behind the widow and her children. There was unanimous agreement among participants that '[i]t's the wife and children who will benefit only.'<sup>79</sup>

Where the children are young, the widow assumes control of the estate and uses it to care for her children in accordance with a typical parent-child relationship.<sup>80</sup> One woman aptly stated 'you [the widow] raise up your children using that money'.<sup>81</sup> The widow may go beyond this and share benefits with the deceased's other children or dependent family members, such as parents or siblings. This depends on the family dynamics, particularly the widow's relationship with the deceased's children and family members. Where the deceased supported the children, the widow is more likely to share benefits with them than when the existence is only discovered upon the deceased's death.

Where a child assumes control of the property, there is an expectation amongst individuals in Kwelanga that the child will care for the family. One participant explained that he would leave

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<sup>77</sup> South African Law Commission Discussion Paper 93 (Project 90) *Customary law of succession* (2000) xvii and 43.

It also recommended the repeal of the Natal and KwaZulu codes to ensure uniform application of the rules throughout South Africa.

<sup>78</sup> Ibid. It also recommended a specific provision providing that heirs do not succeed to the customary law liabilities of the deceased.

<sup>79</sup> Interview with female participant, 2 September 2015.

<sup>80</sup> Also noted by Himonga and Moore (note 8) 265.

<sup>81</sup> Interview with female participant, 2 September 2015.

his sizeable livestock operation to his eldest son ‘because I can see he’s the one who can actually help the members of the family.’<sup>82</sup>

Himonga and Moore similarly found the inheritance of property to encompass an obligation to use the property on behalf of the family.<sup>83</sup> The duty of care may entail consultation with family members in decision-making, performing marriage rituals with the property, selling livestock when there is a financial need in the family and allowing access to the family home.<sup>84</sup> The duty extends to a broad category of people as family is defined widely to include grandparents, grandchildren, siblings, nieces and nephews.

Conversely, the propensity for property grabbing in succession suggests a jettisoning of the duty of support. A potential heir may not only shirk his or her duty of support but attempt to oust the rights of others. Family members may conceal the existence of the deceased’s children or deny the validity of a woman’s customary law marriage to secure the distribution of the estate to their exclusion. In extreme cases, a woman may be threatened to forsake her inheritance as people wrangle to benefit from the estate at the expense of others. Chapter 7 discusses property grabbing in more detail, but it should be noted that it undermines the group nature of the law and places vulnerable women and children in a precarious position.

Succession to status with a concomitant duty of support was the central tenet of customary law succession. In a South African context in which state resources are strained to provide adequate welfare benefits to vulnerable parties,<sup>85</sup> the duty may have served an important social function. Today, whether the duty of support is observed depends on the family dynamics with no reinforcement from the state. Where it is observed, it plays an invaluable role in supporting vulnerable parties and ensuring the well-being of the family and community at large.

#### 4.5.3 *Greater individualised notions of ownership*

The case study revealed a shift away from family ownership of property to greater individualised notions of ownership. The notion of family property, as well as house and

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<sup>82</sup> Interview with male participant, 10 September 2015.

<sup>83</sup> Himonga and Moore (note 8) 254.

<sup>84</sup> Ibid 254–255.

<sup>85</sup> The Old Persons Grant is set at R1 700 per month and R1 720 for those older than 75; see ‘Old Age Pension (Old Persons Grant)’ available at <https://www.westerncape.gov.za/service/old-age-pension-old-persons-grant> [accessed on 30/12/18]. The child support grant is set at R380 per month; see ‘Child Support Grant amount to increase with effect from 1 April 2017’ available at <http://www.sassa.gov.za/index.php/newsroom/239-social-grants-amounts-increase-from-april-2017> [accessed on 1/12/18].

personal property, were descriptions constructed during the colonial and apartheid eras to describe the different customary entitlements to property. The classification of property determined its devolution.<sup>86</sup> However, because the classifications are not inherently customary law classifications, the terms may not always accurately describe the property in question.<sup>87</sup> Nonetheless, the thesis uses the terminology as it is well-established in the literature and used by the Reform Act to regulate the devolution of property.

The notion of ‘family property’ was traditionally defined as property that had not been allotted or did not accrue to any particular house.<sup>88</sup> It encompassed fields and livestock that had a production function and served family interests.<sup>89</sup> On the other hand, house property typically consisted of the house itself, fields assigned to a particular wife, anything the wife brought into the marriage or the members of the house earned, damages paid for adultery, *lobolo* received for the marriage of a daughter, cattle earmarked for the house, and furniture and household items used in the house.<sup>90</sup> The property formed a separate household estate and if there were three wives, there were three household estates.<sup>91</sup>

There is not always a clear distinction between family and house property and in monogamous marriages, particularly, the distinction is blurred.<sup>92</sup> In a monogamous marriage, there is a single estate and the property could easily be regarded as either family or house property.<sup>93</sup> A further complication is that it is unclear how the concepts of family and house property, which are often defined in terms of an agrarian society, are defined today, particularly in light of declining rates of polygynous marriages discussed in Chapter 3. In a post-colonial and urban society, what constitutes house and family property? While the need for an explanation of how the traditional categorisations of property apply today has been recognised, there has been scant development in this regard.<sup>94</sup> Less contentious is personal property typically interpreted as the clothes, tools

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<sup>86</sup> Section 23 of the Black Administration Act.

<sup>87</sup> For a discussion of the dissonance between the common law descriptions of ownership and customary law entitlements, see C Dlamini ‘The role of customary law in meeting social needs’ 1991 *Acta Juridica* 71.

<sup>88</sup> Pienaar (note 6) at 124; Bekker (note 17) 71; South African Law Reform Commission (Project 90) *Report on the Customary law of succession* (2004) 61. The Reform Act does not define ‘family property’.

<sup>89</sup> Mbatha (note 3) at 262.

<sup>90</sup> Kerr (note 10) 160; RD Coertze *Bafokeng family law and law of succession* (1990) 245 and Bennett (note 5) 256.

<sup>91</sup> Kerr (note 10) 159.

<sup>92</sup> Bennett (note 5) 364.

<sup>93</sup> *Ibid.*

<sup>94</sup> See *Nedbank Limited v Molebaloa* (377802015) [2016] ZAGPPHC 863 (12 August 2016) where the court held that further investigation was necessary to understand the household head’s relationship with family property. See also F Osman and C Himonga ‘The constitutionality of section 7 (1) of the Recognition of Customary Marriages

and weapons that serve an individual's interests, and which can be disposed of by the individual.<sup>95</sup> This property tends to be of little value and could be distributed to family members.

Officials at the Master's Office and service point drew no distinction in the administration of the property based on the classification of property as family property or the broader interests the property serves. It was irrelevant to officials whether the livestock was inherited by the deceased in his capacity as family head with a duty to care for other family members or acquired through contributions from other family members. The exclusion of homes in the village from state administration is on the practical basis – detailed below – that the homes are not titled and capable of administration in the ordinary course. Officials stated that only immovable property in the village is excluded from the administration process. Livestock<sup>96</sup> is reported, valued and distributed to heirs.<sup>97</sup> The value of the livestock may be under reported or omitted by heirs, but officials did not exclude it from the administration process. Small stock tends not be reported due to its meagre value.<sup>98</sup> In contrast, Himonga and Moore found that family property is excluded from the official administration process.<sup>99</sup> They define family property to include houses, livestock and gardens.<sup>100</sup>

The variation suggests a diversity in practice across indigenous groups and the need for further study to understand the relevance and categorisations of property today. In the current study, property was not described in terms of family ownership suggesting a shift towards greater individualised ownership of property and a waning in the relevance of house and family property. Exclusions were based on pragmatic reasons rather than on the nature of the property as found by Himonga and Moore.

#### *4.5.4 Best interests of the family*

In a clear manifestation of the use of practical norms, state officials exclude homes in the village from the Reform Act's ambit though the Act does not provide for such exclusion. Officials

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Act: *Ramuhovhi v President of the Republic of South Africa* 2017 (49) *The Journal of Legal Pluralism and Unofficial Law* 166 at 178.

<sup>95</sup> Mbatha (note 3) at 262.

<sup>96</sup> Referring to sheep and cattle.

<sup>97</sup> Interview with official at Master's Office, 23 June 2017. This was supported by the analysis of files which evinced that cattle and sheep were reported as part of estates.

<sup>98</sup> Small stock referred to chickens or pigs.

<sup>99</sup> Himonga and Moore (note 8) 256.

<sup>100</sup> *Ibid.*

apply the exclusion on the practical basis that the homes do not have title deeds and cannot be transferred.<sup>101</sup> The exclusion is in accordance with the social reality in Kwelanga where homes are not sold and transferred between individuals. A few individuals indicated that property could be sold but they were an exception and spoke hypothetically.<sup>102</sup>

Homes have a spiritual significance as the family's relatives are buried on the property<sup>103</sup> and are thus unlikely to be sold. The family will not leave its deceased nor would another family wish to live on the property. Rituals on significant occasions like death, marriage or birth must be performed by the family on their property further negating their ability to sell the property. Thus, it appears that regardless of the state's pragmatic reasons for excluding homes, individuals view homes as family property, and they function as such to secure the enduring well-being of the family. Furthermore, land remains freely available in the village<sup>104</sup> and individuals prefer to obtain their own plots and build their own homes.

Homes in the village that are excluded from the state administration process devolve in accordance with customary law.<sup>105</sup> The exclusion fortuitously addresses Ngcobo J's criticism in *Bhe* regarding the inappropriateness of the application of the Intestate Succession Act to small estates. Ngcobo J stated that in some instances, the application of the Intestate Succession Act may result in the family home being sold and the proceeds distributed among the children.<sup>106</sup> The children would likely receive a small inheritance and be left without a home or livelihood.<sup>107</sup>

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<sup>101</sup> This was the position stated by all state officials and confirmed in the analysis of case files in which homes in the village are not reported as part of the estate. This was also found in Himonga and Moore (note 8) 256. The *Policy and procedure manual* does not state that immovable property in the village is excluded but states that a municipal valuation of the property is required where the deceased was the owner of immovable property. This suggests it would be hard to report an estate without a municipal valuation; M Meyer and M Rudolph *Policy and procedure manual: Administration of intestate deceased estates at service points* (2016) 29.

<sup>102</sup> Focus group with men over 40 years of age, 18 October 2016.

<sup>103</sup> Bennett notes that the family's relatives are buried on the property with the belief that the deceased join the ancestors and remain with the family in spirit; Bennett (note 38) 381.

<sup>104</sup> While this is beyond the scope of the thesis, individuals noted that land is allotted for free by the chief to males and female regardless of their marital status. Young, unmarried (or divorced) women do not appear to have difficulties accessing land in the village. Outsiders from the village may be charged a fee between R50–R100 for allotment of land.

One participant in a focus group joked 'if you want a plot here you will get it [even if] you are single. I also have a plot. Can I sell it to you?'; Focus group with men under 40 years of age, 18 February 2016.

<sup>105</sup> It is unclear how family property located in an urban area would be dealt with as this was not encountered in the case study.

<sup>106</sup> *Bhe* (note 36) at 232.

<sup>107</sup> *Ibid* at 233.

The exclusion of the homes from the state administration and application of customary law ameliorates such inequity by keeping the home intact and determining its devolution.

The inequity may persist with family property situated in an urban area<sup>108</sup> or with livestock or other smaller forms of property which serve family interests but are administered in terms of the formal state administration process. The case study did not encounter such property. As already indicated, there is a need for further study to understand the prevalence of family property in communities and treatment by state officials.

As customary law regulates the devolution of homes in the village, understanding such norms is critical to analysing the administration of estates. The case study reveals that the principle of male primogeniture has been diluted and the eldest son does not automatically inherit the home in the village.<sup>109</sup> The home is generally assumed by the widow and administered in the best interests of the family, functioning similarly to family property. Where there is no widow, or she requires assistance in the home, a son or daughter is selected by the family to administer the property in the interests of the family. The selection of heir is based on who is in the best position to care for the family rather than with reference to a fixed customary law rule. The selected heir would have frequently shouldered responsibility for the family prior to the death of the parent.

The family group orientation of the law is clear in the devolution of the property which occurs in the best interests of the family rather than according to a fixed rule. In this regard, customary law demonstrates a remarkable flexibility to respond to the specific needs of the family. The devolution of the home depends on the family dynamics and while the eldest son is frequently selected as the heir, it may be another sibling, including a daughter. The danger, of course, is that the heir assumes control of the property and fails to discharge his or her duties towards the family. Vesting control of the property in one person poses a risk to the security of the family as individuals increasingly act to secure their own interests above that of the family as a whole.

Verbal dispositions of property are frequently used and encouraged in the village to prevent the misadministration of the property alluded to above and protect the family interests. The value of these disposals may range from a few livestock to the deceased's entire farming operation and thus may be of real significant value. The family head allots property to the person

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<sup>108</sup> In *Nedbank Limited v Molebaloa* (note 94), the court stated that it is possible to have family property within an urban area.

<sup>109</sup> The dilution of the principle is discussed in more detail in Chapter 5 of this thesis at 100–105.

considered most able to administer it in the best interests of the family. This preventative action is meant to safeguard against property grabbing and the heir shirking his duty of care. As one interviewee explained, he would leave most of his estate, including a sizeable farming operation, to his eldest son whom he trusted to administer the property and fulfil his duty of care towards the family:

According to our custom, only one person is the heir, but in our days we have to distribute the property. As a parent you have to do that while you are still alive, just like me. I have a first born, a son, he's the one now who's helping me with all what I'm doing here and the other one, I will actually share with them, but everything or most of the things that I have, it's my first born who will benefit and then I will only share with the other children. I'm solely doing that because he's always by my side, he's supporting me, he's helping me, hence I've decided to actually take that route. It helps a lot too – the other children if they have problems, the other children, they will come to my son and actually say to them, here's the problem, "I need a sheep, I need a cattle, can you sell one cattle for me? I need to do certain things."<sup>110</sup>

The interviewee chose the first born as he was confident that the son would assist family members, including extended family, as he had done in the past.

Furthermore, the dispositions are meant to ameliorate inheritance disputes and guard against property grabbing. A family meeting, consisting of the spouse and children, is usually convened and the allotment of property discussed. The discussion regarding the allotment of property is meant to ensure acceptance of the dispositions and enforcement by the family. These disposals are generally respected and given effect to upon the individual's death.

The family group orientation of customary law is evident in the devolution of homes in the village and the verbal dispositions of property in Kwelanga. While these are not countenanced by the state law, they operate effectively outside the purview of the state, and play a significant role in maintaining the family and group interests. Homes, and in some instances even livestock, function as family property to serve the broader interests of the family and not an individual heir.

#### *4.5.5 Financial and emotional support*

The family group nature of customary law succession is pervasive in the funeral process itself. Upon the death of an individual, the extended family and community are informed and provide invaluable emotional and practical support to the deceased's close family. The burial site is

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<sup>110</sup> Interview with male participant, 10 September 2015.

arranged, rituals performed and food prepared by the family and community members. Duties are divided according to sex with men performing the more laborious tasks such as gathering wood and preparing the grave while women prepare food. A family meeting is convened which typically consists of the widow, the deceased's parents and other close relatives. The purpose of the meeting is to decide the details of the funeral, such as the day of the funeral, how many cattle will be slaughtered and other logistical arrangements. The meetings are often dominated by elder males in the family and younger family members though present will frequently not speak. The patriarchal nature of these meeting is explored further in Chapter 5, but it should be noted that the widow speaks and is commonly positioned as the key decision-maker in these meetings. The widow is typically the only person with knowledge regarding the deceased's financial affairs and generally dictates how the funeral should be conducted. The widow voices her needs and looks to the family for financial support especially where she lacks the funds to conduct the funeral. Moreover, the family provides emotional support to newly bereaved widow and children upon the death of the family head. With the increasing costs of funerals, the family and community are an important source of emotional and financial support for the new widow.

In the presence of a widow, there is no further meeting to discuss the inheritance of property. As explained in Chapter 5, the widow automatically assumes control of the property with (generally) no discussion or contestation. This renders any further meetings superfluous and a formality at most. Where the deceased is unmarried a further meeting may be held in which the personal possessions of the deceased are distributed among the family.

Participants agreed unanimously that funerals have developed into elaborate and expensive proceedings. Whereas historically funerals were a quick process with burial occurring within a day or two, the process may now take several weeks and cost anywhere up to R100 000.<sup>111</sup> During this time, the extended family must be fed which entails the need for additional groceries and the slaughter of sheep or cattle. Societal pressure on individuals to host large funerals and feed many people has resulted in funeral costs increasing dramatically in the last few years. This was best expressed by one participant in the focus group who stated:

...It's difficult. You need to buy scones, you need to buy juices. On that day you need to buy groceries, you need to prepare tea. In some instances, you'll find out that now the wedding, the funeral now, it's more like a wedding. The expense is too much.<sup>112</sup>

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<sup>111</sup> Interviews and focus groups with participants confirmed the costly nature of funerals.

<sup>112</sup> Focus group with females under 40 years of age, 17 October 2016.

Individuals expressed sentiments that '[y]ou don't want to embarrass your house. You must do a quality funeral'.<sup>113</sup> Participants referred to the need to do a 'proper'<sup>114</sup> funeral which meant a large and expensive one.

The escalating costs have strengthened communal ties as the community assists with the expenses. While some individuals had private funeral policies, almost all were members of the village's burial scheme, demonstrating the inter-dependency of members in the community.<sup>115</sup> Individuals contribute monthly to the scheme and on the death of an individual, the scheme provides the family with groceries and sheep to be slaughtered for the funeral or a monetary amount to cover the funeral costs. Where an individual was not a member of the scheme or there are insufficient funds to cover the funeral costs, family members and neighbours may assist by bringing groceries, food or an animal to slaughter for the funeral.

#### 4.5.6 *Dispute resolution*

The family is the primary body for the resolution of succession and inheritance disputes.<sup>116</sup> While the village is presided over by a resident chief, headman, tribal council and king, succession disputes are rarely taken to the chief and headman whose involvement was only noted in limited instances.

The family generally refers to the elder males in the husband's family, but some noted that the mother would be involved in resolving the dispute. The family discusses the matter and recommends a solution to restore peace in the family. Generally, individuals, both male and female, were confident that the family could resolve the dispute in a fair manner. In an illustration of strong legal pluralism and the semi-autonomous social field, the recommendation is usually followed reflecting the authority and coercive power vested with the family. The family does not implement beatings or such other punitive measures. Its source of power rather appears to be twofold. First, customary law and its institutions regulate people's lives. It exerts a normative force on people's lives and the family is viewed as a speedy and accessible dispute resolution forum. Secondly, there is the threat of ostracisation from the family. In a community

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<sup>113</sup> Focus group with males over 40 years of age, 17 October 2016.

<sup>114</sup> Focus group with males under 40 years of age, 18 October 2016.

<sup>115</sup> The dependency on neighbours echoed Hammond-Tooke's earlier research on the important role of neighbours in the old Transkei area, in which Kwelanga is located. Hammond-Tooke noted how people depended upon their neighbours in times of emergency, sickness, death, birth and in everyday life. See WD Hammond-Tooke *Command or consensus: The development of Transkeian local government* (1975) 113.

<sup>116</sup> Himonga and Moore also found that very few succession matters are taken to court and that the family remains the most popular forum for dispute resolution; Himonga and Moore (note 8) 278.

where individuals depend on each other for employment, transport, to act as witnesses to weddings or to provide assistance with a funeral, the threat of ostracisation is real and sufficient to ensure compliance. As some participants in a focus group explained:

It is important for people to listen to the family because everything ... even before we take it to [the courts] we apply the law. Everything must be discussed in the family first. We don't take things to the law. If you have a problem, the family members are the ones who will come and assist or help you. If you don't listen to the family members, if you have any problems ... what will happen is that if anything that has happened to your stock, they will say okay it's fine, you take care of it yourself. We will not help you because you did not want to listen to us. For instance, if there are some issues, we won't just go to court to report the case. They will tell you, that you know, this thing we could have resolved it in your family. You don't have to come and discuss these things here.<sup>117</sup>

Solutions ensure the coherence and well-being of the family rather than the realisation of individual rights. The risk, in a patriarchal society, is that solutions favour men at the expense of vulnerable parties like women and children. However, there was no indication from the case study that women feared being treated unfairly. Given that women are most likely to have their property rights threatened and use the dispute resolution forum,<sup>118</sup> its continued popularity speaks to its effectiveness. Family mediation is also more likely to be sensitive to the family needs and congruent with the underlying values of succession.

Where the family cannot resolve the dispute, it is escalated to the police or magistrate's court. However, Burman *et al* note that there is a pervasive perception that matters should be resolved within the family and community and the escalation of matters to courts is viewed as an embarrassment of the family.<sup>119</sup>

#### **4.6 Conclusion**

Customary law succession was based on the perpetuation of the family and the best interests of the group. This was secured through the principle of male primogeniture and customary dispositions of property. The identification of a single heir meant that an individual could be held responsible for the well-being of the family. Furthermore, oral dispositions of property, which were common, protected the interests of non-heirs and ensured their well-being after the

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<sup>117</sup> Focus group with men under 40 years of age, 18 October 2016.

<sup>118</sup> First, state officials stated that it is predominantly women who report estates. Secondly, as will be discussed in Chapter 5, men do not experience difficulties in succession and inheritance matters.

<sup>119</sup> S Burman, L Carmody and Y Hoffman-Wanderer 'Protecting the vulnerable from 'property grabbing': the reality of administering small estates' 2008 (125) *SALJ* 134 at 141.

deceased's death. During the pre-constitutional era, the statutory regulation of customary law distorted its nature shifting focus to the inheritance of property with a dilution of the duty of support. Socio-economic changes at the time also drove change as urbanisation, migration and the emergence of new forms of property resulted in a more individualised system of succession.

Today, the Reform Act applies the Intestate Succession Act to the intestate estates of individuals who live according to customary law and die without a will. The substitution of customary law with the common law means that emphasis is placed on the distribution of assets and the winding up of the estate. The Reform Act omits mention of the duty of support and officials do not impose it on heirs. The positive law seems, at first glance, to have extinguished the group and communal nature of customary law.

The distinction among different forms of property has become blurred and individualised notions of ownership are increasingly gaining traction. The case study found that homes in the village are excluded from the state administration process. The group nature of the law manifests itself clearly in the devolution of these homes in Kwelanga to an heir who assumes responsibility for the well-being of the family. Male primogeniture has been diluted and the home typically devolves to the widow and the heir who is in the best position to care for the family. While the son is the preferred heir, the preference is trumped by the best interests of the family which is the paramount concern in the devolution of the home. Unfortunately, the case study did not uncover other forms of family property and does not shed light on how family property, other than the home in the village, is treated under the current system of administration.

Individuals also continue to use verbal dispositions of property to secure the well-being of the family. The family head may select an heir or share property with non-heirs to circumvent disputes regarding the property and fortify the well-being of family members.

In addition, the family and community at large, provide critical financial and emotional support to the bereaved family during the funeral process. Funerals have evolved into elaborate and protracted proceedings and the family and larger community assist with the burial and funds as may be necessary. Lack of support from the family and community may lead to property grabbing, discussed in Chapter 7, and thus this support is not to be underestimated. It solidifies the status of the widow and her rights to the property and is an important deterrent to property grabbing.

Finally, the family remains the first port of call for the resolution of succession disputes and offers solutions for the well-being of the family rather than the realisation of individual rights.

In light of the above, the communal nature of the customary law of succession permeates the current framework. Customary law features have not been completely subsumed by the adoption of the common law Intestate Succession Act and Chapter 5 explores this further by examining how the patriarchal nature of the customary law of succession evinces itself today.

## CHAPTER 5 THE PATRIARCHAL NATURE OF THE CUSTOMARY LAW OF SUCCESSION

### 5.1 Introduction

The communal nature of the customary law of succession was discussed in Chapter 4. The discussion is furthered in this chapter by an examination of another defining characteristic, namely the patriarchal nature of the law. Traditional African society is often described as patriarchal<sup>1</sup> though there is scepticism regarding the accuracy of such descriptions.<sup>2</sup> Critiques around the patriarchal culture ignore that most legal systems had patriarchal roots but over time evolved towards more egalitarian values.<sup>3</sup> Customary law, however, was firstly codified, which prevented its natural evolution, and secondly, distorted by the colonial and apartheid state to over-emphasise its patriarchal features.<sup>4</sup> Customary law succession is nonetheless generally described as a patriarchal system of law with interests framed in favour of men.<sup>5</sup> The patriarchal nature of the customary law of succession is examined by explaining the principle of male primogeniture, its distortion during the pre-constitutional era and finally its abolishment under the Reform Act.<sup>6</sup>

The findings of the case study are drawn upon to demonstrate a dilution of male primogeniture in inheritance practices with widows and daughters exercising greater rights to property.

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<sup>1</sup> V Bronstein 'Reconceptualizing the customary law debate in South Africa' 1998 (14) *SAJHR* 388 at 395; F Kaganas and C Murray 'Law and women's rights in South Africa: An overview' 1994 *Acta Juridica* 1 at 16–17; TW Bennett *Customary law in South Africa* (2004) 248–250 and TW Bennett 'The compatibility of African customary law and human rights' 1991 *Acta Juridica* 18 at 23. Also see AM Govender *African customary law: A constitutional challenge for gender equality* (unpublished LLM thesis, University of Natal, 1999) who describes inequality in customary law.

<sup>2</sup> Bronstein (note 1) at 395–398.

<sup>3</sup> For example for a discussion of the patriarchal practice of the common law doctrine of coverture where married women had no legal existence, see C Zaher 'When a woman's marital status determined her legal status: A research guide on the common law doctrine of coverture' 2002 (94) *Law Libr. J.* 459 and AD Ronner 'Husband and wife are one – him: *Bennis v. Michigan* as the resurrection of coverture' 1996 (4) *Mich. J. Gender & L.* 129 at 132–135. In South Africa, married women were under the marital power of their husbands until it was abolished by the Matrimonial Property Act 88 of 1984. South Africa is also generally described as deeply patriarchal society where women are subordinated in the public and private life; C Albertyn and B Goldblatt 'Equality' in S Woolman and M Bishop M (eds) *Constitutional law of South Africa* 2ed (2013) 35.1 at 35.3

<sup>4</sup> *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC) para 89.

<sup>5</sup> J Bekker *Seymour's Customary law in Southern Africa* 5ed (1989) 273. Generally customary law is regarded as a patriarchal system of law, see Bennett 'The compatibility of African customary law and human rights' (note 1) at 23 and C Himonga and T Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 17.

<sup>6</sup> Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

Nonetheless, patriarchal notions continue to influence the nature of rights exercised by widows and daughters, succession to status as head of the household and the mourning customs observed by widows.

## 5.2 Background to the patriarchal nature of the customary law of succession

While there are different systems of customary law in South Africa, the defining characteristic across systems was the principle of male primogeniture.<sup>7</sup> The principle meant that succession was through the male line to the exclusion of women, and male relatives succeeded to the position as head of the household in a predetermined order.<sup>8</sup> The rationale was that any property left to a daughter would be taken to her new family upon marriage and thus male primogeniture ensured the deceased's property remained within his family.<sup>9</sup>

In a monogamous marriage, the eldest son, or his eldest descendant, succeeded to the position as family head.<sup>10</sup> When that line was exhausted, succession moved to the second son and so forth.<sup>11</sup> In the absence of a descendant, the father succeeded and failing him succession moved to the deceased's brothers and their descendants, in order of seniority.<sup>12</sup> The devolution of property in a polygynous arrangement varied according to indigenous groups. In the simplest system of polygyny, the heir was the eldest son of the first married wife, failing him, his eldest son.<sup>13</sup> If there were no male descendants by the first wife, an heir was sought in the house of the second married wife and so on.<sup>14</sup>

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<sup>7</sup> Bekker (note 5) 273; AJ Kerr *The customary law of immovable property and of succession* 3ed (1990) 99; Bennett *Customary law in South Africa* (note 1) 335; Himonga and Nhlapo (note 5) 161 and N Olivier, J Bekker and W Olivier *Indigenous law* (1995) 148. For an overview, see K Madinginye *Impact of the Intestate Succession [Act] on women and children* (unpublished LLM thesis, University of Pretoria, 2017) 17–23.

<sup>8</sup> Kerr (note 7) 99 and M Hunter *Reaction to conquest: Effects of contact with Europeans on the Pondo of South Africa* 2ed (1961) 120–121.

<sup>9</sup> I Schapera *A handbook of Tswana law and custom* 5ed (1955) 232.

<sup>10</sup> Bekker (note 5) 274; Kerr (note 7) 99; Bennett *Customary law in South Africa* (note 1) 337; Olivier, Bekker and Olivier (note 7) 148–149 and Schapera (note 9) 230–231.

<sup>11</sup> *Ibid.*

<sup>12</sup> Bekker (note 5) 274; Kerr (note 7) 99; Bennett *Customary law in South Africa* (note 1) 337; Olivier, Bekker and Olivier (note 7) 148–149.

Rautenbach provides an excellent explanation of inheritance in a monogamous marriage, see C Rautenbach *The legal position of South African women under the law of succession* (unpublished PhD thesis, Potchefstroomse Universiteit vir Christelike Hoër Onderwys, 2001) 281–283.

<sup>13</sup> Bennett *Customary law in South Africa* (note 1) 338.

<sup>14</sup> *Ibid.* at 338–341. Bennett also discusses more complex inheritance practices in Pedi, Tswana, Venda, Xhosa, Zulu, Swazi law as well as in Lesotho. Also see Bekker (note 5) 275–279; Olivier, Bekker and Olivier (note 7) 149–153; Rautenbach (note 12) 283–286 and Schapera (note 9) 232–234.

Customary law rules governing succession to a woman's estate were fragmented and poorly documented.<sup>15</sup> In a patriarchal society, the focus was on succession to status and women never held the position of family head. Women, furthermore, had a limited right to own property and their property was taken to belong to their husbands.<sup>16</sup> A woman's personal effects and domestic utensils were distributed to her mother, siblings or daughters and in some cases even daughters-in-law.<sup>17</sup> In Pondo law, a woman's pots, baskets, hoe, axe and stock were given to her youngest son.<sup>18</sup> Other property may have been divided among her children depending on their age and sex while huts, fields and cattle remained under the control of the husband.<sup>19</sup> Property brought into the marriage by the woman reverted to her own family.<sup>20</sup> Similarly, the death of a young, unmarried person did not change the headship of the family and there were no rules governing succession in such instances.<sup>21</sup>

The customary law of succession was clearly a patriarchal system of law. The principles focused on the death of the male household head and allowed men to succeed to the exclusion of women. While the principles appear blatantly discriminatory, they operated in the context of a system that favoured the well-being of the group rather than individual interests, as discussed in Chapter 4. The focus was on the identification of a successor to assume the responsibilities of the deceased rather than the mere inheritance of property.<sup>22</sup> Thus the heir assumed responsibility for the deceased's dependents ensuring their interests were protected. Death bed dispositions and the disinheritance of an heir, also discussed in Chapter 4, mitigated against an unscrupulous heir exploiting the principle of male primogeniture for his own benefit. Thus, while the system was undeniably patriarchal, it was meant to protect the interests of the family, including women and children.

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<sup>15</sup> TW Bennett *A sourcebook for African customary law for Southern Africa* (1991) 424.

<sup>16</sup> Bekker (note 5) 306–307.

<sup>17</sup> *Ibid* 309; South African Law Commission Discussion Paper 95 (Project 90) *Customary Law: Administration of estates* (2000) 11 and L Mbatha 'Reforming the customary law of succession' 2002 (18) *SAJHR* 259 at 269.

<sup>18</sup> Hunter (note 8) 120.

<sup>19</sup> Bennett (note 15) 424.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid* 384.

<sup>22</sup> See Chapter 4 of this thesis at 68–70.

### 5.3 Regulation during the pre-constitutional era

As discussed in Chapter 4, the Black Administration Act and regulations thereunder<sup>23</sup> entrenched the application of the customary law rules of succession. This section discusses how statutory regulation exacerbated the patriarchal features of the law.

#### 5.3.1 Entrenchment of male primogeniture

During the pre-constitutional era, state officials described claims by women to land in terms of inheritance rights as contrary to established customary law principles.<sup>24</sup> This was despite assertions that widows previously retained control of their husband's property until one of their children was able to assume control over it.<sup>25</sup> State officials encouraged headmen to reallocate land to the husband's family which was expected to pass the land to the widow's children,<sup>26</sup> namely sons. Widows lost their independent claim to the land and were reduced to accessing land through their children.<sup>27</sup> Thus widows with no sons were disadvantaged in accessing their property.<sup>28</sup> The codification of the policy in the Native Administration Act<sup>29</sup> and rigid application by magistrates were met with resistance. Individuals argued that customary law conferred on women and younger children greater access and control over the land and demanded the application of a more authentic, flexible version of customary law – an implicit call for the application of living customary law.<sup>30</sup>

Under living versions of the law, women navigated the patriarchal nature of the law and the principle of male primogeniture may have been contested and modified or bypassed if it did not ensure the well-being of the deceased's dependents.<sup>31</sup> Bennett describes living customary law as having responded pragmatically to protect the rights of women and children by allowing widows to take over their husband's land and assets and having a greater say in the

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<sup>23</sup> *Regulations for the Administration and Distribution of the Estates of Deceased Blacks (GN R200 of 1987) GG 10601 of 6 February 1987*. The regulations were amended by *Amendment of the Regulations for the Administration and Distribution of Estates (GN R1501 of 1987) GG 24120 of 3 December 2002*.

<sup>24</sup> T Weinberg 'Contesting customary law in the Eastern Cape: Gender, place and land tenure' 2013 (1) *Acta Juridica* 100 at 103–104.

<sup>25</sup> *Ibid.* The exclusion of women from land ownership was meant to address the land shortage crisis created by the state in restricting the majority Black population to a mere 13 per cent of the country's land.

<sup>26</sup> *Ibid.* at 105.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> 38 of 1927.

<sup>30</sup> Weinberg (note 24) at 108.

<sup>31</sup> Bennett *Customary law in South Africa* (note 1) 341.

administration of the estate.<sup>32</sup> Furthermore, the youngest son, who assumed responsibility for his parents, was also allowed to inherit the family homestead.<sup>33</sup> In Keiskammahoek in the Eastern Cape, women who were capable of looking after the family and land were advocated as potential heirs of the land.<sup>34</sup>

The dawn of apartheid solidified the state's application of male primogeniture. The Black Administration Act and regulations thereunder provided for the devolution of property in accordance with 'Black law and custom'.<sup>35</sup> While the notion of 'Black law and custom' was open-ended, courts interpreted it to mean the principle of male primogeniture and applied it to all indigenous groups as a rigid rule.<sup>36</sup> The principle was not relaxed to preserve the well-being of the family or where its application would lead to real injustice.

Women and children bore the brunt of the erroneous entrenchment of the principle. Access to land by women was increasingly restricted, and women were helpless when confronted with magistrates who applied male primogeniture as a rigid rule.<sup>37</sup> This was exemplified in cases of *Bhe*<sup>38</sup> and *Mthembu*<sup>39</sup> where women and children faced eviction from their homes by the male heir and were unable to argue for a relaxation of the principle of male primogeniture. Bennett notes that courts often ignored variations of rules that were more woman-friendly in favour of the uniform application of a rule. Courts were described as inventing and enforcing harsh rules out of sync with social practice.<sup>40</sup> Thus, despite the broad concept of 'Black law and custom', the interpretation and application by courts resulted in the entrenchment of the principle of male primogeniture as representative of the customary law of succession.

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<sup>32</sup> Ibid 342–343.

<sup>33</sup> Ibid 342.

<sup>34</sup> Weinberg (note 24) 114–116.

<sup>35</sup> See Chapter 4 of this thesis at 72–73 for a discussion on this.

<sup>36</sup> South African Law Commission (note 17) 2 and Mbatha (note 17) at 264.

<sup>37</sup> Weinberg (note 24) 111 and Bennett 'The compatibility of African customary law and human rights' (note 1) at 25. Mbatha also notes that the formal courts favoured men in inheritance disputes as they were viewed as the customary heirs; Mbatha (note 17) at 277.

<sup>38</sup> *Bhe* (note 4).

<sup>39</sup> *Mthembu v Letsela* 1997 (2) SA 936 (T).

<sup>40</sup> Bennett 'The compatibility of African customary law and human rights' (note 1) at 25.

### 5.3.2 *Distortion of rights*

The codification of the law in legislation such as the Black Administration Act, the Natal Code of Zulu Law<sup>41</sup> and the KwaZulu Act on the Code of Zulu Law,<sup>42</sup> court decisions<sup>43</sup> and by authors, such as Schapera,<sup>44</sup> Seymour<sup>45</sup> and Kerr<sup>46</sup> had a distortive effect on the law. As Hunter noted, language and culture are interdependent and describing one culture in the language of another distorted the description of practices.<sup>47</sup> For example, Kerr described the widow as having a ‘servitude’ over her husband’s land and a ‘personal right’ against the heir to be maintained.<sup>48</sup> These were distinctly common law terms imposed on customary law relationships. The widow had a right to remain in the home, maintenance and use of assets though not ownership in respect of any of the property.<sup>49</sup> The heir to the land was meant to consult the widow in dealing with the property, who in turn could restrain the heir from dissipating the property.<sup>50</sup> If the widow was unhappy regarding the administration of the property, the senior members of the family admonished the heir to rectify the position.<sup>51</sup> The widow was described as having no formal inheritance but a right to remain in her husband’s home and she could not be evicted from the homestead.<sup>52</sup>

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<sup>41</sup> The Natal Code of Zulu Law (Proc R151 of 1987).

<sup>42</sup> KwaZulu Act on the Code of Zulu Law 16 of 1985 .

For a discussion of the Codes, see TW Bennett and A Pillay ‘The Natal and KwaZulu Codes: The case for repeal’ 2003 (19) *SAJHR* 217 and J Bekker and J Coertze ‘The KwaZulu Act on the Code of Zulu Law, 1981’ 1983 (46) *THRHR* 285.

<sup>43</sup> For example, see *Madolo v Nomawu* (1896) 1 NAC 12 and *Sekelini v Sekelini* (1904) 21 SC 118 in which the courts solidified the rule that women do not inherit in customary law. For a good discussion of case law, see Kerr (note 7) 99–154.

<sup>44</sup> Schapera (note 9).

<sup>45</sup> Seymour’s first edition of *Customary law in Southern Africa* was a critical resource on the application of customary law.

<sup>46</sup> AJ Kerr *The customary law of immovable property and of succession* (1976).

<sup>47</sup> Hunter (note 8) 12.

<sup>48</sup> Kerr (note 46) 125.

<sup>49</sup> See Olivier, Bekker and Olivier (note 7) 161; Rautenbach (note 12) 286 and Schapera (note 9) 231.

<sup>50</sup> Bekker (note 5) 298.

<sup>51</sup> *Ibid.*

<sup>52</sup> Bennett (note 15) 416 and Bennett *Customary law in South Africa* (note 1) 348. Sections 11(3)(b) and 27(3) of the Black Administration Act further undermined the status of women and deemed a woman in a customary marriage to be a minor and under the marital authority of her husband. The sections precluded women from owning property, entering into credit agreements and limited their contractual capacity. For a discussion of the distortive effect of these provisions, see KL Robinson ‘The minority and subordinate status of African women under customary law’ 1995 (11) *SAJHR* 457.

Similarly, daughters were also entitled to be maintained and remain on their father's property and could not be evicted without 'a good and sufficient reason'<sup>53</sup> for doing so.<sup>54</sup> Bar a claim that the daughter had married and was required to move out, it is unclear what may have constituted a sufficient reason for eviction. The court in *Moloi v Moloi* held that an allegation that the daughter was disrespectful, sold cattle whose ownership was in dispute and ploughed land without the consent of the heir did not constitute reasonable grounds for eviction<sup>55</sup> but did not elaborate on what was necessary for a successful eviction action.

The descriptions of the rights of widows and daughters were problematic as they cemented the subordinate nature of the rights of females in relation to the male heir. The property rights of men and women may have differed under customary law, but it was the codification that introduced the notions of servitudes and personal rights to describe the property rights of women. This ossified these lesser rights and made it harder for women to negotiate better entitlements and use of the property as they would have had under customary law. This contrasts with the enhancements of men's rights, discussed in Chapter 4, where the male heir was described as having ownership of property, as understood in the common law, which entailed the exclusive right to use and dispose of the property. The effect was that codification exacerbated the patriarchal elements of customary law, exaggerating the rights of male heirs while further subordinating the rights of women.

#### **5.4 Socio-economic changes during apartheid**

As discussed in Chapter 4, socio-economic changes during the apartheid era impacted the communal nature of the customary law of succession and this was equally true in respect of its patriarchal nature.

The move from an agricultural, subsistence economy to a cash economy changed the nature of family assets. Individuals spent more money on goods such as necessities and education resulting in wealth transfers occurring before the death of the household head.<sup>56</sup> The estate was spread among the family leaving less to pass on upon the death of the household head. This

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<sup>53</sup> In *Moloi v Moloi* BAC 57 1967.

<sup>54</sup> Kerr (note 46) 125.

<sup>55</sup> *Moloi* (note 53).

<sup>56</sup> JC Bekker and PD de Kock 'Adaptation of the customary law of succession to changing needs' 1992 (25) *CILSA* 366 at 367.

minimised the patriarchal nature of the law and the impact of the principle of male primogeniture.

Similarly, the emergence of new assets such as pension and insurance benefits were ill-suited to being kept intact and administered for the benefit of the family.<sup>57</sup> The assets comprised cash and the member had to nominate a beneficiary upon joining the scheme. This lent itself to devolution to the surviving spouse as the children, if already born, would often be young minors. Furthermore, as women joined the labour force, assets were accumulated by both spouses and devolved to the surviving spouse upon the death of one of them.<sup>58</sup>

The migrant labour system also resulted in men being dispersed across the country. As the first born son frequently left home in search of work,<sup>59</sup> the practices of inheritance changed.<sup>60</sup> The last born son was left in the home and assumed responsibility for the family.<sup>61</sup> This resulted in a practice of ultimogeniture in which the last born son inherited the property to fulfil his duties.<sup>62</sup> Bekker and de Kock note early studies confirmed these changing practices in which the wife administered the property after the husband's death and upon her death the property fell to the youngest son.<sup>63</sup> Brandel-Syrier notes in a very limited study that there were increased inheritance disputes which frequently led to the first born son not inheriting or sharing the inheritance with the other siblings, including sisters.<sup>64</sup> She attributes this to disturbances in the social systems discussed above, the impoverished socio-economic context and other siblings, including daughters, claiming a share of the heir's inheritance.<sup>65</sup> The eldest sisters also successfully assumed the responsibility of caring for the family resulting in them being

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> M Brandel-Syrier 'First-borns and younger sons: Culture change and sibling relations' 1979 (9) *Africa Insight* 41 at 43.

<sup>60</sup> Bekker and de Kock (note 56) at 368.

<sup>61</sup> Bennett *Customary law in South Africa* (note 1) 342–343.

<sup>62</sup> Ibid.

<sup>63</sup> Bekker and de Kock (note 56) at 369. Bekker and de Kock also noted changes in succession practices among the Pedi. The eldest son succeeded as head of the family and to the general property while the youngest son succeeded to the house and arable allotment with the responsibility to care for the widow and dependent children. In certain Sotho tribes, the youngest son of each house succeeded to the arable allotment of the house when the widow died. Monnig confirmed that the youngest son inherited the homestead and domestic articles but did not mention the arable allotment; see MM Watney 'Customary law of succession in a rural and an urban area' 1992 (25) *CILSA* 379 at 380.

<sup>64</sup> Brandel-Syrier (note 59) at 43–44. This was a limited study conducted in the 1970s with 60 residents in a township in the Witwatersrand.

<sup>65</sup> Ibid at 43.

revered.<sup>66</sup> These early findings point to a dilution of the male heir's rights and the emergence of the stronger rights of daughters in succession.

In summary, changes in the socio-economic context impacted on the customary law of succession. The dispersal of the family and emergence of new forms of wealth meant that the eldest son was no longer the obvious heir. The widow and other children inherited property demonstrating an evolution in the customary law succession.

## 5.5 Current practice

Customary law succession today exhibits signs of an egalitarian system of law and this section discusses these developments while noting certain persistent patriarchal features of the law.

### 5.5.1 *The Reform Act*

The Reform Act gives effect to the *Bhe* decision and the court's declaration that the principle of male primogeniture is unconstitutional. The preamble notes that male primogeniture has been declared unconstitutional and cannot be reconciled with the notions of equality and human dignity. Accordingly, the Reform Act provides that property devolves in accordance with the Intestate Succession Act.<sup>67</sup> The Intestate Succession Act gives preference to the surviving spouse and does not distinguish between children based on gender in inheritance.<sup>68</sup> This is counter to the previously patriarchal nature of the devolution of property.

Of course, the pressing question is whether the distribution set out under the Intestate Succession Act is given effect to in practice. From the case study, it appears that generally the directions from the Master's Office and service point are followed. Most estates are reported by women<sup>69</sup> and are smaller than R250 000<sup>70</sup> with the result that they are inherited by the widow as the surviving spouse. As the widow is primarily the sole heir, the thesis focuses on her experience in the administration of the estate.

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<sup>66</sup> Ibid at 44.

<sup>67</sup> Intestate Succession Act 81 of 1987 ('Intestate Succession Act').

<sup>68</sup> The beneficiaries under the Reform Act as read with the Intestate Succession Act are discussed in detail in Chapter 6 of this thesis at 117–118. The widow is entitled to the greater of R250 000 or a child's portion. Where the estate is smaller the R250 000, the widow inherits the entire estate, see section 1(c)(i) of the Intestate Succession Act.

<sup>69</sup> See Chapter 8 of this thesis at 178–179.

<sup>70</sup> As discussed in Chapter 3 of this thesis at 56–57.

There was unanimous agreement among participants in the village and state officials that the distributions under the Reform Act are effected in practice. This is secured through placing the widow in charge of the administration process. Individuals and officials were adamant that the widow receives the letter of authority. The analysis of files confirmed this practice. In 87 out of the 93 intestate estates in which there was a surviving spouse, the letter of authority or executorship was issued to the surviving spouse. Thus, ordinarily not only is the widow the sole beneficiary of the estate but she also assumes control of the administration process. Only in rare cases was the letter of authority issued to another relative, usually a child, despite the presence of the surviving spouse.<sup>71</sup> The reason for the deviation was not always evident. In one instance, the surviving spouse explained that she was sick and required her son to take control of the estate. In other cases, the absence of a marriage certificate evincing the existence of the marriage resulted in the son or brother being appointed to administer the estate. This, however, was not consistent as in some cases the surviving spouse was appointed as the administrator of the estate despite the lack of a marriage certificate. There appeared to have been some uncertainty in the appointment of the administrator in the early years with unregistered customary marriages. This became a non-issue later on as the Master's Office insisted on the registration of a marriage as proof of an individual's status as a surviving spouse.

The findings confirm the earlier study of Burman *et al* who found that in almost all cases, the surviving spouse is appointed as the representative of the estate in conflict with their hypothesis that the eldest male child or closest male relative represents the estate.<sup>72</sup> Similarly, Himonga and Moore found that in the majority of cases examined in their study, the surviving spouse as heir is appointed as the administrator of the estate.<sup>73</sup> In a minority of cases, sons were appointed as the administrator instead of the surviving spouse but the reasons for this were not apparent from the files.<sup>74</sup> It may be that the surviving spouse was incapable of acting as an administrator or that officials were uncertain in the application of the Reform Act.

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<sup>71</sup> Only in 6 out of the 93 files in which there was a surviving spouse, constituting 6.5 per cent of the cases was the surviving spouse overlooked.

<sup>72</sup> S Burman, L Carmody and Y Hoffman-Wanderer 'Protecting the vulnerable from 'property grabbing': The reality of administering small estates' 2008 (125) *SALJ* 134.

<sup>73</sup> C Himonga and E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015) 244.

<sup>74</sup> *Ibid* 244–245.

### 5.5.2 *Dispositions of property*

Patriarchal practices of succession are further diluted by the verbal dispositions of property discussed in Chapter 4. Individuals dispose of property, such as livestock or fields, to sons or daughters and often to younger children to assist them to establish their homes.<sup>75</sup>

A further notable disposition of property is the devolution of pension benefits, which often constitutes a significant asset of the deceased. This is regulated by the Pension Funds Act<sup>76</sup> and is not administered in terms of the Reform Act. Individuals nominate their beneficiaries to the fund, and notably, the principle of male primogeniture did not guide the nomination of beneficiaries in Kwelanga. Spouses or children were equally nominated as beneficiaries and the eldest son, or any son for that matter, was not favoured in this regard. Single individuals nominated their parents and there was no manifest preference for the father over the mother.

### 5.5.3 *Widow's rights*

The Reform Act as read with the Intestate Succession Act secures the inheritance rights of widows. Homes situated within the village, however, are excluded from the state administration process<sup>77</sup> and their devolution may thus potentially be guided by the principle of male primogeniture.

Early research points to developments in the principle of male primogeniture. Mnisi Weeks in research conducted prior to the commencement of the Reform Act found that women inherited their husband's property, with the term 'property' referring to valued resources.<sup>78</sup> The caveat was that sons had oversight of the property and women inherited to the extent they had a responsibility to care for their children.<sup>79</sup> Nonetheless, the women maintained that they inherited the property.<sup>80</sup> Men, however, claimed that the eldest son inherited everything coupled with an obligation to care for his mother and siblings.<sup>81</sup> The son's inheritance was qualified as the responsibility to oversee the property with a duty to consult with the family on everything and

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<sup>75</sup> See Chapter 4 of this thesis at 83–84. Schapera noted this practice amongst the Tswana as well; Schapera (note 9) 216.

<sup>76</sup> Section 37C of the Pension Funds Act 24 of 1956.

<sup>77</sup> Chapter 4 of this thesis at 81–82.

<sup>78</sup> SM Weeks 'Securing women's property inheritance in the context of plurality: Negotiations of law and authority in Mbuzini customary courts and beyond' (2011) *Acta Juridica* 140 at 144 and 164.

<sup>79</sup> *Ibid* at 164–165.

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid* at 165.

act in the best interests of the family.<sup>82</sup> Men and women appeared to frame the entitlements from their own perspectives but the general perception was that the widow controlled and administered the property upon the death of the husband.<sup>83</sup>

Consonant with these findings, Himonga and Moore found some participants believed that the widow had no independent right of inheritance but inherited to safeguard the interests of her children.<sup>84</sup> Women, nonetheless, retained ownership of the property after the children had grown up and left the home.<sup>85</sup>

In Kwelanga, the widow's rights were not framed as conditional upon her having children though she was expected to use the estate to fulfil her responsibilities towards them. There was unanimous agreement that the widow assumes full control and responsibility of the estate, comprising the home in the village, livestock and any other assets not bequeathed to a specific individual.<sup>86</sup>

The articulation of the unequivocal rights of inheritance in Kwelanga may reflect the variation in practice across indigenous groups. Women in Kwelanga were assertive and outspoken which may have assisted them and others in framing their entitlements strongly as unqualified rights. Indicative of the nuance and evolving nature of customary law, the norms cannot be represented as fixed, rigid rules but manifest in rich differences across studies.

The widow's assumption of the property is treated as a given and no family meeting is held to discuss the distribution of property. This confirms the earlier findings of Himonga and Moore that the rights of widows were automatic and as a widow aptly stated '[n]o one decided, it just became mine'.<sup>87</sup> The widow inherits her husband's property without any difficulty, in preference to any children, including adult sons.<sup>88</sup> Individuals in Kwelanga noted that a family

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Himonga and Moore (note 73) 264–265.

<sup>85</sup> Weeks (note 78) at 165 and Himonga and Moore (note 73) 267.

<sup>86</sup> In the current study, an interview revealed that a young widow with no children returned to her natal home after her husband's death taking only certain personal effects with her. The couple were living in a small home on a larger family property and had not properly established their own home or accumulated much property. The interviewee explained that the widow was from the Sotho clan and her return home was required by Sotho custom. Interview with female participant, 9 September 2015.

<sup>87</sup> Himonga and Moore (note 73) 267–268.

<sup>88</sup> Ibid.

meeting to discuss the property may trigger an unnecessary interest in the deceased's property and is thus best avoided.

In a shift from the family orientation of the law to a more individualised notion, women asserted their individualised rights to the estate.

No. They [the other family members] will not be given. Even with others, it's something practised here all around my village. I'm the one who will benefit. I'm the one who will get everything because those people, they will do nothing for you at the end of the day. You are the one who has to raise your children and do everything for them.<sup>89</sup>

But in a testament to the continued family orientation of the law, discussed in Chapter 4, the deceased's family may support the widow in her inheritance claims. Himonga and Moore describe how the husband's relatives may confirm the existence of the marriage and husband's death and support the widow's inheritance of the property.<sup>90</sup> Similarly, in Kwelanga, the widow may be accompanied by a close relative to report the estate and family members assist in confirming the existence of the marriage and the status of the woman as the deceased's widow. Unfortunately, there are times when the family may deny the existence of the marriage to usurp the rights of the widow which is discussed in Chapter 7.

While the widow's inheritance of the estate aligns with the distribution under the Reform Act, the development has not necessarily been driven by state law. In the explanation of the distribution, participants never referred to state law but alluded to a sense of equity and entitlement that the widow who worked to amass the estate and was responsible for the family be given control of the property to discharge her liabilities. One woman negated that her rights to the property could ever be challenged 'because actually I'm the one who contributed more in building the house.'<sup>91</sup>

Similarly, Himonga and Moore noted that while the devolution of property may in some instances accord with the *Bhe* rules, it could not be deduced that individuals followed these

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<sup>89</sup> Interview with female participant, 2 September 2015. This was in response to a question of whether any other family member would have a claim to the property.

<sup>90</sup> Himonga and Moore (note 73) 269.

<sup>91</sup> Interview with female participant, 2 September 2015.

rules.<sup>92</sup> The devolution may have reflected the living customary law practices<sup>93</sup> which evolve and adapt to changing conditions, including changes in the legal order.

The widow's rights may be compared to the rights of the widower whose wife passes on. The participants who had lost their wives in Kwelanga did not consider their wives to have separate estates triggering inheritance claims to the home, livestock or money by relatives.<sup>94</sup> In a clear illustration of the persistent patriarchal influence in the village, men are assumed to be the owners of the entire estate and the property is assumed to belong to the husband with no challenge from family members.<sup>95</sup> The wife's personal effects, such as clothing, are distributed among her daughters or female family members.<sup>96</sup> The pervasive belief that the estate is owned by the man and not the woman protects the rights of a widower upon the death of his wife and renders him immune to property grabbing.

In summation, widows today inherit their husband's estate under both the Reform Act and living customary law. While inheritance may be linked to the responsibility to care for their children, in Kwelanga, a widow's rights are not contingent upon her having children. She has clear rights in her own stead to the estate. The findings suggest a strengthening of women's rights and developments which reflect greater egalitarian practices.

#### 5.5.4 *Children's rights*

The Reform Act does not distinguish between male and female children and confers upon them equal rights of inheritance. Most estates are smaller than R250 000 and the surviving spouse inherits to the exclusion of any children in such cases. Where there is no surviving spouse, the estate is shared between the children. The state administers this distribution effectively abolishing male primogeniture in succession.

Given that homes in the village are excluded from administration under the Act, there is a risk that such property devolves in accordance with male primogeniture outside the purview of the state. Mbatha's early research found that because of the distortions in the rules of succession discussed above and in Chapter 4, parents desired to leave their properties, which appears to be

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<sup>92</sup> Ibid 253.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid 269.

<sup>95</sup> Ibid who also found that widowers appear to experience no problems in inheritance matters.

<sup>96</sup> Ibid.

a reference to residential properties, to all their children regardless of their gender.<sup>97</sup> The family home was meant to be accessible on the basis of need and as compensation for those who contributed to the welfare of the family.<sup>98</sup> Daughters and unmarried siblings inherited property as the principle of male primogeniture was relaxed.<sup>99</sup> Succession practices developed to reflect egalitarian values aimed at ensuring the well-being of the family.<sup>100</sup>

In Kwelanga, the widow's death triggers questions regarding the inheritance of the home in the village. The eldest son is the preferred heir, succeeds as head of the family and inherits control of the property with an obligation to care for the family.<sup>101</sup> Where the eldest son is not perceived as capable of fulfilling his responsibilities, the property is given to a more responsible child, which may well be a daughter.<sup>102</sup> The inheritance of the property is thus determined by who is in the best position to care for the family rather than a rigid customary law rule. Where the eldest son is irresponsible, participants, both male and female, indicated that he would be passed over and the responsibility conferred upon another child.

The female focus group with women under 40 years of age were quick to negate that the son would assume control of the property upon the death of the widow.<sup>103</sup> They explained that while sons should assume responsibility for the property, they are often disinterested regarding the property and 'don't care much'.<sup>104</sup> Daughters on the other hand demonstrate greater aptitude and responsibility in respect of the house and family members and therefore could be entrusted with the property. The women jokingly expressed a desire to only have girls as they knew how to care for the property:

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<sup>97</sup> Mbatha (note 17) at 268. Mbatha also discusses the traditional distinction in the forms of property, namely personal, house and family property under customary law. The categorisations in the forms of property are examined in Chapter 4 of this thesis at 79–81 in the discussion on the devolution of family property.

<sup>98</sup> Ibid at 269.

<sup>99</sup> Ibid at 269 and 273.

<sup>100</sup> Ibid at 269. Research into the inheritance practices in Lesotho also revealed such developments; P Letuka *Inheritance in Lesotho* (1994) 165 and 173 noted instances where property did not devolve according to male primogeniture but to a family member who had contributed to the accumulation of wealth as a reward.

<sup>101</sup> Himonga and Moore (note 73) 256–57 also found that sons were favoured in succession matters.

<sup>102</sup> This, however, is not the norm everywhere and Himonga and Moore found that in certain areas in KwaZulu-Natal and the Eastern Cape, the principle of male primogeniture in respect of family property continues to apply; Ibid 250; 257 and 267. Participants in Kwelanga never denied a daughter's right to inherit property as was done by a participant in the study by Himonga and Moore.

<sup>103</sup> Female focus group under 40 years of age, 17 October 2016.

<sup>104</sup> Female focus group under 40 years of age, 17 October 2016.

Yes. You know in our days we wish we can have girls only. Because girls, they know how to take care of property. They know how to take care of the house.<sup>105</sup>

In conclusion, care of the family home devolves to the most responsible child upon the death of the widow. The eldest son was generally acknowledged to be the rightful successor, but his rights were not fixed. Both men and women stated that a daughter may be placed in charge of the property if she was considered more responsible. Some women participants vehemently advocated daughters as being better suited to care for the property and asserted their rights to the property. What is clear is that the principle of male primogeniture is not applied as a rigid rule and both sons and daughters may assume responsibility for the family home. A determinative factor is the ability to care for the property and family.<sup>106</sup>

### *5.5.5 Gendered differences in rights*

#### *5.5.5.1 Home in the village*

While widows and daughters have greater inheritance rights than previously, there are clear gendered differences in their rights to the home in the village. Widows and daughters may assume control over the home in the village but are not considered the owners of the house. Participants, both male and female, described the house as belonging to the deceased husband. One woman anticipated the future inheritance of the house by her 14-year-old son and stated that the house belonged to her son.<sup>107</sup>

Widows and daughters who assume control of the house are expected to remain in the house without getting married, or remarried in the case of widows, and upon marriage are expected to leave the home. Young women may be told this explicitly and refrain from marriage and engage in informal relationships. It is considered inappropriate for a man to stay in another man's house and as a matter of pride the son-in-law should establish his own home.

Upon the daughter's marriage, the house passes to a brother or other close male relative. Some women may temporarily live with their husbands in the home while they build their house elsewhere. Others may discretely move their boyfriends or husbands into the family home though this is frowned upon. One participant stated:

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<sup>105</sup> Female focus group under 40 years of age, 17 October 2016.

<sup>106</sup> The notion of a responsible heir echoed earlier attempts by councillors in Ciskei during the apartheid era to counter the rigid application of male primogeniture. The ability to care for the family was argued to be the most important criterion for land inheritance; Weinberg (note 24) 115.

<sup>107</sup> Interview with female participant, 2 September 2015.

Yes, in some instances the daughter will be told that, listen, you will not leave this household, you are not even allowed to get married, you must take care of this household. Though it is rare because the daughter will get married, the daughter will...in some instances the parents will actually say, you know, my daughter is more responsible than the son and therefore she must take care of the property but apparently the daughter will get married and then eventually the son will be responsible for the household.<sup>108</sup>

There's no way that she [my daughter] can bring her husband here. She's the one who leaves this house and gets married, not the other way around. There's no way that the man can come here.

[And the son? Can he, does he bring his wife here?]

Yes. Yes, my son can actually get married, and he can use this house.<sup>109</sup>

The son, however, may bring his wife into the house and establish his family in the home. Despite the dilution of the principle of male primogeniture, the property is expected to remain within the family and devolve through the male line. This finding is supported by Himonga and Moore's study which unearthed the desire to keep the home within the family as the daughter would take the property to her husband's family after marriage.<sup>110</sup> Participants also alluded to the exclusion of females based on their incapability and immaturity with respect to managing the estate.<sup>111</sup>

Sons and daughters thus have significantly different rights towards the home in the village. Sons have greater rights to the property than daughters who cannot establish their families in their father's homes. It disincentivises daughters from assuming responsibility for the property or from marriage. Even women who adamantly extolled the rights of daughters to assume control over the property articulated this as the position. Male primogeniture is still apparent and favours the devolution of the property through the male line.

The restricted rights to the property apply equally to widows. Widows do not generally remarry in the village. Young widows who wish to remarry must return to their natal homes and are precluded from remarriage while in the deceased's house. This entails leaving the homes they built with the deceased and their children in the care of the deceased's family. Participants

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<sup>108</sup> Focus group with men over 40 years of age, 17 October 2016.

<sup>109</sup> Interview with female participant, 2 September 2015.

<sup>110</sup> Himonga and Moore (note 73) 256 and 258. Himonga and Moore, however, question this reasoning given that 49 per cent and 15 per cent of women 15 years and older and women 50 years and older respectively report never having been married.

<sup>111</sup> Ibid 257.

explained that it was more common for women to have boyfriends and ‘[s]he must visit the boyfriend, or the boyfriend must come at night’.<sup>112</sup>

No, what will happen if the husband passed away and then the wife will make a means of getting someone to come and visit, a boyfriend, and then she will see him. But for us as the family members we must not see that. She must do that privately.<sup>113</sup>

Relationships outside of marriage have become more socially acceptable provided they are not openly flaunted, and many widows engage in such relationships. Where women do not have children, they are more likely to remarry or enter a cohabitant relationship where the boyfriend may discretely move into her house though this remains frowned upon.

Women negotiate relationships to retain control of the property. This demonstrates how women strategise within their concrete constraints for the best possible outcome.<sup>114</sup> Kandiyoti describes this as ‘patriarchal bargains’ in which women operate within the system to maximise their own interests rather than attempt to dismantle the institutionalised patriarchy.<sup>115</sup> Thus, women in Kwelanga did not seek to break the norms against remarriage but navigated around them; they accept the patriarchal nature of the system but bargain for a better position.

The restrictive norms on remarriage appear harsh but evince the family / group nature of the law discussed in Chapter 4. Participants explained the reticence regarding remarriage based on ensuring the well-being of children. The concern was that a step-parent may not care for the children or may jeopardise the children’s proprietary interests by attempting to usurp the property left to them by their father. Thus, remarriage was discouraged to ensure the well-being of the children.

The patriarchal nature of the law means that widowers find themselves in a more favourable position. Widowers may re-marry and bring their new wife into the home. A couple of participants, however, indicated that it was rare for men to remarry as it may cause conflict within the family.<sup>116</sup> They are therefore required to establish a new home elsewhere if they wish

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<sup>112</sup> Focus group with women under 40 years of age, 17 October 2016

<sup>113</sup> Focus group with men under 40 years of age, 18 October 2016.

<sup>114</sup> D Kandiyoti ‘Bargaining with patriarchy’ 1988 (2) *Gender & society* 274 at 275.

<sup>115</sup> *Ibid* at 280.

<sup>116</sup> Focus group with males under 40 years of age, 18 October 2016.

to do so.<sup>117</sup> The general perception, nonetheless, was that men were free to remarry and often did so.

Some women explained the differing treatment of widows and widowers on the basis that the home belonged to the man and he was thus entitled to bring a new wife into it.<sup>118</sup> Regardless of the women's contribution to the home, she was not considered the owner of the home. Other participants explained that men could remarry as they required assistance with household chores.

Because it is not easy for a man to stay alone. To do all the household duties. So, with men, it's allowed and it's acceptable to remarry. But, with the wife – no, it's not allowed.<sup>119</sup>

#### 5.5.5.2 Livestock

The differences in rights did not appear to manifest themselves with regard to livestock. Widows were clear that they could sell livestock to realise cash if needed. The sale or slaughter of the animals may be necessary to care or feed the family and widows positioned themselves as the decision-makers in this regard. There was some difference on whether the widow could sell all the livestock or had to retain a few, but this appeared to be based on differing views of what was in the best interests of the family rather than a negation of the widow's rights with respect to the livestock. However, women were adamant that the decision was theirs and if family members objected, they would be responsible for the expenses.

In some instances, there will be a case whereby I will sell some of the things. I have a right to do that, if I'm experiencing some challenges or problem. Now that they belong to me, actually, I can do anything with them.

You can't sell all of them, you can't sell all of them. If you're having a certain problem, you can actually sell a few.

In some instances when you're actually in a lot of debt, you actually sell everything.<sup>120</sup>

While one male participant suggested that women would not be physically capable of managing livestock, it was not the general view of the community. The general perception was that

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<sup>117</sup> Focus group with males over 40 years of age, 18 October 2016.

<sup>118</sup> Focus group with women under 40 years of age, 18 October 2016.

<sup>119</sup> Focus group with women under 40 years of age, 17 October 2016.

<sup>120</sup> Focus group with women under 40 years of age, 6 September 2015.

widows inherited and managed the livestock, including making decisions regarding the sale thereof in the interests of the family.

In conclusion, while widows and daughters enjoy greater rights to property than before, stark differences between their rights and those of their male counterparts remain. Properties in the village are expected to devolve through the male line. Thus, the widow or daughters are expected to vacate the property upon their marriage (or remarriage). The property devolves to the closest male relative who may establish his family in the home. The principle of male primogeniture has been diluted with women exercising greater rights over property, but widows appear to have fewer rights than the widower evincing the patriarchal nature of customary law. Men's ownership of property and their needs are prioritised over those of women.

#### *5.5.6 Patriarchy in succession to status*

From the discussion above, it is apparent that widows and daughters may assume control of property in the village. However, it is unclear whether women succeed as head of the household. The household head, in addition to the duty of care, typically had other responsibilities such as communicating with ancestors, performing rituals and going into the kraal to deal with animals. Individuals never relayed that the widow or daughter would assume such duties. Moreover, during mourning, the widow was precluded from entering the kraal. Some participants defined the son's role as head of the family with reference to his responsibility to perform certain rituals.<sup>121</sup> It thus appears that the spiritual and traditional role may still fall to the eldest male.

The finding on the distinction between succession and inheritance confirms earlier research by Mbatha who also noted the distinction in her research. While respondents in Mbatha's study were open to women inheriting property, they were ambivalent as to whether women could succeed as head of the family.<sup>122</sup> Male primogeniture was preferred to regulate succession to this position though the family may assist the successor in discharging his responsibilities.<sup>123</sup> The issue of succession to status is beyond the scope of this thesis and further research is required on this subject.

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<sup>121</sup> Focus group with women under 40 years of age, 17 October 2016.

<sup>122</sup> Mbatha (note 17) 272.

<sup>123</sup> Ibid.

### 5.5.7 *Funeral and mourning customs*

As already stated, funerals have grown into elaborate affairs in Kwelanga.<sup>124</sup> Decision-making in respect of the funeral is important to determine how much money and livestock is used in the process and what will remain for the widow and her family.

The widow, together with the elders of the family, particularly the deceased's parents and brothers, decide the arrangements for the burial and funeral of the deceased, including the costs thereof and what animals will be slaughtered during this time. Most participants stated that the wife is the key decision-maker in these proceedings. Some male participants,<sup>125</sup> however, noted that the wife is informed of the arrangements and has no input in decisions made. Women are expected to remain silent and comply with decisions made.<sup>126</sup> Most participants, however, disagreed and questioned what would happen if the widow was working and the money belonged to her. The widow was represented as the only person with knowledge of the estate which is under her control and therefore, she must be consulted in the funeral arrangements. In meetings where women are silent, they articulate their concerns and desires to a male relative who will ensure that they are addressed.

While control over the funeral arrangements appears as a benign, administrative task, it confers on the widow control over the use of the deceased's property. This importantly allows the widow to protect her interests and guard against property grabbing. The widow in Kwelanga is the key decision-maker in the funeral arrangements conferring on her control over the estate.

There's nothing much in that meeting. What they normally do is they ask anything from me, what I want on the day of the burial, and everything. Actually, there's nothing they will say. They will do anything that I want as a person. So it is just a formality that they will come together, but they will not take any decision without my consent.<sup>127</sup>

The description of the widow's power in funeral arrangement is at odds with the mourning customs and practices in the village which remain traditional and patriarchal in nature. A widow's mourning entails secluding herself from the ordinary day-to-day life in the village.<sup>128</sup> The widow wears black clothing, abstains from eating certain food and refrains from socialising, including attending church or dealing with the livestock. She is expected to

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<sup>124</sup> This was discussed in Chapter 4 of this thesis at 84–85.

<sup>125</sup> Focus group with males under 40 years of age, 18 October 2016.

<sup>126</sup> Focus group with males under 40 years of age, 18 October 2016.

<sup>127</sup> Interview with female participant, 2 September 2015.

<sup>128</sup> The mourning by the widow described below was confirmed across participants.

demonstrate her grief by the adoption of a subdued demeanour, which includes not raising her voice and keeping her head bowed when addressing people. The widow does not visit the king or the chief's place during the mourning period and would send a member of her family or the headman to act on her behalf.

However, some participants noted that the widow may travel to the chief's place if she did not mix with any of the livestock. These restrictions could be problematic if there was a dispute the widow wished to present to the chief. However, most disputes are resolved at the family level with no need to involve the chief and the widow may call the chief on his cellular phone even if she could not physically visit him. Furthermore, women in mourning are not precluded from travelling to the Master's Office or service point to report the estate and obtain the letter of authority. The restrictive mourning rituals were generally not presented as a hindrance to the realisation of the widow's rights.

In one instance, the mourning customs appeared to have been exploited to the detriment of the widow. A widow, whose status in the family was ambivalent because she had concluded a civil marriage and not a customary marriage, was coerced into paying the money she had received from the estate to her deceased husband's family. The incident is discussed in more detail in Chapter 7. As a customary marriage had not been concluded, the deceased's family controlled the funeral and burial process and requested the widow to mourn for a shortened period of four months in the deceased's home village. The woman acceded to the family's requests as she feared that she would be prevented from attending the funeral.

The request that the woman observe the mourning rituals as a widow while simultaneously denying her rights as a widow to control the funeral process was contradictory. It appeared that the husband's family had nefarious intentions in wanting the widow to observe the mourning customs. The intention appeared to be to separate the widow from her social support structures when the financial claims were paid to her to gain control thereof. They initially requested that she mourn for four months but looked to extend that period when they learnt further claims would be paid to her. However, the widow left amid recommendations by the community that that it was dangerous for her to remain with the family and that she should return home. The widow mourned for between four to five months before returning to Kwelanga.

Thus, while generally not the case, the mourning customs may be exploited by unscrupulous individuals for their own benefit. The isolation of widows from their social support structures, such as family and friends, and the expectation that the mourning is observed at the husband's

home may render widows vulnerable to property grabbing and hinder their ability to assert their rights.

The degree to which individuals observe the mourning rituals differs according to their own beliefs and family relations. Some may strictly observe the rituals while others will refer to mourning being ‘done in the heart’ without observing the actual customs and rituals. There are many practising Seventh Day Adventists in the village who do not follow the mourning rituals because of the religious beliefs. The mourning period usually lasts 12 months but certain limitations may be lifted at various stages during this 12-month period. For example, three months after the husband’s death, a ritual is performed which includes the slaughtering of sheep and the widow is partially released from mourning. From this point, the widow can travel and socialise more freely. Mourning is ended by the performance of a cleansing ritual after which the widow may be considered ‘free’. Freedom is limited, as even after the release, the widow is expected to adopt a demure and submissive demeanour and refrain from remarriage out of respect for the deceased husband. The on-going mourning, and the restriction on re-marriage, impact on the women’s rights to property as was discussed under the gendered differences in rights above.

On the other hand, mourning customs are much less restrictive for widowers. A man may wear a black hat to indicate his mourning for six months but there are no other limitations on his behaviour or movement. One participant<sup>129</sup> stated that the widower’s movement was also restricted during mourning, but this was negated by almost all other participants. One female participant stated succinctly:

No, they’re allowed to go. With them, the law is lenient, they’re allowed to go. This thing is more harsh on us as women.<sup>130</sup>

Despite the acknowledgment of harshness, women generally followed the mourning rituals and practices pertaining to remarriage out of respect for the deceased and based on their own spiritual beliefs. For example, the permeating belief was that the mourning rituals and customs must be followed to avoid illness and ensure the woman’s life goes well. One woman observed:

In some instances, the wife will get sick, and then probably later, many years later, then the wife will get sick, then the elderly will say: it’s because you didn’t mourn over your

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<sup>129</sup> Focus group with males over 40 years of age, 17 October 2016.

<sup>130</sup> Focus group with females under 40 years of age, 17 October 2016.

husband. Then they will start to do the process of mourning. Do the clothes, and then she will wear those clothes, and then after that she will be healed, she'll be fine.<sup>131</sup>

These kinds of statements, of which there were many variations, illustrated that compliance with the mourning customs was generally not achieved through violence or threat of excommunication. There was no compulsion to observe the mourning rituals and no fear of being driven out of the village for failing to do so. Rather the customs are tied to deeply-held supernatural or spiritual beliefs that failure to observe could result in illness or hardship which induce compliance.

In conclusion, the widow is generally in charge of the funeral arrangements in Kwelanga. This confers on her control over the estate which is important for protecting her property interests. Nonetheless, the traditional mourning customs are much more restrictive on the rights of women than men, which may potentially be exploited for property grabbing.

## **5.6 Conclusion**

The customary law of succession was historically a patriarchal system of law. Succession was characterised by the principle of male primogeniture, where the closest male relative succeeded as head of the household and usually to the exclusion of females. The patriarchal nature of the law was ameliorated in the flexible application of the principles that were applied to protect the best interests of the family.

Unfortunately, the codification of the law during the pre-constitutional era drastically distorted the nature of the law. The patriarchal features of the law were exaggerated and entrenched conferring ownership of property on the male heir while simultaneously weakening the rights of widows and children. It created conditions rife for property grabbing, exemplified in the *Bhe* case, where opportunistic heirs assumed the property with no responsibility for the care of family members.

Customary law norms of succession appear more favourable to females today with women having much stronger rights of inheritance. The Reform Act abolishes the principle of male primogeniture and provides that in small estates, the estate is inherited by the widow, which is generally given effect to in practice. The household head also frequently disposes of property prior to his death further diluting the principle of male primogeniture. Upon the death of the

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<sup>131</sup> Focus group with females under 40 years of age, 17 October 2016.

household head, there was unanimous agreement in Kwelanga that the widow inherits the home in the village and uses it to care for her family.

Upon the widow's death, the eldest son is often the favoured successor reflecting the pervasive patriarchal influences in the law. However, the son has no fixed right to inherit the property, and daughters are frequently given control of the property because they are considered more responsible and better able to care for the family and the property. A determinative factor in the inheritance of the property is the heir's ability to fulfil his or her responsibilities to the family. While gender affected the expression of answers and the framing of interests, there was unanimous agreement that the heir must be able to fulfil his or her responsibilities to care for the family and property. The development appears as a response to changing socio-economic circumstances in which women play a significant role in caring for the family and the eldest son is the first to leave home to search for employment, marry and establish his own home elsewhere. Daughters shoulder a greater responsibility caring for the family and home and are thus entrusted with the property upon the death of the widow.

Widows and daughters, however, have limited rights to the property in contrast to their male counterparts. Widows and daughters may not marry and establish their families in the home. Upon marriage, they are expected to move out and the property reverts to the male heir and devolves through the male line. Women navigate these restrictions by entering informal relationships with male suitors. In this way, they retain control over the property but continue their lives. As a result, women in Kwelanga control property in the village despite the apparent restrictions on their rights. Widows also control the funeral arrangements, which places them in control of the deceased's estate and how property is used during the funeral process.

The mourning customs are much more restrictive for widows than for widowers evincing the persistent patriarchal influences in the law. Furthermore, despite the stronger rights to property women may exercise, it remains unclear whether they may succeed as the head of the household with the spiritual responsibilities this entails.

Chapters 4 and 5 discussed the two most distinctive characteristics of the customary law of succession, namely the group nature and patriarchal features of the law. In doing so, it examined the living customary law practices of succession. Chapter 6 now examines the issue of beneficiaries under the Reform Act.

## CHAPTER 6 BENEFICIARIES UNDER THE REFORM ACT

### 6.1 Introduction

The findings of the study on the communal and patriarchal nature of the customary law of succession were discussed in the preceding two chapters. The chapters explored the rights of widows and children to property in the village. This chapter discusses how customary law practices are accommodated in the Reform Act<sup>1</sup> by explaining the expanded definitions of spouse and descendant. Lacunae in the Act are also highlighted with reference to the customary law practice of *ukungena* and unmarried partners. The chapter concludes that despite the legislative overhaul, close scrutiny of the Reform Act reveals that women and children remain vulnerable parties susceptible to being overlooked in matters of succession.

### 6.2 The Reform Act

The Reform Act provides that the intestate estates of individuals who live according to customary law devolve in accordance with the Intestate Succession Act<sup>2</sup> subject to certain modifications.<sup>3</sup> This section summarises the pertinent rules of inheritance and explains the modifications to the notions of ‘spouse’ and ‘descendant’.

#### 6.2.1 Rules of inheritance

The primary beneficiaries under the Intestate Succession Act are the nuclear family, being the surviving spouse and children. This framework is adopted by the Reform Act despite the extended family’s persistence in African society.<sup>4</sup> The Reform Act does not recognise that the direction of dependent relationships may not be limited to parents caring for children or spouses caring for each other but may extend to children caring for parents and siblings.<sup>5</sup> Thus, other

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<sup>1</sup> Reform of Customary Law of Succession and Regulation of Related Matters Act, 11 of 2009.

<sup>2</sup> Intestate Succession Act, 81 of 1987.

<sup>3</sup> Section 2 of the Reform Act.

For a discussion of the basic principles of intestate succession, see J Jamneck, C Rautenbach, M Paleker, *et al* *The law of succession in South Africa* (2012) 30 and MJ de Waal and MC Schoeman-Malan *Law of succession* (2016) 20.

<sup>4</sup> J Bekker ‘Interaction between constitutional reform and family law’ 1991 *Acta Juridica* 1 at 2 and M Wilson, S Kaplan, T Maki and EM Walton *Social structure. Keiskammahoek rural survey* (1952) 46.

<sup>5</sup> S Mnisi *The interface between living customary law(s) of succession and South African state law* (unpublished PhD thesis, Oxford New College, 2009) 346. Mnisi discussed the direction of dependent relationships in terms of *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole* 2005 (1) SA 580 (CC).

dependents such as grandparents, aunts, uncles, nieces, nephews or other family members who the deceased may have supported while alive do not ordinarily benefit from the estate.<sup>6</sup>

In terms of the Intestate Succession Act, beneficiaries do not succeed to the deceased's liabilities nor is the inheritance coupled with a concomitant duty of care towards the deceased's dependents as is found in customary law.<sup>7</sup> The Reform Act does not explicitly repeal the customary heir's duty of care<sup>8</sup> but given the adoption of the common law Intestate Succession Act with its individualised nature, it is unlikely that courts would impute the duty to an heir. Neither the Intestate Succession Act nor the Reform Act regulate matters ancillary to succession such as the deceased's funeral or the right to decide on the manner and place of burial.<sup>9</sup> These matters do not relate directly to the distribution of property, but Chapter 7 explains that they are important to the bereaved widow and may be exploited to usurp property rights.

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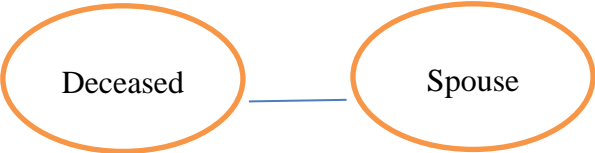
<sup>6</sup> The Bill preceding the Reform Act, The Reform of Customary Law of Succession and Regulation of Related Matters Bill GG 30815 25 February 2008, defined a descendant as a person who in terms of customary law was a dependent of the deceased immediately prior to his death. It echoed the amendment in the Draft Bill for the Amendment of Customary Law of Succession as proposed in South African Law Commission Discussion Paper 93 (Project 90) *Customary law of succession* (2000) ('Draft Bill') to the term 'survivor' in the Maintenance of Surviving Spouses Act 27 of 1990 ('Maintenance Act'), which provided that survivor would include any child or other person factually dependent upon the deceased for support prior to the deceased's death. These broader definitions captured parents or siblings of the deceased he was caring for prior to his death. It addressed Mbatha's concerns that merely allowing wives to inherit would be unfair to other family members with rights under customary law; L Mbatha 'Reforming the customary law of succession' 2002 (18) *SAJHR* 259 at 282. However, in the deliberations leading to the enactment of the Reform Act, the definition was considered too broad with concern that it cast the net too wide and extended family members and non-blood relations who the deceased was caring for would inherit from the estate at the expense of blood relations. The Justice and Correctional Services Meeting which deliberated on the Bill recommended a narrowing of the definition on the assumption that parents and siblings were assumed to be less likely dependent on the deceased and in less urgent need of protection. See Justice and Correctional Services Committee 'Meeting report on Reform of Customary Law Succession Bill [B10D-2008]: NCOP Amendments; Traditional Courts Bill & Superior Courts Bill: Committee Resolution' 18 February 2009 available at <https://pmg.org.za/committee-meeting/9910/> [accessed on 29/11/18]; South African Law Reform Commission (Project 90) *Report on the customary law of succession* (2004) 58 and South African Law Commission *Customary law of succession* (2000) 41.

<sup>7</sup> Chapter 3 of this thesis at 68–70.

<sup>8</sup> The Discussion Paper recommended that once the Intestate Succession Act was made generally applicable, the customary heir's duty to support the deceased's dependents should in fairness be abolished as women and children would inherit in their own right. An explicit repeal was deemed necessary as it was unclear whether the Intestate Succession Act repealed the customary law of duty of care by implication; South African Law Commission *Customary law of succession* (note 6) xvii and 43. Accordingly, the Draft Bill repealed any customary laws obliging an heir to maintain a deceased's dependents but it was omitted in the Reform Act.

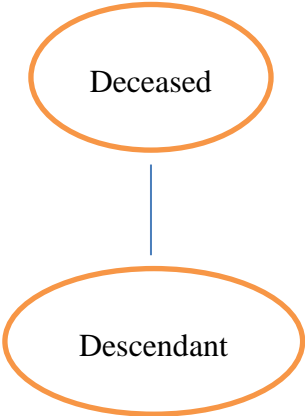
<sup>9</sup> The South African Law Reform Commission stated that the right to decide funeral ceremonies cannot be regulated by intestate succession; South African Law Reform Commission *Report on the customary law of succession* (note 6) 58.

According to the Intestate Succession Act, where an individual is survived by a spouse and no descendants, the spouse inherits the entire estate (regardless of the existence of any other relatives).<sup>10</sup>



**Figure 5: Deceased survived by a spouse and no descendants**

Where an individual is survived by a descendant and no spouse, the descendant inherits the entire estate.<sup>11</sup>



**Figure 6: Deceased survived by a descendant and no spouse**

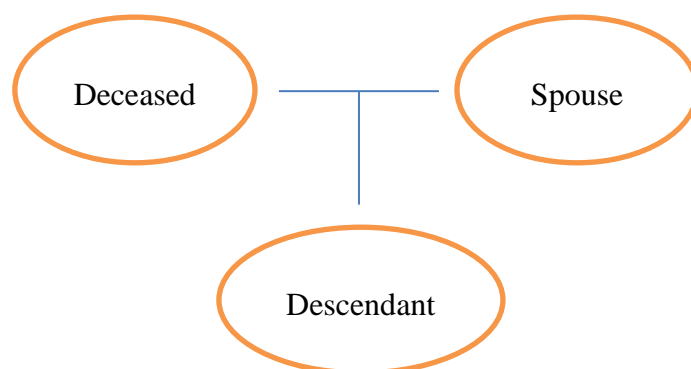
Where there is both a spouse and a descendant, the spouse inherits the greater of the child's portion<sup>12</sup> or the prescribed amount, currently set at R250 000, with the descendant inheriting the residue of the estate, if any.<sup>13</sup>

<sup>10</sup> Section 1(1)(a) of the Intestate Succession Act. This is regardless of whether there are any other relatives.

<sup>11</sup> Section 1(1)(b) of the Intestate Succession Act.

<sup>12</sup> A child's portion is calculated by dividing the monetary value of the estate by the number of children of the deceased who have survived him or who have predeceased him but are survived by their descendants plus the number of spouses or women in a seed raiser arrangement or woman-to-woman marriage; Section 3(3) of the Reform Act. For a general discussion on the calculation of child's portion see de Waal and Schoeman-Malan (note 3) 21–22 and Jamneck, Rautenbach, Paleker, *et al* (note 3) 32–33.

<sup>13</sup> Section 1(1)(c) of the Intestate Succession Act as read with GN 921 in *Government Gazette* 38238 of 24 November 2014. See de Waal and Schoeman-Malan (note 3) 21–24 and Jamneck, Rautenbach, Paleker, *et al* (note 3) 32–35.



**Figure 7: Deceased survived by a descendant and spouse**

Where the estate is small and less than R250 000, as the preponderance of estates in the case study were, the surviving spouse inherits the estate to the exclusion of any children. In a nuclear family, children of the deceased and surviving spouse indirectly benefit from the estate through the surviving spouse's care.

In a polygynous marriage (discussed in detail below) or where there are children outside of marriage, the distribution of the estate to the surviving spouses yields a disappointing outcome. Where the mother of the children is not married to the deceased, neither she nor her children benefit from a small estate, which is generally inherited by the surviving spouse. The unmarried partner's children do not indirectly benefit from the estate though they have a claim for maintenance against the estate.<sup>14</sup> The surviving spouse is unlikely to share the estate with the children, particularly where the relationship is characterised by hostility. This is supported by Himonga and Moore who found that one participant in their study adamantly maintained that an extra marital child would not inherit by stating '... I am not related to this child, I don't owe her anything. I am only concerned about my children'.<sup>15</sup> The marginalisation of these children and complete lack of protection for the unmarried partner illustrates why the rules of inheritance may be inappropriate in a non-nuclear family.

Where there is no surviving spouse or children, the estate is distributed to other family members such as grandchildren, siblings and parents.<sup>16</sup>

Generally, however, estates are small and are therefore inherited by the surviving spouse as the sole heir. The thesis thus focuses on the surviving spouse's inheritance of the estate as it was

<sup>14</sup> *Carelse v Estate De Vries* (1906) 23 SC 532. See MMG Corbett, G Hofmeyr and E Kahn *The law of succession in South Africa* (2001) 41–43 for a discussion of the maintenance claim.

<sup>15</sup> C Himonga and E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015) 266.

<sup>16</sup> Sections 1(1)(d)–(f) of the Intestate Succession Act. For a discussion of the rules see Jamneck, Rautenbach, Paleker, *et al* (note 3) 39–43 and de Waal and Schoeman-Malan (note 3) 24–27.

the predominant inheritance scenario in Kwelanga. The rules are fixed and there is no room for discretion in the distribution of the estate.

### 6.2.2 *Family property*

The discussion above illustrates the imposition of the common law rules of inheritance on the customary law of succession. The SALRC noted, however, that the distribution of family property in terms of the common law was impractical as it may result in the family home being sold and proceeds distributed rendering the family homeless.<sup>17</sup> Seemingly cognisant of these difficulties, section 5 of the Reform Act provides that if there is any dispute or uncertainty regarding the devolution of family property, the magistrate or traditional leader in the area may conduct an inquiry and make a recommendation to the Master who makes a decision in the best interests of the deceased's family and equality between spouses in civil and customary marriages.<sup>18</sup> Family property would then not devolve in accordance with the intestate rules of succession discussed above but in accordance with the Master's recommendation.

There was no evidence in the case study of the implementation of section 5 of the Act. As discussed in Chapter 4, the Master does not distinguish between different forms of property in the administration of estates. Homes situated in the village are excluded because they do not have a title deed and are not transferrable like land in urban areas. The intimation is that had there been a title deed, the home would have been administered in terms of the Reform Act.

This suggestion has serious implications as property situated in an urban area and registered in the name of a single individual, usually the head of the household, may serve the broader family interests and constitute family property.<sup>19</sup> If such property is deemed part of the household head's estate and distributed amongst his heirs, it would eradicate the notion of family property. In the socio-economic context of a country plagued by unemployment and poverty where many family members outside of the nuclear family may depend on access to the family property for survival, this is problematic.<sup>20</sup> The case study did not shed light on how this would be dealt with in practice having not encountered family property in the state offices.

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<sup>17</sup> South African Law Reform Commission *Report on the customary law of succession* (note 6) 62–63.

<sup>18</sup> See details of the section in Annexure A. The provision echoes Ngcobo J's recommendation as to how disputes regarding the applicability of indigenous law to regulate the devolution of property are to be resolved; *Bhe* (note 5) para 240.

<sup>19</sup> *Nedbank Limited v Molebaloa* (377802015) [2016] ZAGPPHC 863 (12 August 2016).

<sup>20</sup> Mnisi (note 5) 144.

In conclusion, the Reform Act acknowledges that it may be inappropriate for family property to devolve in accordance with the common law rules of inheritance. The Master is empowered to make a recommendation for the devolution of such property in the best interests of the family. The section is not used, and this is likely because the Master's Office does not distinguish forms of property in the administration process. Section 5 nonetheless remains an important provision which may be invoked by officials to regulate access to family property in the future. It allows for oversight of the living customary law practices which govern this issue and enables officials to make determinations which safeguard the rights of vulnerable parties.

### 6.2.3 Spouse

The Reform Act modifies the definition of a 'spouse' to accommodate polygynous marriages, seed raiser arrangements and woman-to-woman marriages.<sup>21</sup> Unfortunately, as a result of poor drafting, there is uncertainty regarding how women in these arrangements should be treated. The SALRC recommended that the women be regarded as spouses of the deceased and the children of such unions be regarded as descendants of the deceased.<sup>22</sup> The Reform Act, however, refers to the women as descendants of the deceased, but then includes them with the surviving spouse in the calculation of a child's portion.<sup>23</sup> This has created confusion as to whether the women should be treated as spouses or descendants. This distinction is important as the entitlements of spouses and descendants to the estate are different.<sup>24</sup> The uncertainty was addressed by the Masters of the high court who formulated a policy to treat the women as spouses as it conferred upon them the greatest entitlement to the estate.<sup>25</sup> Accordingly, the women in these relationships are discussed as spouses in this thesis.

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<sup>21</sup> See sections 2(2)(b) and 2(2)(c) of the Reform Act. Section 3(1) of the Reform Act provides that any reference in section 1 of the Intestate Succession Act to a spouse must be construed as referring to every spouse and woman referred to in sections 2(2)(a), (b) and (c) of the Reform Act. The reference to section 2(2)(a) appears to be an anomaly as this section sets out how an estate is to devolve where the deceased is survived by a spouse and a descendant rather than referring to a woman.

The Act does not use the term seed raiser but section 2(2)(b) of the Act refers to a 'woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house'. In customary law the woman is referred to as a seed raiser, see N Olivier, J Bekker and W Olivier *Indigenous law* (1995) 166.

<sup>22</sup> South African Law Reform Commission *Report on the customary law of succession* (note 6) 60.

<sup>23</sup> Definition of 'descendant' and section 3(1) of the Reform Act.

<sup>24</sup> For example, in an estate smaller than R250 000, the surviving spouse is the sole heir while descendants inherit nothing.

<sup>25</sup> J Bekker and D Koyana 'The judicial and legislative reform of the customary law of succession' 2012 (45) *De Jure* 568 at 577-578.

### 6.2.3.1 Polygynous marriage

The Reform Act recognises partners engaged in polygynous marriages as spouses.<sup>26</sup> Spouses inherit equally, and no account is taken of the number of children, the duration of the marriages, the level of dependency or any other factor in the devolution of property. While this achieves formal equality among the women, it does not necessarily lead to substantive equality. For example, where the deceased dies leaving two wives, the estate if smaller than R250 000 is shared equally between the wives. It is irrelevant whether the first wife was married to the deceased for 20 years and has three children to support while the second wife was married to the deceased for three years with no children to support. The blunt division of the estate which does not consider the circumstances of individuals may be a source of frustration for individuals and perceived as unfair.<sup>27</sup>

Furthermore, the division of the estate may prove problematic in a polygynous arrangement. Under the common law, an estate less than R250 000 is kept intact and inherited by the surviving spouse. In a polygynous arrangement, the estate is divided among the spouses, which may necessitate the sale of one or more of the houses rendering a family homeless.<sup>28</sup> If the homes are in the village, this may not be an issue. According to current practice discussed in Chapters 4 and 5, such homes devolve in accordance with customary law, generally to the surviving spouse. This may not be a strictly equitable division of property if one home is worth significantly more than the other, but it ensures that the home is not sold leaving a family homeless. Nonetheless, the concern remains over other forms of property such as motor vehicles, livestock and immovable property situated in an urban area which must be divided among the spouses. The sale and division of these assets may realise cash but it negates their utility, ultimately to the detriment of the family.

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<sup>26</sup> The Reform Act defines a spouse as a partner in a customary marriage recognised in terms of the Recognition of Customary Marriages Act 120 of 1998 ('the Recognition Act'). The Recognition Act recognises polygynous marriages in sections 2(3) and 2(4) and thus polygynous spouses inherit in terms of the Reform Act.

<sup>27</sup> Mnisi (note 5) 309. This is unlike the Zambian Intestate Succession Act which provides that where there is more than one widow, the widow's share is determined by the duration of the marriage, the respective contribution to the estate and other factors; see Section 5 of Intestate Succession Act 5 of 1989. The SALRC shied away from this approach with no real explanation merely noting that it required an 'unnecessarily intricate calculation of each inheritance' which may not be feasible with small estates; see South African Law Commission *Customary law of succession* (note 6) 47.

<sup>28</sup> C Rautenbach, W du Plessis and G Pienaar 'Is primogeniture extinct like the dodo, or is there any prospect of it rising from the ashes? Comments on the evolution of customary succession laws in South Africa: Notes and comments' (2006) 22(1) *SAJHR* 99 at 116. This was also a concern of Ngcobo J in *Bhe* (note 5) para 231–232.

It is notable that the *Bhe* decision provided that the judgment did not preclude the conclusion of an alternative agreement between parties as to the devolution of the property.<sup>29</sup> For example, the surviving spouses may agree that one of them will inherit all the deceased's immovable property.<sup>30</sup> Such agreements are allowed provided they are voluntarily entered into and are not exploitative of vulnerable parties like women and children.<sup>31</sup> This implies that women in polygynous relationships enjoy harmonious relationships or may be coerced into such harmony by their property interests<sup>32</sup> which reflects an idealised notion of polygynous marriages that is unlikely to be the case. Indeed, in Uganda it has been found that a polygynous marriage is the greatest risk factor for property grabbing<sup>33</sup> and this was supported by the case study where individuals identified polygynous arrangements as a threat to women's property interests. Accordingly, Bekker and Koyana describe the court's suggestion as 'absurd' and 'highly improbable'.<sup>34</sup>

The Reform Act does not explicitly provide for such agreements but there is nothing precluding parties from concluding a redistribution agreement where they agree in writing among themselves that the assets should devolve in a different manner.<sup>35</sup> There were three instances in the sample of case files analysed in which beneficiaries agreed to forsake their inheritance in favour of another beneficiary. This was completed through a simple affidavit in which the beneficiary confirmed that all the assets be given to a single heir and that the beneficiary understood the contents of the affidavit. In one case, a brother consented to his sister inheriting their mother's money because she was responsible for the home while he lived in a different province. Similarly, in the second case, siblings repudiated their benefits in favour of the eldest sister who assumed responsibility for a minor sibling. In the final case, two major children consented to their grandmother receiving their inheritance as she cared for them as a parent. Such undertakings appear as a rarity and property is more likely to devolve in accordance with the Reform Act.

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<sup>29</sup> *Bhe* (note 5) para 130.

<sup>30</sup> *Ibid* para 130.

<sup>31</sup> *Ibid*.

<sup>32</sup> F Osman and C Himonga 'The constitutionality of section 7(1) of the Recognition of Customary Marriages Act: *Ramuhovhi v President of the Republic of South Africa*' 2017 (49) *The Journal of Legal Pluralism and Unofficial Law* 166 at 179.

<sup>33</sup> International Justice Mission *Property grabbing from Ugandan widows and the justice system response: A mixed-methods assessment in Mukono County, Uganda* (2014) 62.

<sup>34</sup> Bekker and Koyana (note 25) at 572.

<sup>35</sup> De Waal and Schoeman-Malan (note 3) 242.

Polygyny is rare in Kwelanga and participants noted that there are very few such marriages in the village. The general position expounded was that upon the death of the husband, both wives mourn, and the property is distributed equally between them with no favouritism of the first wife. However, it was noted that women in such marriages may experience difficulties in asserting their rights and were at risk of property grabbing. To guard against this, the letter of authority is issued in the name of both surviving spouses to place both spouses in control of the estate. Nonetheless, there is a risk that the estate is reported and distributed to the exclusion of a surviving spouse and these risks and difficulties are discussed in Chapter 7.

The Reform Act provides much-welcomed protection for polygynous spouses. The protection, however, is rudimentary as the intestate succession calculation is merely amended to include polygynous marriages and assumes a quick and easy division of the estate between spouses. As discussed above, this yields formal equality but may not produce substantive equality. Given that property is generally not excluded from the administration process, it may result in a realisation and distribution of cash, which does not provide long-term benefit or security to beneficiaries.

#### 6.2.3.2 Seed raiser arrangement

The Reform Act provides that a spouse includes, among others, a woman mentioned in section 2(2)(b) of the Reform Act.<sup>36</sup> Section 2(2)(b) refers to a woman other than the spouse of the deceased with whom he concluded a union in accordance with customary law for the purposes of providing children for his spouse's house. Typically, the wife is barren or deceased and the man marries another woman to produce an heir for his wife's house.<sup>37</sup> The woman is known as a seed raiser and any children born belong to the wife's house as if they were the wife's children.<sup>38</sup> According to the Reform Act, the women in these relationships are considered spouses of the deceased and inherit a surviving spouse's share.

The Act does not articulate the criteria for the recognition of this practice but rather defines it in terms of customary law, which as explained in Chapter 2 is living customary law. This guards against ossification of this law and ensures the Act recognises developments in the practices

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<sup>36</sup> Section 3(1) of the Reform Act.

<sup>37</sup> Bekker and Koyana (note 25) at 578. Also see AJ Kerr *The customary law of immovable property and of succession* 3ed (1990) 134–137 and C Harries *The laws and customs of the Bapedi and cognate tribes of the Transvaal* (1929) 24–27 for a discussion of the practice.

<sup>38</sup> Bekker and Koyana (note 25) 568 at 578.

that constitute this form of customary law. It nonetheless introduces uncertainty as there are no criteria to distinguish a seed raiser arrangement from an extra marital affair.

Seed raiser arrangements were not found in Kwelanga nor had officials encountered them. Thus, the case study provides no insight into the matter. Individuals merely speculated that where the parties agreed to the arrangement, the child would live with the father and inherit as an heir to the husband.

### 6.2.3.3 Woman-to-woman marriage

A spouse also encapsulates a woman referred to in section 2(2)(c), namely a woman in a woman-to-woman marriage. This is not a homosexual relationship and there are no sexual relations between the women involved. Generally, an older, barren woman (referred to as the female husband) marries a younger woman with all the accompanying marriage requirements, including the payment of *lobolo*.<sup>39</sup> Children of the bride, if any, are considered that of the female husband and if the bride does not have children, she is impregnated by a male relative of the female husband.<sup>40</sup> The biological father has no rights to the children who assume the surname of the female husband.<sup>41</sup> These marriages are arguably valid marriages under the Recognition Act,<sup>42</sup> and the patrimonial consequences of marriage and rules of succession should apply to them as well.<sup>43</sup>

Woman-to-woman marriages are a rarity but have been reported in 10 groups in South Africa; they are typically undertaken by women to demonstrate their social status and power rather than to produce children.<sup>44</sup> The practice is famous amongst South Africa's only matrilineal community, the Bolobedu community in Limpopo,<sup>45</sup> but was unheard of in Kwelanga and the

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<sup>39</sup> B Oomen 'Traditional woman-to-woman marriages, and the Recognition of Customary Marriages Act' 2000 (63) *Journal of Contemporary Roman-Dutch Law* 274 at 275; J Bekker *Seymour's Customary law in Southern Africa* 5ed (1989) 147; TW Bennett *Customary law in South Africa* (2004) 197–198 and National Council of Provinces Security and Justice 'Meeting report on Reform of Customary Law of Succession and Regulation of Related Matters Bill: Final Mandates' 17 February 2009 available at <https://pmg.org.za/committee-meeting/9891/> [accessed on 6/11/18].

<sup>40</sup> Oomen (note 39) at 275 and National Council of Provinces Security and Justice Meeting (note 39).

<sup>41</sup> *Ibid.*

<sup>42</sup> Oomen (note 39) at 277–279.

<sup>43</sup> Bekker and Koyana (note 25) at 580.

<sup>44</sup> *Ibid.* Also see Oomen (note 39) 274 and 276. Oomen list these groups as the Venda, Lovedu, Pedi, Hurutshe, Sotho, Phalaborwa, Narene, Koni, Tawana and Zulu and describes the practice as being uncommon but normal and notes the lack of research on the practice.

<sup>45</sup> The Bolobedu are presided over by the Modjadji Queenship which was recognised on 31 March 2016 after being nullified during the apartheid regime. The Queen, known as the Rain Queen because of the belief in her rain

state offices in the case study. For these reasons, the woman-to-woman marriage is not given prominence in this thesis, but Maphalle's recent empirical research provides insight into the succession practices in these marriages.<sup>46</sup>

#### 6.2.4 *Descendant*

The Reform Act defines 'descendent' to include a descendant in terms of the Intestate Succession Act and any person the deceased during his lifetime accepted as his or her own child in accordance with customary law.<sup>47</sup>

The Intestate Succession Act does not define the term 'descendant' but it is commonly interpreted to mean blood relations in the descending line, being the deceased's children, grandchildren, great grandchildren and so on.<sup>48</sup> It also provides that illegitimacy, that is, being born out of wedlock, does not affect the capacity of a child to inherit and adopted children are deemed the descendants of their adoptive parents.<sup>49</sup> Thus in terms of the Intestate Succession Act, 'descendants' are taken to refer to the deceased's biological, including children born out of wedlock and adopted children.

Service points do not have jurisdiction where the beneficiary is a minor and these estates are administered at the Master's Office.<sup>50</sup> An attorney is appointed to protect the minor child's interests and supervise the administration of the estate. The costs of the attorney are borne by the estate but the Department of Justice and Constitutional Development, Office of the Chief Master of the High Court has entered into an agreement with Legal Aid South Africa to provide legal assistance in such matters.<sup>51</sup>

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making powers, is not supposed to marry and have children but concludes woman-to-woman marriages to raise an heir. This creates ties of affinity as the Queen is sent wives by those who desire her favour and these wives cement political alliances throughout the kingdom. See Bongani Nkosi 'Rain Queen finally recognised' 30 May 2016 available at <http://www.sowetanlive.co.za/news/2016/05/30/rain-queen-finally-recognised> [accessed on 27/03/17]; EJ Krige and J Krige *The realm of the Rain-Queen: A study of the pattern of Lovedu society* (1943) and TW Bennett *A sourcebook for African customary law for Southern Africa* (1991) 412; KA Maphalle *Succession in woman-to-woman marriages under customary law: A study of the Lobedu kingdom* (unpublished LLM thesis, University of Cape Town, 2017) 10–11 and 97.

<sup>46</sup> See Maphalle (note 45) 85–109.

<sup>47</sup> Definition of 'descendant' in the Reform Act.

<sup>48</sup> Jamneck, Rautenbach, Paleker, *et al* (note 3) 244.

<sup>49</sup> S 1(2) of the Intestate Succession Act.

<sup>50</sup> The jurisdiction of the Master's Office and service points are discussed in Chapter 3 of this thesis at 51–55.

<sup>51</sup> Co-operation agreement between Legal Aid South Africa and the Department of Justice and Constitutional Development, Office of the Chief Master of the High Court dated 27/10/2010 available at [http://www.justice.gov.za/master/m\\_docs/2011-lasa-agreement.pdf](http://www.justice.gov.za/master/m_docs/2011-lasa-agreement.pdf) [accessed on 2/11/18].

The minor child's rights are disaggregated from the guardian as the inheritance is paid to the Guardian Fund which releases amounts to the child's guardian for the child's maintenance.<sup>52</sup> In one file, the attorneys in the matter requested that the minor's share of about R14 000 (approximately US\$ 1 000) be paid to the guardian who had struggled financially in the 5 years since the mother's death.<sup>53</sup> The Master's Office maintained that the funds be paid to the Guardian's Fund. In other files, however, funds appeared to be paid directly to the guardian. This was typically where the benefit was small (ranging from R900 (US\$ 64) to R13 500 (US\$ 964))<sup>54</sup> and the guardian was most likely entitled to it immediately for the child's maintenance. Property grabbing in such instances is not a paramount concern as the inheritance is frequently insufficient to sustain the child's needs and the guardian more likely to incur expense in caring for the child.

The guardianship of the child is meant to be proved by a guardianship court order but Himonga and Moore found that the Master's Office accepts 'declarations of guardianship' whereby the guardian declares under oath that he or she is living with the child in question, which is usually confirmed by a social worker.<sup>55</sup> This case study similarly found that 'declarations of guardianship' rather than court orders are used by the Master's Office to determine guardianship. Himonga and Moore argue that this modified practice is an expedient and cost-effective alternative to the costly and complex court procedure required for a court order.<sup>56</sup> They acknowledge that it may give rise to contestation regarding guardianship among family members who want to control the child's inheritance but argue that the benefits of the abridged process outweigh the risks.<sup>57</sup> Their argument is persuasive given that it was not highlighted by officials as problematic and there was only one instance of disputed guardianship in the sample of files analysed. To protect the children's interests in the matter, the Master's Office required an attorney be appointed as an executor and security furnished. The scarcity of such disputes and small nature of the estates means that requiring costly guardianship orders in this context

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<sup>52</sup> Section 43(2)(a) as read with section 90(1) of the Administration of Estates Act 66 of 1965 ('Administration of Estates Act'). See Jamneck, Rautenbach, Paleker, *et al* (note 3) 108.

<sup>53</sup> It was a complex estate which required the appointment of attorneys. Some money, while in the deceased's name, was the deceased's mother's and had to be administered accordingly. It illustrated how the winding up process could be significantly delayed.

<sup>54</sup> There were no fixed criteria and it appeared as a discretionary decision.

<sup>55</sup> Himonga and Moore (note 15) 247–248.

<sup>56</sup> *Ibid* 248.

<sup>57</sup> *Ibid*.

may be unrealistic and prejudicial to the interests of children. Disputes are better addressed as they arise.

#### 6.2.4.1 Children born out of wedlock

Children born out of wedlock are a complex matter under customary law.<sup>58</sup> Historically under customary law, rights over children are generally transferred to the father of the children when *lobolo* is paid to the mother's family.<sup>59</sup> Where *lobolo* is paid over several years, the wife's family is unlikely to exercise rights over the children where there is an expectation that the payment will be completed.<sup>60</sup> Where *lobolo* is not paid or there is no agreement regarding it, the succession rights of children born of such parties is uncertain.

If the father of a child born out of wedlock has not paid damages to the mother's guardian, the child is regarded as belonging to the wife's family.<sup>61</sup> Generally, under customary law, the child does not inherit from the natural father but may inherit from the wife's family if there are no other eligible male relatives.<sup>62</sup> Where damages are paid to the woman's guardian, the son may succeed as heir to the father after all other heirs have been exhausted.<sup>63</sup> The factual circumstances, such as whether the child was raised by the family and grew up in the home and the child's relationship with the family, largely determine the child's succession rights.<sup>64</sup>

In Kwelanga, it is an increasingly common occurrence to find children born out of wedlock.<sup>65</sup> As most estates were smaller than R250 000, the estate was inherited by the widow and children had no right of inheritance under state law. Some participants, however, intimated that they would share some property with the children because it was their father's property illustrating that children may have better entitlements under customary law than under the state law.

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<sup>58</sup> For a historical discussion of legitimacy in customary law, see Bennett (note 45) 358–375; I Schapera *A handbook of Tswana law and custom* 5ed (1955) 169–173 and M Wilson, S Kaplan, T Maki and EM Walton *Social structure. Keiskammahoek rural survey* (1952) 93–97.

<sup>59</sup> S Burman 'Illegitimacy and the African family in a changing South Africa' 1991 *Acta Juridica* 36 at 38.

<sup>60</sup> *Ibid.*

<sup>61</sup> Bekker (note 39) 296; Olivier, Bekker and Olivier (note 21) 155.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Bhe* (note 5) para 79; Olivier, Bekker and Olivier (note 21) 156.

But note in Sotho law, the natural father never obtained rights to the child even if damages were paid, see Bekker (note 39) 296.

<sup>64</sup> Bekker (note 39) 295.

<sup>65</sup> Mothers are frequently summoned to the king's place to pay damages on behalf of their son who impregnated a woman outside of marriage. In accordance with the family nature of the law, the mother is held responsible and not the man alone.

In Kwelanga, whether children benefit from the estate depends on the factual circumstances and the relationship between the child and the deceased and the deceased's family, particularly the widow who assumes control of the estate. Where the widow and family have acknowledged the child and established a harmonious relationship with the child, the child is more likely to share in the property. The payment of damages to the mother's family and/or the introduction of the child to the ancestors through a special ceremony are perceived as an acknowledgment and acceptance of the child by the father and his family. Where the existence of the child is only discovered upon the deceased's death or there is an acrimonious relationship among the parties, the child is unlikely to share in the estate unless listed in a specific policy. The case study confirms the earlier findings of Himonga and Moore who found that the rights of children born out of wedlock are precarious and must be negotiated within the family.<sup>66</sup>

In conclusion, the Reform Act secures the rights of all children but in practice much depends on the family dynamics. In estates smaller than R250 000, the widow is typically the sole heir but may share some property with a child of the deceased born out of wedlock with whom she has a harmonious relationship.

#### 6.2.4.2 Any person the deceased accepted in accordance with customary law as his or her own child

The Reform Act broadens the common law understanding of descendant to include any person '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'.<sup>67</sup> The child is considered a descendant of the deceased person and not of his or her natural parents<sup>68</sup> and inherits from the deceased and not his or her natural parents.

#### 6.2.4.3 Customary adoption

The amendment to the definition of descendant is interpreted to refer to customary adoption.<sup>69</sup> There are no clear criteria for customary adoption across communities and the definition uses

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<sup>66</sup> Himonga and Moore (note 15) 262, 265–266.

<sup>67</sup> Definition of 'descendant' in the Reform Act.

<sup>68</sup> Section 4(eA) of the Intestate Succession Act 81 of 1987.

<sup>69</sup> M Meyer and M Rudolph *Policy and procedure manual: Administration of intestate deceased estates at service points* (2016) 46–48. Interview with official at the Master's Office, 23 June 2017. Customary law adoption was not modified or repealed by the Children's Act 33 of 1960, nor its successor the Children's Act 38 of 2005, and continues to be enforceable, see *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (TkA) at 776.

general wording rather than specifying the criteria for an adoption to avoid unduly narrowing the practice to the prejudice of some children.<sup>70</sup> Where a customary adoption is alleged, officials will convene a family meeting to determine whether the salient requirements of an adoption have been satisfied,<sup>71</sup> which historically under customary law were:

- a. an agreement between the families in respect of the adoption;
- b. informing the traditional leader in the community; and
- c. the adoptive family hosting a small ceremony involving the slaughtering of an animal to mark the adoption.<sup>72</sup>

Agreement between the families and publicity are key to the recognition of a customary adoption as illustrated by *Maswanganye v Baloyi*.<sup>73</sup> The court in *Maswanganye v Baloyi* had to decide whether the applicant had been customarily adopted by the deceased and was therefore entitled to inherit from the estate. The deceased and the applicant's mother were sisters and the deceased claimed that she had been customarily adopted by the deceased when she was 10 years old.<sup>74</sup> As proof of this, the applicant claimed she resided with the deceased, was recorded with authorities as the daughter and occupant of the deceased's house, assumed the deceased's surname<sup>75</sup> up until the applicant's marriage and remained solely responsible for the care of the deceased.<sup>76</sup> The court noted as common cause that when the applicant married, *lobolo* was paid to the biological parents.<sup>77</sup>

The High Court emphasised the importance of publicity in adoption and noted that residence alone was insufficient to constitute adoption.<sup>78</sup> Notably, there was no publicising of the applicant's adoption.<sup>79</sup> The court also cautioned that courts should be slow to infer an adoption where the biological parents are alive and noted that it would be more reasonable to infer one

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<sup>70</sup> National Council of Provinces Security and Justice Meeting *Meeting report Scorpions closure: Public submissions; Reform of Customary Law of Succession Act: Deliberations* 13 November 2008 available at <https://pmg.org.za/committee-meeting/9735/> [accessed on 6/11/18].

<sup>71</sup> Meyer and Rudolph (note 69) 48.

<sup>72</sup> For a discussion on the requirements of an adoption see Bekker (note 39) 236; Bennett (note 45) 375–378; *Maswanganye v Baloyi* Case no 62122/2014 Gauteng Division, Pretoria; *Kewana v Santam Insurance Co Ltd* (note 87) at 773 and I Maithufi '*Metiso v Road Accident Fund* Case No 44588/2000 (T)' 2001 (34) *De Jure* 390 at 391–392.

<sup>73</sup> *Maswanganye v Baloyi* (note 72).

<sup>74</sup> *Ibid* para 10.

<sup>75</sup> This was the deceased's maiden surname shared by the applicant's mother.

<sup>76</sup> *Maswanganye v Baloyi* (note 72) para 3.

<sup>77</sup> *Ibid* para 7.

<sup>78</sup> *Ibid* para 14.

<sup>79</sup> *Ibid*.

where the parents were deceased or had abandoned the children.<sup>80</sup> The court was reluctant to infer a severing of parental rights when there was no basis to infer that the applicant's family had intended that.<sup>81</sup> The payment of *lobolo* to the biological parents also proved significant. The court reasoned that if an adoption had occurred, the deceased would have received the *lobolo* and the payment of *lobolo* to the applicant's biological parents militated against the claim of adoption.<sup>82</sup>

It should be noted that *Maswanganye v Baloyi* was decided in 2015, after the Reform Act came into force, and the court should have considered whether the applicant constituted a descendant in terms of the Reform Act and therefore entitled to inherit. However, the judgment makes no mention of the Reform Act and hinges the right of inheritance on whether a customary adoption occurred rather than on whether the applicant constituted a descendant in terms of the Reform Act. The case may have been poorly pleaded, but it illustrates that the legislative changes are unlikely to find immediate application even by the courts.

Historically, a customary adoption was also inferred when a man married a woman with a young child unless expressly excluded in the *lobolo* negotiations.<sup>83</sup> A man with no heir may have also adopted someone, usually a close relative, for succession purposes.<sup>84</sup> The child was regarded as an actual child of the man<sup>85</sup> and natural heir of the house in which he was placed.<sup>86</sup> The adopted child lost his rights of succession from his biological father.<sup>87</sup>

#### 6.2.4.4 Belonging to a house?

While the definition of a descendant is interpreted to refer to customary adoption, the statute uses broader language to refer to anyone who 'was accepted by the deceased person in accordance with customary law as his or her own child.' It is thus possible that the definition encapsulates other practices which do not constitute customary adoption, but which still amount to the deceased's acceptance of the child as or her own child in terms of customary law. For example, in many matrilineal communities, a spinster belongs to her father's family home, and

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<sup>80</sup> Ibid para 15.

<sup>81</sup> Ibid para 15–16.

<sup>82</sup> Ibid para 13, also *Kewana v Santam Insurance Co Ltd* (note 72) at 773 also discusses the importance of the ceremony to publicise the adoption.

<sup>83</sup> Meyer and Rudolph (note 69) 46–47 and *Motsepe v Khoza* 15078/12 South Gauteng High Court para 15–16.

<sup>84</sup> Kerr (note 37) 134.

<sup>85</sup> Ibid.

<sup>86</sup> Bekker (note 39) 283.

<sup>87</sup> Ibid.

so any of her children are considered to belong to the same house and to her father.<sup>88</sup> Similarly, children of the wife conceived during a marriage, whether conceived within the marriage or not, belong to her husband.<sup>89</sup> The household head is responsible for these children as he would be for any other family members in the house.

The relevance of the principle of belonging to a house was aptly illustrated in Kwelanga. A recently widowed woman had a nine-year-old daughter from a previous relationship.<sup>90</sup> The daughter resided at the woman's brother's house and was described as not belonging to her husband's house with no right to his property.<sup>91</sup> A year after the husband's death, the daughter moved into the mother's house to assist the mother with household chores. Nonetheless, the mother explained that the daughter would not inherit from her as a mother as the woman controlled and administered property emanating from the deceased husband's house to which the daughter had no claim. The daughter belonged to the brother's house which meant that if she experienced any difficulties, financial or otherwise, she would look to her uncle for help, *lobolo* would be paid to her uncle and she may receive something from her uncle when he died. The daughter was part of the brother's house regardless of where she physically resided though the woman never described it as an adoption

Practices such as that described above arguably do not amount to customary adoption as there was no ceremony or publicising, nor was there any evidence of an agreement to effect a customary adoption. The practice may, however, constitute an acceptance of the children as the deceased's own children in terms of customary law. Bekker and Koyana argue that children who belong to the deceased's home qualify as descendants in terms of the Reform Act.<sup>92</sup> The Reform Act does not limit the definition of descendant to adoption only and placing such an interpretation on the definition appears overly restrictive and prejudicial to the children. The children are supported and cared for by the deceased as his or her own children while alive. There is no rational reason to terminate the duty of support the deceased voluntarily assumed, especially where the children remain in need of support.

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<sup>88</sup> Bekker and Koyana (note 25) at 577.

<sup>89</sup> *Ibid.* It excludes children conceived before marriage and the husband may claim damages for adultery.

<sup>90</sup> Interview with female participant, 19 October 2016.

<sup>91</sup> This practice of the exclusion of a child conceived from a previous relationship was confirmed by participants in the village.

<sup>92</sup> Bekker and Koyana (note 25) at 577.

The question, however, is how far the notion of descendant extends. Would it encapsulate situations where children are sent to live with relatives or friends for pragmatic reasons?<sup>93</sup> For example, the parent may not be able to afford to raise the child or may need to work or the other individual requires help in the household.<sup>94</sup> Bennett argues that as there is no intention to sever the parental relationship in the arrangement, there is no customary adoption and the child would not ordinarily acquire succession rights in the new household.<sup>95</sup> The Reform Act, however, may bring about a legislative change allowing children in these arrangements to be considered descendants of their care takers with a right to inherit from them.

The definition of descendant has yet to be interpreted by a court. Adoption and other analogous arrangements are rarely reported at the state offices and the case study did not clarify how such claims are administered. It is submitted that it should depend on the facts of each case and the development of a rigid rule may do more harm than good. Where there has been a reciprocal relationship of care and support between the child and the deceased, then excluding the child from an inheritance and support which the child enjoyed while the deceased was alive is prejudicial to the child. On the other hand, where such reciprocal relationship of support does not exist, it is prejudicial to other heirs to allow the child to benefit from the deceased's estate. Thus, the broad definition of descendant allows officials to determine whether the factual circumstances amount to the deceased having accepted the child as his or her own child in terms of customary law – taking into account whether there exists a reciprocal relationship of care and support between the parties – and therefore entitled to inherit under the Reform Act. The flexible approach allows for the recognition and protection of real dependents as opposed to an overzealous focus on legal dependency.

### **6.3 *Ukungena* marriages**

An *ukungena* (levirate) marriage is the customary law practice in which the widow enters into a union with a relative of her deceased husband, usually the deceased's brother, for the purposes of producing offspring for her deceased husband's house.<sup>96</sup> Children are considered heirs of the

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<sup>93</sup> Bennett (note 45) 377–378.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Kerr (note 37) 138. Also see C Dlamini 'The role of customary law in meeting social needs' 1991 *Acta Juridica* 71 at 80 and Bekker (note 39) 286–294.

deceased husband and not the *ukungena* husband; the practice ensures the continuation of the deceased's house.<sup>97</sup>

*Ukungena* is usually not practised amongst the isiXhosa,<sup>98</sup> which was reflected in Kwelanga where the practice was not found.<sup>99</sup> It was described as a rarity and something that 'used to happen long time ago, but not anymore.'<sup>100</sup> The case study confirmed earlier research that the practice had declined to obsolescence in recent times though Mnisi notes that participants in her study stated that the practice frequently occurred.<sup>101</sup>

No provision in the Reform Act recognises the practice of *ukungena* and the administration process is not conducive to the recognition of the rights of children born of such unions. As discussed in Chapter 2, the speedy winding up of the estate is one of the primary purposes of the truncated administration process provided for in section 18(3) of the Administration of Estates Act. Letters of authority may be issued as quickly as within one month of the deceased's death. Even in the full process of administration, it usually takes 12 to 24 months to wind up an estate. This means that an estate is likely to be wound up before the conception of any children in the *ukungena* union who may assert claims against the estate. Thus, while in customary law, children of the *ukungena* union are considered heirs of the deceased husband, their rights are unlikely to be recognised and protected under the Reform Act.

It is unclear why the Act omits protection for *ukungena* yet protects seed raiser arrangements and woman-to woman marriages. There is no evidence that the recognised arrangements are more prevalent than *ukungena* unions or more deserving of protection. The impact of the omission, however, is unclear given that the practice is not found in Kwelanga and focused research on this is required.

## 6.4 Unmarried partners

The Reform Act does not protect unmarried partners in informal unions despite the SALRC's recommendation that such partners are deserving of protection.<sup>102</sup> The reason for the omission

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<sup>97</sup> Kerr (note 37) 137–139 and Bennett (note 45) 420.

<sup>98</sup> Bennett (note 45) 419 and Wilson, Kaplan, Maki and *et al* (note 58) 96.

<sup>99</sup> Individuals confirmed that it was not practised and there was no evidence of it at the service point or Master's Office.

<sup>100</sup> Focus group with women over 40 years of age, 17 October 2016.

<sup>101</sup> Mnisi (note 5) 141.

<sup>102</sup> South African Law Commission *Customary law of succession* (note 6) xviii.

is unclear but it re-enforces the common law position where only the surviving spouse, and not the surviving partner of an informal union, benefits from the estate.

#### 6.4.1 *The ignored reality*

The lack of protection for unmarried partners is out of touch with the social reality today. The declining rates of marriage<sup>103</sup> and the increase in informal unions<sup>104</sup> and cohabitation, particularly among Black women is well-documented.<sup>105</sup> For example, Himonga and Moore note that the majority of Black women in any age category in South Africa are unmarried.<sup>106</sup> Posel notes that in 2008 only 24 per cent of all African women aged 20 to 45 were married and cohabitation had increased from 5 per cent to 14 per cent among African women.<sup>107</sup> Unmarried partners are a growing segment in society and a more sensitive approach would have extended protection to vulnerable unmarried partners<sup>108</sup> rather than perpetuate the exclusionary protection of spouses over unmarried partners.

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<sup>103</sup> C Mhongo and D Budlender ‘Declining rates of marriage in South Africa: What do the numbers and analysts say?’ 2013 *Acta Juridica* 181 at 196; South African Law Reform Commission (Project 118) *Report on domestic partnerships* (2006) 4; V Hosegood ‘Women, marriage and domestic arrangements in rural KwaZulu-Natal, South Africa’ 2013 *Acta Juridica* 143 at 144; E Moore and R Govender ‘Marriage and cohabitation in South Africa: An enriching explanation?’ 2013 *Journal of Comparative Family Studies* 623. In 2016, 8.3 per cent of the population at the time were reported as cohabiting, Statistics South Africa *Community Survey 2016: An exploration of nuptiality statistics and implied measures in South Africa* (2018) 10 available at <http://www.statssa.gov.za/publications/03-01-25/03-01-252016.pdf> [accessed on 7/11/18].

<sup>104</sup> *Volks v Robinson* (2005) 5 BCLR 446 (CC) para 119; C Lind ‘Domestic partnerships and marital status discrimination’ 2005 *Acta Juridica* 108 at 111–112. In *Volks v Robinson* the Constitutional Court refused to extend the benefits of the Maintenance Act to a permanent life partner in a heterosexual relationship. For a critique of the case, see L Wildenboer ‘Marrying domestic partnerships and the Constitution: A discussion of *Volks NO v Robinson* 2005 5 BCLR 446 (CC): Case note’ 2005 (20) *SAPL* 459 and B Smith ‘Rethinking *Volks v Robinson*: The implications of applying a “contextualised choice model” to prospective South African domestic partnerships legislation’ 2010 (13) *PER* 238. In the recent Constitutional Court case of *Laubscher N.O. v Duplan* 2017 (2) SA 264 (CC), Froneman J agreed with the criticisms of the *Volks* and stated that it was not inclusive enough in the current social circumstances. He advocated a departure from the decision on the basis that it was clearly wrong (para 84 and 86).

<sup>105</sup> Moore and Govender (note 101) at 623–624; D Posel, S Rudwick and D Casale ‘Is marriage a dying institution in South Africa? Exploring changes in marriage in the context of *ilobolo* payments’ 2011 (25) *Agenda* 102 and Himonga and Moore (note 15) 15.

<sup>106</sup> Himonga and Moore (note 15) 15.

<sup>107</sup> Posel, Rudwick and Casale (note 103) at 104.

<sup>108</sup> For an argument about the need to protect the cohabitants see *Volks v Robinson* (note 102) para 163–182 and L Mwambene and H Kruuse ‘Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa’ 2013 (2013) *Acta Juridica* 292; D Meyerson ‘Who’s in and who’s out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa’ 2010 (3) *Const. Ct. Rev.* 295 and Lind (note 102).

Informal relationships and cohabitation without marriage occur frequently in Kwelanga. The reason for the increase in cohabitation is not apparent but some participants expressed the mistaken apprehension that after a period of cohabitation ranging from 3 to 12 months, the parties are regarded as married. This erroneous belief was also evident Burman *et al's* study.<sup>109</sup> Thus, parties may cohabit in the mistaken belief that it results in marriage and only discover upon their partner's death that they are not married and are without a legal right to their partner's estate.<sup>110</sup> Furthermore, as discussed in Chapter 5, widows and daughters lose control of the home upon marriage and may rather enter informal relationships with their partners to retain control of the property.

#### 6.4.2 *Discarded spouses*

Some women, who believe they are in valid marriages, may find themselves as discarded spouses with their marriages invalidated upon their partner's death. Prior to 1988, if a man in a customary marriage concluded a civil marriage with another woman, the civil marriage automatically nullified the customary marriage.<sup>111</sup> This had harsh consequences for the customary law spouse, referred to as the 'discarded spouse', whose marriage was automatically terminated and left with no recourse and rights. Section 22(7) of the Black Administration Act was enacted to protect the rights of the discarded customary spouse and provided that on the husband's death, the patrimonial consequences of the civil marriage would be governed by customary law and the civil widow would have no greater rights in respect of the estate than the customary widow.<sup>112</sup> It created the anomalous situation where the customary widow's

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<sup>109</sup> S Burman, L Carmody and Y Hoffman-Wanderer 'Protecting the vulnerable from 'property grabbing': The reality of administering small estates' 2008 (125) *SALJ* 134 at 141. Some cohabitants believe that the law protects them and consider marriage unnecessary see B Goldblatt 'Regulating domestic partnerships – a necessary step in the development of South African family law' 2003 (120) *SALJ* 610 at 614.

<sup>110</sup> Mnisi also acknowledges the description of women in these cohabitant relationships as 'common law wives'; Mnisi (note 5) 312.

<sup>111</sup> *Nkambula v Linda* 1951 (1) SA 377 (A); M Mamashela and M Carnelley 'The catch 22 situation of widows from polygamous marriages being discarded under customary law: *MM v MN* 2010 (4) SA 286 (GNP) in a historical context' 2011 (25) *Agenda* 112 at 114; Bennett (note 39) 239–240; I Maithufi 'Do we have a new type of voidable marriage?' 1992 (55) *THRHR* 628 at 628; NS Peart 'Civil or Christian marriage and customary unions: The legal position of the "discarded" spouse and children' 1983 (16) *CILSA* 39 at 41 and P Bakker and J Heaton 'The co-existence of customary and civil marriages under the Black Administration Act 38 of 1927 and the Recognition of Customary Marriages Act 120 of 1998 – The Supreme Court of Appeal introduces polygyny into some civil marriages' 2012 (3) *TSAR* 586 at 591–592.

<sup>112</sup> Section 22(7) of the Black Administration Act 38 of 1927:

'No marriage contracted after the commencement of this Act (1 January 1929) but before the commencement of the Marriage and Matrimonial Property Law Amendment Act 1988 (2 December 1988) during the subsistence of any customary union between the husband and any woman other than the wife shall in any way affect the

marriage was regarded as void but she had patrimonial rights to her husband's estate and customary law regulated the devolution of the estate.<sup>113</sup>

Post 1988, the Marriage and Matrimonial Property Law Amendment Act provided that a man in an existing customary law union was not competent to conclude a civil marriage with another woman.<sup>114</sup> Any civil marriage contracted in contravention was void.<sup>115</sup> No protection was conferred upon the discarded civil wife whose marriage was considered void and the rights found in section 22(7) of the Black Administration Act were limited to discarded customary spouses created prior to 1988.

Unfortunately, many women today continue to find their marriages invalidated and in a similar position to discarded spouses but with none of the protection of section 22(7) of the Black Administration Act. The Recognition Act provides that no person in a customary marriage is competent to conclude a civil marriage with a third party during the subsistence of the customary marriage though they may conclude a further customary marriage.<sup>116</sup> Individuals in a civil marriage may not conclude a customary marriage.<sup>117</sup> Any purported marriage in violation of these provisions is void.<sup>118</sup> The provisions are frequently contravened as it is speculated that the monogamous nature of a civil marriage is 'not fully appreciated nor understood by many South Africans, or the prohibition is merely ignored by many of them'.<sup>119</sup> Furthermore, as most customary law marriages are unregistered<sup>120</sup> with no record thereof, it is easy for an individual

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material rights of any partner of such union or any issue thereof, and the widow of any such marriage and any issue thereof shall have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the said marriage had been a customary union.'

<sup>113</sup> Mamashela and Carnelley (note 111) at 114–115; I Maithufi and G Moloji 'The need for the protection of rights of partners to invalid martial relationships: A revisit of the discarded spouse debate' 2005 (38) *De Jure* 144 at 147 and Peart (note 111) at 59.

<sup>114</sup> Section 1 of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988.

<sup>115</sup> *Murabi v Murabi* [2014] 2 All SA 644 (SCA); *Thembisile v Thembisile* 2012 (2) SA 209 (T); E Bonthuys and S Sibanda 'Til death do us part: *Thembisile v Thembisile*' 2003 (120) *SALJ* 784 at 787; C Dlamini 'The new marriage legislation affecting Blacks in South Africa' 1989 *JS Afr. L.* 408 at 411–412; Bakker and Heaton (note 111) at 587–588.

<sup>116</sup> Section 3(2) as read with and 2(4) of the Recognition Act allows parties to conclude a polygamous customary law marriage but does not permit parties to combine a customary and civil law marriage. In terms of section 10(1) of the Recognition Act, parties in a customary marriage may conclude a civil marriage with each other.

<sup>117</sup> Section 10(4) of the Recognition Act. Also see *Palesa v Moleko* [2013] 4 All SA 166 (GSJ).

<sup>118</sup> D Cronjé and J Heaton *South African family law* (2004) 225; Bennett (note 39) 2004) 241; *Mrapukana v Master of the High Court* [2008] JOL 22875 (C) where a civil marriage between the parties was declared void because the husband was in a subsisting customary law marriage with another woman.

<sup>119</sup> Maithufi and Moloji (note 113) at 150.

<sup>120</sup> Himonga and Moore (note 15) 106.

in a customary marriage to conclude a civil marriage with another person.<sup>121</sup> The marriages are rendered invalid regardless of whether the wife was in good faith or could not have reasonably been expected to know about the existing marriage.<sup>122</sup> This is further complicated by the Recognition Act's requirement that a customary marriage be dissolved by an order of court.<sup>123</sup> There is scant compliance with this requirement and individuals continue to negotiate their divorce privately in accordance with customary law or separate without obtaining a divorce.<sup>124</sup> The result is that the customary law marriage persists and renders invalid any subsequent civil marriage concluded with a third party.<sup>125</sup>

Unfortunately, the law does not countenance parties mixing marital systems. It belies the reality of legal pluralism where individuals flit between systems in living their lives. Under the Reform Act, partners to these invalid marriages have no entitlements or protection regardless of any *bona fides* on their part. Section 22(7) of the Black Administration Act has been re-enacted as section 7 of the Reform Act<sup>126</sup> and continues to protect the historically discarded customary

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<sup>121</sup> Maithufi and Moloi (note 113) at 151.

<sup>122</sup> The tension between co-existing civil and customary marriages is illustrated by cases in which courts have been called upon to adjudicate the validity of the marriage or rights of the spouse in the face of a competing civil or customary law marriage. See *Thembisile v Thembisile* 2002 SA 209 (T); *Palesa v Moleko* [2013] 4 All SA 166 (GSJ) and *TN v NM* 2014 (4) SA 575 (SCA).

Maithufi and Moloi argue that the harshness could be addressed by allowing a civil and customary marriage to exist simultaneously in law; *ibid* at 152. This introduces polygyny into civil marriages and is beyond the scope of the thesis.

<sup>123</sup> Section 8(1) of the Recognition Act.

<sup>124</sup> Himonga and Moore (note 15) 169; Mamashela and Carnelley (note 111) at 118 and Maithufi (note 111) at 630.

<sup>125</sup> Furthermore, in *MM v MN* (2013) (4) SA 415 (CC), the South African Constitutional Court held that the consent of the first wife is required for second customary marriage under Tsonga law. While there was some uncertainty as to whether the decision applied to other systems of customary law, the chief legal advisor opined that the decision was applicable to other systems of customary law and that going forward the consent of the first wife is required for a second customary marriage under all customary law systems. Opinion by the Office of the Chief State Law Advisor, 7 November 2013, 680/2013 as discussed in Meyer and Rudolph (note 69) 36. For a discussion on this, also see C Himonga and A Pope 'Mayelane v Ngwenyama and Minister for Home Affairs: A reflection on wider implications' 2013 *Acta Juridica* 318 at 322–32. The failure to obtain consent renders the second marriage invalid which once again leaves women in these invalid marriages in a precarious position with no rights under the Reform Act. The requirement of the first wife's consent and the impact on the second customary law marriage was not highlighted by officials as problematic. The decision does not appear to have affected, as yet, the succession rights of women in polygynous customary law marriages.

<sup>126</sup> 7. Property rights in relation to certain customary marriages.

(1) A marriage under the Marriage Act, 1961 (Act 25 of 1961), does not affect the proprietary rights of any spouse of a customary marriage or any issue thereof if the marriage under the Marriage Act, 1961, was entered into—

(a) on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act 3 of 1988)); and

(b) during the subsistence of any customary marriage between the husband and any woman other than the spouse of the marriage under the Marriage Act, 1961 (Act 25 of 1961).

spouses. The section has not been expanded to the current context to protect other women who find themselves in invalid marriages as discussed above. These women are in a worse position than the discarded wives created by the old regime because their patrimonial rights are not protected.

Officials in the Master's Office noted that women in particular bear the brunt of the legal complexities discussed above and are in dire need of protection when their marriages are declared invalid. Officials may negotiate a compromise between the customary law and civil law wife to ameliorate the harshness of the provisions.

Because usually we come into negotiations with both families. In some cases, if maybe the first wife was married in terms of civil rights, you see and then the other women married by customary rights it's actually, you know, the law it says that you cannot have a civil marriage ... the civil marriage and the other marriages cannot co-exist.

Yes. So, if someone has a civil marriage first and thereafter marries by customary rights, the customary marriages are, in terms of the law, they are invalid those customary marriages.

But you will find out that the first wife who was married by civil rights does not have a problem in giving whatever is due to those other wives, you see. So, I mean we would ask her to make an affidavit to that effect that she, those other wives with their houses and their livestock and their places, those ones even though they belonged to her, husband I mean, she does not want them, they are going to stay there.

If there is any cash, then she would be prepared to share it with the other wives.

[And do you find that? Are people prepared to share actually?]

Yes. Those ones concerned I mean those, actually those people who are in polygamous marriages which were – I mean, if they had good relationships during the lifetime of the deceased, all of them, then there is yeah then there's no chances of them now squabbling over the assets of the deceased.<sup>127</sup>

Officials, however, noted that there was no strict rule and it depended on the facts of each case and the willingness of the spouses to compromise. Where individuals refused, the statutory provisions would be effected. In these instances, officials noted the harshness of the provisions and the need for reform. The negotiation facilitated by officials undoubtedly creates a risk that

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(2) The widow of the marriage under the Marriage Act, 1961, referred to in subsection (1), and the issue thereof have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the marriage under the Marriage Act, 1961, had been a customary marriage.

<sup>127</sup> Interview with official at the Master's Office, 23 June 2017.

parties may be exploited and made to give up their rights, but it is the only means through which some of the unfairness of invalidating marriages is addressed.

Informal relationships and discarded spouses are unaddressed in the Reform Act. The lacunae in the law's protection of unmarried partners coupled with ignoring the persistence of discarded spouses today often leaves women vulnerable upon the death of their partners. The state law offers no protection to women in these relationships which is a significant problem in succession. Chapter 9 thus argues for the adoption of a functional fact-based approach which allows individuals who can prove dependency on the deceased to inherit from the estate. The requirements and limitations of the approach are canvassed fully in Chapter 9.

### 6.4.3 *Current practice*

In Kwelanga, unmarried partners enjoy greater protection under customary law than the state law. Under customary law, an unmarried partner may benefit from her partner's estate depending on the factual circumstances. Where the parties have lived together for a period and have children, the partner is likely to assume control of the home and property in the village. As mentioned previously, cohabitants may consider themselves and be regarded by the general community as being married. The woman's family may demand payment of the *lobolo* amount from the man's family upon his death, but she may nonetheless be treated as a widow and follow the customary rituals for mourning. The woman's rights are often more secure when there is no surviving spouse with whom she competes for the property.

The unmarried partner cannot assert rights to property in the formal economy, such as the bank account and policies. In some cases, the woman may 'marry' the deceased post death according to civil law to secure her rights to such property.

At the mortuary they will just put the fingerprint in a certain pad and then the elderly also put their finger and then after that they will sign. When the deceased is putting [his finger], you need to have both your finger and the finger of your husband in a certain pad.

It is the civil marriage now, so that you can have the marriage certificate.

The brother of the deceased will act as a witness. . . . So, what will happen is that you need the brother of the husband, he must be there at the mortuary to also put his finger as a witness . . . saying, I know that they were married. So, he will also put his finger on the pad as well to actually sign on behalf of the husband. . . . you cannot have access [to] the money of your husband if you are not married. If you do not have a marriage

certificate. The reason why we do that is because we do need access to the money of the husband, so it is important to take that route of you get married.<sup>128</sup>

Women complete these 'marriages' by using the deceased's identity document and obtaining his fingerprints to obtain a civil marriage certificate. Women noted that obtaining the fingerprints from the corpse of a beloved partner may be emotionally upsetting but regard it as necessary to access the deceased's property.

The completion of posthumous civil 'marriages' is an interesting phenomenon that requires further research to understand the actors involved and how these marriages are recognised and registered at the Department of Home Affairs. Posthumous marriages are not provided for in legislation and it may have been that the phenomenon described was the registration of an existing marriage. Participants, however, described it as women marrying their husbands. They did not perceive the marriages to be legally problematic and were not able to clarify how they were legally possible. The case study investigated the practices at the Master's Office where officials had no knowledge of these practices. Thus, while further research is essential to understand the phenomenon, the practice speaks to the lack of protection for unmarried partners and the lengths to which they are forced to go to obtain rights and entitlements to the property. The practice furthermore speaks to the existence of practical norms some women use to access what they consider to be their entitlement to the deceased's estate.

Where the parties do not have children or have not cohabited for a significant period of time, the woman may be regarded as a girlfriend and her rights are precarious under customary law. The woman is generally not regarded as having a right to her partner's property and will not benefit from her partner's estate. Where the parties are living together, the woman will often claim the small stock and other small movable property before the man's family assert their rights to the property. If there are children, the woman may have a stronger claim to the property, but much depends on the particular family dynamics and the relationship with the man's family.

Where a man has moved into a woman's home, his family does not have a claim to their accumulated property upon his death. The deceased's clothing may be sent back to his family but the property such as furniture and livestock are left for the benefit of the girlfriend.

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<sup>128</sup> Focus group with women over 40 years of age, 17 October 2016.

In summary, unmarried partners may benefit from their partner's estate under customary law. Where there is a long-term relationship and the parties were living together, the woman is likely to be treated as a spouse and claim the home and other property in the village. Her rights are generally more secure where she does not face competing claims from a legally recognised surviving spouse. The woman may also conclude a posthumous marriage to secure her rights in the formal economy.

## **6.5 Conclusion**

The Reform Act applies the Intestate Succession Act to regulate the devolution of customary law intestate estates. The primary beneficiaries under the current regime are the surviving spouse and the descendants of the deceased. The Act carves out family property to which the broader family may have an entitlement from devolution in terms of the Intestate Succession Act. It provides that such property may devolve in accordance with the directions of the Master. However, there is no evidence that officials consider the different forms of property or that family property is excluded from devolution in terms of the Reform Act. Currently, it appears that all reported property, save for homes situated in the village, devolves in accordance with the Reform Act. The discretionary nature in reporting property means that not all property is reported, however, and state law is ineffectual in respect of such property.

The most significant accommodation of customary law in the Reform Act is the modification of the understanding of 'spouse' and 'descendant'. The notion of a spouse is expanded to accommodate customary law practices such as polygynous marriages, seed raiser arrangements and woman-to-woman marriages. It is unclear how prevalent these practices are and the usefulness of these modifications given that they were not found in Kwelanga. More focused research is required to understand these practices and the succession rights of those involved therein. It should not be assumed that the modifications are effective in reflecting current customary law practices or in conferring protection on those involved in the practices. Indeed, Maphalle's research into woman-to-woman marriages reveals that the legislative modifications are yet to protect the women and children involved in these marriages.

The definition of 'descendant' encompasses the biological and adopted children of the deceased, including those born out of wedlock. The definition also includes any person the deceased accepted as his or her own child in terms of customary law. While this is generally

interpreted as customary adoption, the wording is general enough to encompass care-taking arrangements that do not amount to adoption.

Despite the statutory protection of spouses and children, there are glaring omissions in the Reform Act. First, neither the Act nor the administration process accommodates the practice of *ukungena*. The reason for the omission is unclear given that it mirrors the seed raiser arrangement which finds protection in the Reform Act. The impact of the omission is incalculable from the case study as *ukungena* is not practised in Kwelanga or in the Eastern Cape generally. This is a limitation of the study and focused research is required to understand the prevalence of the practice and the impact of the lack of accommodation in the Reform Act.

Secondly, the Act does not confer protection on unmarried partners despite declining rates of marriage and increasing rates of cohabitation in South Africa. Like the common law, the Act ignores unmarried partners, appearing oblivious to the current social reality and the pressing needs of women and children in these relationships. The lack of accommodation here is more alarming because the complex marital laws mean that many women unwittingly find themselves in invalid marriages, as discarded spouses, upon the death of their partners. Unfortunately, these women are offered no protection and whether they share in the estate is at the mercy of the legally recognised spouse.

Customary law offers these unmarried partners greater rights towards the estate especially when they have cohabited for a significant period of time or the parties have children. The rights are not enforceable in the formal economy and often these women conclude posthumous marriages to secure their rights. This is an undesirable situation for all involved but it speaks to what happens when the law focuses on an individual's status as a spouse rather than the need for support. It raises questions of why protection is extended to dying practices such as polygyny but not growing practices such as cohabitation and unmarried partners.

Nonetheless, the Reform Act is a welcomed reform meant to secure the rights of widows and children. A grave concern, however, is that beneficiaries, particularly widows, experience difficulties in asserting their rights to property. Chapter 7 discusses the challenges to the realisation of rights and the occurrence of property grabbing despite the statutory reform.

## CHAPTER 7      PROPERTY GRABBING AND RISK FACTORS

### 7.1      Introduction

The statutory protection of the inheritance rights of women and children found in the Reform Act<sup>1</sup> as read with the Intestate Succession Act<sup>2</sup> is no guarantee of the realisation of rights. In customary law succession, rightful heirs frequently have their property usurped through the notorious phenomenon of what has come to be known as property grabbing. The blatant and frequently violent attempts to deprive rightful heirs of their inheritance benefits is explored here, but it is argued that individuals are more often denied their property through subtle and nuanced tactics. These means though less apparent than threats of violence are equally as effective. The case study is used to identify several risk factors which render individuals vulnerable to property grabbing and hinder the realisation of inheritance rights.

### 7.2      Property grabbing

An heir's inheritance rights are threatened by outright property grabbing and coercive pressure to share estate benefits. Both threats are explained, and it is argued, with reference to the case study, that property grabbing in nuanced manners is a growing and under-estimated phenomenon threatening an heir's rights.

#### 7.2.1    Sources used to administer customary law estates

Customary law estates are administered in accordance with a combination of laws and norms. The Reform Act as read with the Intestate Succession Act<sup>3</sup> details the devolution of an intestate estate. The common law rules of inheritance are adopted and estates devolve in accordance with fixed, predetermined rules set out in the Intestate Succession Act.<sup>4</sup> These rules, as read with the Administration of Estates Act,<sup>5</sup> provide a comprehensive statutory framework for the administration of estates and devolution of property. The *Policy and procedure manual*:

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<sup>1</sup> Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

<sup>2</sup> Intestate Succession Act 81 of 1987.

<sup>3</sup> Intestate Succession Act 81 of 1987.

<sup>4</sup> Chapter 6 of this thesis at 115–119.

<sup>5</sup> Administration of Estates Act 66 of 1965.

*Administration of intestate deceased estates at service points*<sup>6</sup> further provides a step-by-step account of the process followed at the Master's Offices and service points.<sup>7</sup>

Customary law is a further important source of law in the administration of customary law estates. At first glance, the Reform Act replaces the customary law of succession with the Intestate Succession Act. However, the findings reveal that customary law determines the devolution of certain forms of property, such as homes situated within a rural area and unreported property which is typically livestock.<sup>8</sup> As the home may be the most valuable if not only asset in the estate, customary law is a critical source of law.

In Kwelanga, customary law has evolved to favour the widow's rights to assume control over the home.<sup>9</sup> But this is not necessarily representative of the law of every indigenous community in South Africa. The law of some communities may not have evolved or may have evolved in a manner detrimental to the rights of vulnerable parties, such as women and children. The current framework provides no oversight on the customary law that regulates the devolution of property. Officials were aware that customary law regulated the devolution of certain forms of property but were oblivious to the content of the law. The lack of oversight, or even just knowledge regarding the content of the customary law, is disturbing as there is a risk that exploitative customary law norms may thrive unchecked. The blind spot in the law is an unfortunate result of the state's positivistic approach which ignores the non-statutory laws that regulates people's behaviour.

Customary law is also incorporated into the Reform Act itself. In the interpretation of the Act, recourse must be had to customary law to understand the amended definitions of 'spouse' and 'descendant' which encapsulate the customary law practices of seed raiser unions, woman-to-woman-marriages and customary adoption.<sup>10</sup> The customary law practices envisaged in these definitions were not prevalent in Kwelanga and most research points to their limited occurrence.<sup>11</sup> It is thus unclear whether customary law plays any significant role in the identification of beneficiaries.

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<sup>6</sup> M Meyer and M Rudolph *Policy and procedure manual: Administration of intestate deceased estates at service points* (2016).

<sup>7</sup> Chapter 3 of this thesis at 52–55.

<sup>8</sup> Chapter 4 of this thesis at 81–83.

<sup>9</sup> Chapter 5 of this thesis at 101.

<sup>10</sup> Chapter 6 of this thesis at 123–131.

<sup>11</sup> *Ibid.*

As mentioned previously, the Reform Act incorporates chiefs in the state dispute resolution process. The Master is meant to consult with the chief before any recommendations for the resolution of a dispute is made. The chief's recommendations would presumably offer a customary law perspective and in this way customary law values shape the recommended resolution. The chief in Kwelanga, however, had never been consulted on such matters and findings from the Master's Office indicate that it does not conduct such meetings. Thus, customary law does not play a role in the formal state dispute resolution process.

It is also evident that other norms or repertoires may not constitute customary law but may regulate the process of administration of estates. In accordance with Lipsky's theory that the decisions made by state officials create policy,<sup>12</sup> the practical norms created by state officials are found throughout the administration process. The Reform Act as read with the Intestate Succession Act does not exclude homes situated in rural areas from the administration process. Officials at the Master's Office, service point and Office of the Chief Master created this exclusion in the application of the Reform Act because immovable property in a rural area, which does not have a title deed, cannot be valued and transferred in the same manner as immovable property in an urban area.<sup>13</sup> Similarly, the requirement that a customary marriage be registered before a woman is recognised as a surviving spouse was created by state officials who were frustrated by the evidential difficulties in determining the existence of a marriage.<sup>14</sup> Registration is now, rightly or wrongly, a gatekeeper for accessing benefits in an estate though it is not a requirement in the statutory provisions. Moreover, officials facilitate negotiations between the legally recognised spouse and the 'spouse' in the invalid marriage to ameliorate the harsh consequences of the non-recognition of the marriage.<sup>15</sup> As the only legal intervention directed at the new category of discarded spouses, it is an important practical norm unearthed in the research.

The creation of practical norms is also facilitated by the Reform Act itself. Section 5 of the Act empowers the Master to, among others, determine the devolution of family property in the event of a dispute having regard to the best interests of the deceased's family members and equality of spouses in customary and civil marriages.<sup>16</sup> There is no further guidance to the Master on what is likely to be a difficult issue on how property, which is the subject of multiple and

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<sup>12</sup> Chapter 2 of this thesis at 34.

<sup>13</sup> Chapter 4 of this thesis at 81–82.

<sup>14</sup> Chapter 7 of this thesis at 161.

<sup>15</sup> Chapter 6 of this thesis at 138–139.

<sup>16</sup> Chapter 6 of this thesis at 119.

possibly conflicting interests, should devolve. The discretionary approach appears to be an acknowledgment that rigid, prescriptive rules often do more harm than good and a flexible approach which allows a solution to be crafted for every situation is more appropriate. The result, nonetheless, is that the Master is empowered to create norms regarding the devolution of property, though the case study indicates that this has not yet transpired.

The findings reveal that the practical norms created by officials in the administration process are just as important as statutory law and customary law. These norms are not ascertainable from a cursory examination of the statutes, which underscores the importance of this qualitative research to understand the implementation of statutory reform.

In addition, norms and practices are generated among ordinary individuals without constituting customary law. For example, funerals in Kwelanga have evolved into elaborate and costly events leaving significantly diminished estates to support the widow and children thereafter.<sup>17</sup> The escalating costs were explained by participants to be a result of societal pressure to host a large funeral rather than customary law,<sup>18</sup> but the expectation was nonetheless effectual in regulating people's behaviour. Funerals must be understood as part of the administration process as they are almost always an unavoidable burden on the estate and explain the drain on the estate before it is even distributed.

In light of the findings above, estates are administered in accordance with state law, customary law and practical norms generated by both state officials and ordinary individuals. Failing to consider any of these laws and norms would provide an impoverished picture of the administration process.

### 7.2.2 *Outright property grabbing*

Himonga aptly explains the phenomenon of property grabbing as when:

the deceased's relatives or customary-law claimants seek to inherit the deceased's property and actually take it away without at the same time accepting the collateral customary-law duty and responsibility associated with the deceased's role as husband and father and breadwinner of his household. Thus the deceased's relatives are said to 'grab' the property from the spouse and children and other dependents who almost certainly need it for their support. The term also signifies the often disorderly and

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<sup>17</sup> Chapter 4 of this thesis at 85–86.

<sup>18</sup> Chapter 2 of this thesis at 34–35.

violent manner in which the deceased's relatives conduct themselves towards the widows when taking away the deceased's property.<sup>19</sup>

Threats to property rights tend to emanate from the deceased's family members, such as siblings, cousins or mother. Women are frequently the perpetrators or at least complicit in property grabbing. Himonga and Moore and Mamashela and Xaba narrate numerous incidents where women perpetrated property grabbing.<sup>20</sup> Similarly, in Kwelanga, the deceased's brother, sister-in-law and mother were the central protagonists. The cyclical nature of oppression means that daughters-in-law who experienced hardship upon joining a family evolve into mothers-in-law who expect to exert authority and control over their own daughters-in-law.<sup>21</sup> Women expect to benefit from the system they were marginalised by, thus becoming active participants in the systems of oppression.<sup>22</sup> Violence is thus often perpetrated by women against women as they act in their own best interests. Property grabbing should thus not be construed in terms of a binary of powerful men robbing helpless women of their property as it overlooks the reality of the experience.

In Kwelanga, it was only widows who complained about the usurping of rights and where widowers or children stood to inherit, there were no manifestations of property grabbing. The reasons for this are twofold. First, men are perceived as owners of the estate and enjoy security in their claim to the estate.<sup>23</sup> Secondly, where the heirs are minor children, an attorney is appointed to oversee the administration process and money is paid to the Guardian's Fund with periodic maintenance payments to the child's guardian.<sup>24</sup> This socio-legal context makes property grabbing unlikely to occur. On the other hand, the widow's position in the family in relation to other co-wives, as the case may be, and her outsider status as a result of joining the

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<sup>19</sup> C Himonga 'The law of succession and inheritance in Zambia and the proposed reform' 1989 (3) *International Journal of Law, Policy and the Family* 160 at 167.

<sup>20</sup> Himonga and Moore further note that senior females of the husband's family play an authoritative role over their daughters-in-law, C Himonga and E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015) 261 and 289–291 and M Mamashela and T Xaba *The practical implications and effects of the Recognition of Customary Marriages Act No. 120 of 1998* (2003).

<sup>21</sup> D Kandiyoti 'Bargaining with patriarchy' 1988 (2) *Gender & society* 274 at 279.

<sup>22</sup> *Ibid* at 280–281.

<sup>23</sup> Chapter 5 of this thesis at 103.

<sup>24</sup> Chapter 6 of this thesis at 125–126.

family render her an easy target for property grabbing and may be reasons for the subordination of her rights.<sup>25</sup>

The family is the primary forum for the resolution of inheritance disputes.<sup>26</sup> The forum, however, is ineffectual in mediating behaviour where the perpetrators are not resident in the village, rendering them relatively immune from the social constraints and family structures that govern such behaviour. The family's coercive power and authority is rooted in the co-dependency of family members and compliance is induced through the threat of being ostracised from the family. Thus, societal and family pressure is ineffectual in controlling the behaviour of family members living outside Kwelanga whose lives are not interwoven with the community.

Where the family as a dispute resolution forum fails, the matter may be escalated to the chief – though this is rarely the case – or other state structures such as the police or state courts. In most cases, the formal structures are also perceived as incapable of addressing the relentless pressure and threats of violence by the deceased's relatives on beneficiaries to forgo their entitlements.

Participants stated:

There are a lot of cases, especially where the wife will be chased away. You know, in some cases they will actually even burn the house down.<sup>27</sup>

No, no. To a point where they'll also want to kill you, they'll even threaten to kill you. So in such cases, as a wife you just have to leave the house. In some cases, you have to travel at night, try to hide and leave your house, when things are very bad.<sup>28</sup>

'And really, that really happens sometimes, where there were a lot of quarrels in most homes. To a place where others will actually fight, up until they will actually kill each other.<sup>29</sup>

They will kill each other. I remember in the recent case that I heard, that the husband passed away, and then they wanted to take away everything that belongs to the wife. So, what they did, they actually killed the wife so that they can acquire everything. So those

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<sup>25</sup> Moore explains this in the context of the oppression experienced by women in the breakdown of a customary marriage; E Moore 'Forms of femininity at the end of a customary marriage' 2015 (29) *Gender & society* 817 at 831.

<sup>26</sup> Chapter 4 of this thesis at 86–87.

<sup>27</sup> Focus group females under 40 years of age, 6 September 2015.

<sup>28</sup> Focus group females under 40 years of age, 6 September 2015.

<sup>29</sup> Interview with male participant, 3 September 2015.

things, they do happen ... In most cases, the wife will be killed. In most cases, there will be no help for her. For then they'll demand what belongs to the husband.'<sup>30</sup>

These narrations illustrate the serious risks of property grabbing. Individuals are driven out of their homes with violence, or threats thereof, or killed to usurp their property. In addition, as an allegation of witchcraft usually results in the woman being killed,<sup>31</sup> such allegations are also used to drive the widow out of her home. The victims of such violence who were driven out of the homes were not captured in the sample of interviewees drawn from residents in the village. The case study, however, identified a widow who had been the victim of property grabbing elsewhere and returned home to Kwelanga thereafter.<sup>32</sup>

The widow, who had been pressurised into forsaking monetary claims from her deceased husband's estate, refrained from seeking assistance from state institutions for two reasons. First, she believed she would be adequately supported by her family and friends and her husband's colleagues, though she could not explain how they would assist her. In contrast to her expectations, her family and friends perceived the widow's life to be in danger and advised her to relinquish the money to her husband's family and return home to Kwelanga. Their advice echoed the general community view that where the widow's life is in danger, there is no recourse and the only solution is to leave the village. Second, the widow feared that if she antagonised the deceased's family, she would be barred from attending the deceased's funeral. This revealed the oft underestimated emotional complexity of inheritance claims. The bereaved widow's paramount concern was burying her husband and she was willing to forgo her claims to achieve this end. The deceased's family exploited the widow's emotional vulnerability to coerce her to hand over the money.

The previous discussion illustrates how threats of violence, allegations of witchcraft and the emotional state of the widow are used to separate the widow from her property. Property grabbing often places the beneficiary's life at risk and thus where it occurs, individuals consider the situation to be hopeless and perceive both traditional and state fora as impotent to resolve these issues. Women are primarily the victims of this violent usurping of property rights while simultaneously being perpetrators, evincing the multi-faceted nature of the phenomenon.

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<sup>30</sup> Interview with male participant, 3 September 2015.

<sup>31</sup> C van der Waal 'Formal and informal dispute resolution in the Limpopo Province, South Africa' 2004 (27) *Anthropology Southern Africa* 111 at 115.

<sup>32</sup> Interview with female participant, 19 October 2016.

### 7.2.3 *Nuanced property grabbing*

Property grabbing usually occurs in a more nuanced manner than outright violence and frequently manifests as coercion or pressure on a beneficiary to share benefits from the estate. For example, Himonga narrates a harrowing example in Zambia where the widow was coerced into leaving the matrimonial home.<sup>33</sup> The deceased's family buried the deceased's relatives in the land surrounding the widow's home to create a cemetery out of the land and force the widow out of the home on her own accord.<sup>34</sup> While such harsh, mentally abusive practices were not found in Kwelanga, there were manifestations of other more subtle forms of coercion meant to usurp the widow's property rights. These forms of coercion are discussed separately below.

#### 7.2.3.1 Extravagant funerals

The societal expectation of a large funeral<sup>35</sup> is perhaps a bigger threat to a woman's property rights than outright property grabbing because of its pervasive nature. Almost all participants acknowledged the current trend of large funerals and the expense they entail which was also confirmed at the Master's Office. The practice is attributed to culture which makes it harder to resist and it is therefore not perceived as a means through which the widow is separated from her property. The reality is that a substantial portion of the estate is used to host the funeral leaving very little to sustain the surviving family members thereafter.

Some individuals were cognisant that family members may selfishly pressurise them into an expensive and elaborate funeral, uncaring of the living needs of the widow and children. The awareness of the wasteful expenditure meant that in some cases there was resistance and widows curbed the amount spent on the funeral. However, widows generally acceded to the societal pressure to host large funerals to their detriment. Participants explained:

‘I don't know how this thing started because now we ended up going to loans and having some debt after the funeral. It's expensive’.<sup>36</sup>

The family members will be selfish. They would want to spend all the money whilst in another family they will say no, let's leave something for her.<sup>37</sup>

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<sup>33</sup> C Himonga ‘Taking the gap – ‘Living law land grabbing’ in the context of customary succession laws in Southern Africa’ 2011 *Acta Juridica* 114 at 133.

<sup>34</sup> *Ibid.*

<sup>35</sup> See Chapter 4 of this thesis at 85–86.

<sup>36</sup> Focus group with women under 40 years of age, 17 October 2016.

<sup>37</sup> Focus group with women under 40 years of age, 17 October 2016.

In some instances, especially if they have children, they will be told that they must not use all the money for the funeral so that the kids can also get something from the money.<sup>38</sup>

You know in the olden days we did not cook, we will just eat the maize, we will not cook food, but these days there are a lot of expenses that are involved. People will actually cook and do lot of things for preparations for the funeral. [Previously] we [dug] a pit in a certain way, [bought] a coffin which [was] not very expensive and then we'll just bury that person. These days there are a lot of expenses that are involved, people will even do the tombstone, buying expensive coffins, things have changed now. You know in these days, if in that particular house there were five cattle, one will be sold out so that we can buy a coffin, an expensive coffin; another cattle will be sold out to buy groceries and try to do renovations around the house and then the third cattle will be slaughtered during the day of the funeral. If probably it's the husband who's passed away and then the other one will be slaughtered, and then the other one will be sold, the fourth one will be sold, preparing for the wife during the mourning period, the clothing will be taken out so they will be preparing to do that ritual, and then the fifth one will be slaughtered, in other words that particular house or home will have nothing, all the five cattle will be used. You know in some instances where there are children, they will struggle, because there is no cattle. There's nothing that will be left out that can be sold that can be taken to school. You know this is unnecessary expenditure, a lot of wasteful expenditure that is happening in our days now. In summary others will try to mimic what is happening in other families, if that family is wealthy, they can actually afford that, and then the other will actually try to mimic what is happening in that family.<sup>39</sup>

The excessive expenditure on funerals is allowed under the state administration process as the Administration of Estates Act<sup>40</sup> permits the release of a sum of money prior to the estate being wound up to cover funeral expenses.<sup>41</sup> The amount released is meant to be reasonable and consider the interests of minor children who may require maintenance from the estate.<sup>42</sup> In large estates of more than R500 000, officials may release between R50 000 to R60 000. In smaller estates of up to R200 000, officials may release R30 000–R40 000.<sup>43</sup> The money is released to the surviving spouse as the heir who is required to account for the money spent by producing receipts and vouchers. However, the case files reveal that individuals may fail to comply with such accounting and suffer no punitive action.

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<sup>38</sup> Focus group with women under 40 years of age, 17 October 2016.

<sup>39</sup> Interview with male participant, 10 September 2015.

<sup>40</sup> Administration of Estates Act 66 of 1965 (Administration of Estates Act).

<sup>41</sup> Section 11(1)(b) of the Administration of Estates Act.

<sup>42</sup> M Meyer and M Rudolph *Policy and procedure manual: Administration of intestate deceased estates at service points* (2016) 77.

<sup>43</sup> Interview with official at the Master's Office, 17 July 2017.

Extravagant funerals are a threat to the well-being of the surviving family. They do not threaten the safety of an individual like outright property grabbing but are equally as effective in separating the heir from the property. A substantial portion of the estate, if not its entirety, is used in the funeral process. Its pervasive nature means that it is experienced by all individuals and appears to be embedding itself in Kwelanga as a customary law norm. This makes it more dangerous than violent property grabbing, which is not a common practice and regarded as wrong, as it is solidifying into an unavoidable burden on the estate.

#### 7.2.3.2 Solicitation of payments by the chief

Widows are often assisted by family members as well as the chief when reporting the estate.<sup>44</sup> While this may evince the family nature of the law, it also is an additional expense for the widow. For example, officials noted that the family's presence was unnecessary and often a burden to the bereaved who funded their transport costs.

With regard to the chief, most individuals stated that the chief was not paid for assistance in reporting the estate and did so at his own cost. Men noted that the chief may be paid a small amount, such as the purchase of lunch, as a token of gratitude but had no entitlement thereto. However, revealing the potential for exploitation, some women noted that they were responsible for paying the chief's travelling expenses to town. Furthermore, one woman noted that she was requested by the chief to buy him a 'drink', referring to a bottle of alcohol while another paid him R100. As discussed in 7.3, widows are more prone to being asked to pay for the chief's assistance than men, exposing the continuing importance of gender as a risk factor in property grabbing. Interestingly, in one interview, a recently bereaved widow indicated that she had been asked by the chief to share a portion of her claims with him, and it appeared that she would do so.<sup>45</sup> In a follow-up interview a year later, she explained that she had not shared her claims with the chief, stating that it was her money to which the chief had no claim.<sup>46</sup> The reason for the change in the widow's attitude was unclear but it may have been that the experience of the administration process empowered her to resist claims to her property.

The solicitation of payments by the chief and the extra costs incurred by the widow in reporting the estate are subtle means through which the widow is separated from her entitlements. While

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<sup>44</sup> Chapter 3 of this thesis at 58.

<sup>45</sup> Interview with female participant, 2 September 2015.

<sup>46</sup> This was in a follow-up interview conducted with the widow a year after the initial interview, Interview with female participant, 19 October 2016.

several hundred rand may appear insignificant, in the context of estates that may be as small as a couple of thousand rand, it represents a sizable portion of the estate. They are unnecessary, solicited payments that result in the widow losing a portion of the estate.

### 7.2.3.3 Misadministration and corruption by state officials

Individuals are further exploited through the misadministration and corrupt practices of state officials. Officials may demand bribes during the formal administration process and individuals unfamiliar therewith may view the bribes as a necessary evil to access estate benefits.

For example, one widow was extorted to pay a bribe to attain a marriage certificate necessary to substantiate her claim of a marriage.<sup>47</sup> The widow explained that she was told ‘at the Home Affairs’ that a marriage certificate would be issued after two years but was advised by another person that the certificate could be issued on the same day if she bribed the officials. The woman paid a R150 bribe and received the marriage certificate on the same day. In the ordinary course, registration of a customary marriage is free and takes two months to reflect upon the system.<sup>48</sup> Unfortunately, ignorance regarding the formal system, including how to report the request for a bribe and her legal recourse in the matter rendered her susceptible to exploitation. The risk is that corrupt practices such as these are embedded as necessary payments and ‘legitimate’ practical norms in the administration process despite their unlawful and fraudulent nature.

In another example, an extreme case of misadministration by state officials led to the heir’s loss of property. An old woman approached the Master’s Office for assistance when her deceased husband’s son from his first marriage claimed a portion of the livestock in the estate, being the only asset in the estate.<sup>49</sup> The matter was heard by a magistrate who had no jurisdiction over it but ordered that the livestock be divided equally between the widow and son. The official at the Master’s Office advised the woman to seek legal advice to take it on appeal. The woman returned after some time stating that she had lost the case and needed to pay the advocate 20 sheep as payment for fees and was left with nothing.

The official described it as ‘painful’ and expressed concern that the woman who was also illiterate had been exploited and taken advantage of. He expressed doubts as to the authenticity of the magistrate and advocate and whether the individuals had been bribed as the pronounced outcome conflicted so starkly with the law. The official at the Master’s Office, though dismayed

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<sup>47</sup> Interview with female participant, 19 October 2016.

<sup>48</sup> Information provided by the Department of Home Affairs Call Centre, 11 November 2018.

<sup>49</sup> Interview with official at the Master’s Office, 10 September 2015.

by the outcome, considered himself powerless to investigate the matter. The official appeared hamstrung by the statutory provisions which did not empower him to question the magistrate or review the court decision. However, officials operate outside of the statutory provisions all the time, such as when they facilitate discussions between surviving spouses or exclude homes in the village from the administration process. The official appeared regretful over the situation, intimating that he could have investigated it further, and it is likely that the novelty of the situation meant that it was poorly handled.

Property grabbing is a nefarious phenomenon whereby lawful beneficiaries are usurped of their rights. While this may happen through force and violence, it more frequently and disturbingly occurs through pressure to host extravagant funerals and an extortion of payments from beneficiaries. These nuanced encroachments are effective as they often go undetected and are not perceived as a threat to an heir's inheritance rights.

### **7.3 Risk factors for property grabbing**

The case study revealed several factors, such as gender, the nature of the estate, the type of marriage, proof of status as a beneficiary, the urban / rural divide and the existence of a polygynous marriage, which leave individuals prone to property grabbing.

#### *7.3.1 Gender*

As discussed previously, it is widows who are generally the victims of property grabbing and face contestations over their property rights. The findings in Kwelanga confirm Himonga and Moore's earlier research that men inherit with ease and do not experience violent property grabbing in the same manner as widows.<sup>50</sup> Widowers are generally immune to property grabbing and enjoy secure entitlement to their estates. They are assumed to be the owners of the entire estate upon their wife's death, and there were no reported disputes regarding a widower's assumption of property.<sup>51</sup>

The significance of gender manifests itself equally in the nuanced forms of property grabbing found in Kwelanga. The chief solicited payments from women for assistance in reporting an estate, and the inequitable power relations between women and the chief meant that most women acceded to the pressure and remunerated the chief in some form or other. Men, on the

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<sup>50</sup> Himonga and Moore (note 4) 269.

<sup>51</sup> Chapter 5 of this thesis at 103.

other hand, were adamant that the chief not be paid for assistance in reporting an estate and never reported that the chief requested payments for assistance. Moreover, in the case of misadministration, the victim was an old woman and her gender and age left her vulnerable to property grabbing. It thus appears that gender is a significant risk factor for all forms of property grabbing.

### 7.3.2 *Nature of the estate*

The nature of assets in the estate is also a determinative factor of property grabbing. Where there is cash, either in the form of savings or a policy, or livestock, there is a greater risk of unscrupulous individuals attempting to usurp the wealth of a beneficiary.

Where the husband is having money or the livestock, or the small stock, or he has a tractor or car, they'll want to take those things. Oh the money causes a lot of problems. They want to chase you...

No, if there's money that's when the problem arises. And if there's no money, in most cases they'll actually leave the house to the wife and the daughter. But if there's money, that's when the problem will arise.<sup>52</sup>

This confirms Himonga and Moore's earlier findings that widows encounter property grabbing where the estate contains monetary claims or immovable property with a title deed realisable for cash.<sup>53</sup> This is an anomalous situation as these assets are reported as part of the estate and are encompassed by the formal administration process. One explanation of why these assets may be subject to property grabbing is that they may be omitted when the estate is reported. For example, as discussed in Chapter 6, livestock may or may not be reported as part of the estate at the discretion of the family. Where property is not reported, opportunistic individuals may purport to assume it for themselves. However, reporting the assets is no guarantee of the rightful distribution of the estate. In the abridged section 18(3)<sup>54</sup> administration process, the beneficiary is appointed as the administrator of the estate with the power to collect and realise assets on behalf of the estate.<sup>55</sup> After the money is collected, there is no supervisory check that the beneficiary receives the money. This contrasts with the full administration process where beneficiaries are required to confirm receipt of the distributed benefits.<sup>56</sup> As most reported

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<sup>52</sup> Focus group with females under 40 years of age, 6 September 2015.

<sup>53</sup> Himonga and Moore (note 4) 261.

<sup>54</sup> Administration of Estates Act.

<sup>55</sup> Chapter 3 of this thesis at 55.

<sup>56</sup> Chapter 3 of this thesis at 53.

estates follow the abridged process, coercion on beneficiaries to relinquish assets goes unseen by state officials.

The coercion to hand over money was well-illustrated in Kwelanga. A widow explained pressure by her husband's family to hand over cash she received from her husband's estate.<sup>57</sup> The deceased's family insisted that the money was necessary to cover the funeral expenses<sup>58</sup> but never accounted for the money and the widow doubted the truth thereof. Some of the deceased's colleagues counselled the widow to hold on to the money but facing threats of physical violence and fearing for her life, she complied with the family's demands. The woman received the money and then handed it over to the deceased's family.

On the other hand, homes in the village, that are not administered in terms of the state administration process are less likely to be the subject of property grabbing. This is surprising as without state oversight as to the devolution of the property, it may have been expected that the homes would be subject to fierce contestation. However, cash and livestock were continuously alluded to as the important assets in an estate. Individuals may be driven out of their homes as a means to attain their livestock, but in Kwelanga the homes themselves were not identified as property that triggers conflict.

There may be several reasons for the lack of conflict surrounding land in the village. First, land in the village is freely available. Participants explained that the chief allots plots to both men and women who are over the age of 18, single or married, at no cost. The availability of land means that it is unlikely that individuals will fight over it. Secondly, homes in Kwelanga are generally not sold or transferred among residents.<sup>59</sup> The non-transferable and realisable nature of the property means that it would hold little appeal for most individuals other than someone who wished to stay in the home. This would result in the usurper, usually an outsider from the village, staying among the friends and family of the heir. This is unlikely to occur in a community where the lives of individuals are interwoven and depend on each other daily. The usurper is likely to be ostracised by the surrounding neighbours and would therefore find it easier to establish his or her own home elsewhere.

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<sup>57</sup> Interview with female participant, 19 October 2016.

<sup>58</sup> The widow was not in charge of the funeral arrangements because a customary marriage had not been concluded. This is discussed in more detail under the type of marriage below.

<sup>59</sup> Chapter 4 of this thesis at 81–82.

However, this does not mean that an heir would retain possession of his or her home when usurped of other assets, like livestock or cash. Control of the assets is often obtained by driving the heir out of her home with threats of harm or burning the house down. Where the heir is a widow, she is likely to be accused of witchcraft, which is punishable by death, to force her out of the village. Thus a widow who is the victim of property grabbing would most likely lose occupation of her home even though this may not have been the usurper's primary aim.

Where property has a realisable value, like when it is situated in an urban area, or is scarce, it is more likely to be the object of property grabbing. For example, in the *Bhe*<sup>60</sup> case, the dispute arose over the immovable property situated in the township in which the applicant and her two daughters resided. The deceased's father was interested in the property because of its realisable value and he intended to sell the property to defray funeral expenses.

In summation, cash and livestock though encompassed by the formal administration process are most likely to trigger property grabbing in Kwelanga. The realisable value of livestock and the transferable nature of cash explain their allure to unscrupulous individuals. Though the home itself is typically not the focus of property grabbing, forcing the widow out of her home is often the way individuals usurp the widow's rights to the home. Where the land itself is scarce or may be sold for cash, it may be the object of property grabbing.

### 7.3.3 *Type of marriage*

The general perception in Kwelanga was that civil and customary marriages are equally valid and effectual in securing the rights of parties as spouses. Reality, however, proved different and the type of marriage concluded affected an heir's rights and vulnerability to property grabbing.

The widow who was the victim of property grabbing by her husband's family and discussed previously, concluded a civil marriage and not a customary marriage. The deceased wanted to do a 'special marriage' referring to the civil marriage and the couple had deferred the customary marriage as it would necessitate considerable time and preparation. The husband died before the parties concluded the customary marriage. Upon the husband's death, the deceased's family did not recognise the woman as a widow with the rights and status that it entailed. For example, in stark contrast to the rights and role of the widow as a key decision-maker in funeral

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<sup>60</sup> *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC).

arrangements,<sup>61</sup> the widow had no input in the funeral arrangements and burial of the deceased which was arranged by the deceased's family.

The widow noted:

'Because at the time I didn't have much authority or power over him, because he was not fully my husband.'<sup>62</sup>

A customary marriage is thus important for the woman's recognition as a widow by the family and a civil marriage does not suffice in this regard. The deceased's family's treatment of the widow was mirrored by her own family. The woman's parents provided her with no support in the assertion of her rights nor did they regard the deceased as her husband as *lobolo* had not been paid. The denial of the woman's status as a spouse meant she had no right to control the funeral process and bury the deceased in Kwelanga, her home village, as opposed to the deceased's family's village.

The widow speculated that had *lobolo* been paid, her family would have assisted her to bury the deceased in Kwelanga. This would have significantly changed the power relations among the parties as it was the widow's fear that the deceased's family would prevent her from attending the funeral which drove her to relinquish the money to her husband's family. Had the widow been secure in her right to attend the deceased's funeral, she would have most likely not have acceded to coercion by the deceased's family.

The failure to conclude a customary marriage was a determinative factor in the woman's experience. The absence of the customary celebrations, rituals and negotiations in which families play a crucial role meant the loss of forged relationships between families and across generations.<sup>63</sup> This likely made it easier for the deceased's family to position the woman as an outsider with no rights to the property and explains the failure of the widow's family to intervene. It is also arguable that the lack of a customary marriage disempowered the woman to assert her rights as a widow. In the widow's own words, she did not consider the deceased

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<sup>61</sup> This was discussed in Chapters 4 and 5 of this thesis at 85 and 110–111 respectively.

<sup>62</sup> Interview with female participant, 19 October 2016.

<sup>63</sup> The traditional customary marriage ceremony unites families and the negotiation and payment of *lobolo*, is meant to, amongst others, create and cement relationships between families and forge a web of affiliations across generations; see Himonga and Moore (note 4) 123 and JH Shope "'Lobola is here to stay': Rural black women and the contradictory meanings of *lobolo* in post-apartheid South Africa' 2006 (20) *Agenda* 64 at 65–66. Also see S Rudwick and D Posel 'Contemporary functions of *ilobolo* (bridewealth) in urban South African Zulu society' 2014 (32) *Journal of Contemporary African Studies* 118 at 120–123 for a discussion of the historical function of *lobolo*.

to be ‘fully’ her husband and perceived herself to lack authority to be involved in the funeral process.

The absence of a customary marriage is thus clearly a significant factor in property grabbing. On the other hand, the absence of a civil marriage makes it harder to prove the existence of a marriage placing the widow at risk and is discussed in the next section below.

### 7.3.4 Proof of status as a beneficiary

The primary beneficiaries of an estate are the surviving spouse and descendants. Thus a beneficiary’s inheritance hinges on the ability to prove his or her status as a spouse or descendant.

#### 7.3.4.1 Spouse

The easiest way to negate a widow’s right to inheritance is to refute her status as the surviving spouse. State officials in the case study identified the determination of the existence of a customary marriage as the most significant problem in the administration process.

The Recognition of Customary Marriages Act<sup>64</sup> (‘the Recognition Act’) allows for the registration of customary marriages which registration serves as *prima facie* proof of the marriage.<sup>65</sup> While the registration of marriages is encouraged,<sup>66</sup> non-registration does not affect the validity of the marriage,<sup>67</sup> though in practice, non-registration may affect the recognition of the marriage.<sup>68</sup> The Women’s Legal Centre noted in 2011 that a surviving spouse could not lodge a claim against the estate without a marriage certificate.<sup>69</sup> Participants in Himonga and Moore’s study also attested to the fact that registration conferred upon them greater protection

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<sup>64</sup> Recognition of Customary Marriages Act 120 of 1998.

<sup>65</sup> Section 4(8) of the Recognition Act. For a discussion of the registration process, see Himonga and Moore (note 4) 103–105; L Mwambene and H Kruuse ‘Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa’ 2013 *Acta Juridica* 292 at 299–300 and Women’s Legal Centre *Recognition of Customary Marriages* (2011) 11–16.

<sup>66</sup> Section 4(1) of the Recognition Act provides that ‘The spouses of a customary marriage have a duty to ensure that their marriage is registered.’ De Souza explains that the section was meant to encourage mass voluntary registration of customary marriages; M de Souza ‘When non-registration becomes non-recognition: Examining the law and practice of customary marriage registration in South Africa’ 2013 *Acta Juridica* 239 at 243.

<sup>67</sup> S 4(9) Recognition Act and *MG v BM* 2012 (2) SA 253 (GSJ).

<sup>68</sup> De Souza (note 50) at 243–244. De Souza notes that registration is often treated as a benchmark for the validity of the marriage and most institutions such as government departments, employers and pension funds require a marriage certificate as proof of the marriage. Also see Mwambene and Kruuse (note 49) at 300–301.

<sup>69</sup> Women’s Legal Centre (note 49) *Recognition of Customary Marriages* (2011) 12.

and rights with regard to inheritance and access to marital assets.<sup>70</sup> Thus failing to register a marriage may render a marriage ineffectual in claiming from an estate.<sup>71</sup>

Despite the severe consequences of non-registration, most customary marriages are not registered.<sup>72</sup> De Souza, whose findings are supported by Himonga and Moore, found that ignorance regarding the need for registration, the time and cost it entails, mistaken understandings by state officials regarding registration and the difficulties experienced by spouses in proving the customary marriage at the Department of Home Affairs all frustrate the registration of marriages.<sup>73</sup> Furthermore, according to Himonga and Moore, individuals tend to wait until the completion of all customary procedures, such as the payment of *lobolo* in full, before registering the marriage.<sup>74</sup> Power relations between the parties are also important and the husband's refusal to consent often results in the non-registration of the marriage.<sup>75</sup>

Women in Kwelanga understood the importance of registration but echoed the difficulties associated therewith '[e]ven if you are old, even if my husband can't walk. I need to take him to court and register our marriage.'<sup>76</sup> Most customary marriages thus remain unregistered placing the widow in the difficult position of proving her marriage upon her husband's death.<sup>77</sup> Family members of the deceased may opportunistically deny the existence of the marriage to inherit themselves.<sup>78</sup>

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<sup>70</sup> Himonga and Moore (note 4) 122–123.

<sup>71</sup> De Souza (note 50) at 244.

<sup>72</sup> Mamashela and Xaba (note 4); Himonga and Moore (note 4) 106 and D Budlender, S Mgweba, K Motsepe and L Williams *Women, land and customary law* (2011) 74.

<sup>73</sup> De Souza (note 50) and Himonga and Moore (note 4) 111–127. People cannot be required to conclude civil marriages for the purposes of certainty as this impacts on their cultural religious freedom, see C Rautenbach, W du Plessis and G Pienaar 'Is primogeniture extinct like the dodo, or is there any prospect of it rising from the ashes? Comments on the evolution of customary succession laws in South Africa: Notes and comments' 2006 (22) *SAJHR* 99 at 115.

<sup>74</sup> Himonga and Moore (note 4) 109–110.

<sup>75</sup> Ibid 114 and 125. The Women's Legal Centre also found the reasons discussed as factors in the non-registration of marriages; Women's Legal Centre (note 49) 14. Meyerson found similar reasons for the non-registration of non-marital domestic relationships; see D Meyerson 'Who's in and who's out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa' 2010 (3) *Constit. Ct. Rev.* 295 at 296.

<sup>76</sup> Focus group with women under 40 years of age, 6 September 2015.

<sup>77</sup> South African Law Commission Discussion Paper 93 (Project 90) *Customary law of succession* (2000) 46.

<sup>78</sup> Mwambene and Kruuse discuss the difficulties courts experience in determining the validity of a marriage; Mwambene and Kruuse (note 49) at 303–310. Also see Women's Legal Centre (note 49) 12 and S Burman, L Carmody and Y Hoffman-Wanderer 'Protecting the vulnerable from 'property grabbing': The reality of administering small estates' 2008 (125) *SALJ* 134 at 150–152 where the vulnerability of women in these marriages is discussed.

The Master's Office in the case study initially conducted family meetings with relatives from both the deceased's and widow's family and the chief in the area to determine the existence of a customary marriage. Officials relied upon the couple's family as witnesses, the chief's confirmation of the marriage and evidence of *lobolo* being paid as proof of the customary marriage.<sup>79</sup> The enquiry proved difficult as officials suspected that individuals seeking to benefit from an estate claimed the existence of a customary marriage and manufactured proof thereof. On the other hand, families, who were necessary as witnesses of the customary marriage, also denied the existence of a marriage to trigger their inheritance as intestate heirs. The determination of a customary marriage proved to be an impossible task as people blatantly lied, brought false witnesses and misrepresented the situation for their own benefit as illustrated by the following statement:

Yes, that form requires that there should be two witnesses from both families, coming from the wife's side and the husband's side, who are witnesses that the deceased was married to this lady. So, if in some instances you will consult with these people and inform her that you need these witnesses. In thirty minutes' time the witnesses are here. And then you usually find out that even those witnesses are not even related to these people, and they don't even know that the deceased was married to this lady. And, then you issue the appointment letter in those situations. And then there will be conflict now ... because there is also someone else who was married to the deceased, by customary law then, you know, it created a lot of problems that one.<sup>80</sup>

'...But these days, *ish*, the challenge with the *lobolo* letters. And you find out that the person who signs is somebody who was found here on the street. But who are we to question that?'<sup>81</sup>

Officials felt helpless to reject evidence, such as the affidavits by witnesses or *lobolo* letters, tendered in support of a claim of a customary marriage or to recognise a marriage where a widow had no proof in support thereof. In response to these evidential difficulties, practice at the Master's Office evolved in or about 2014 to require a marriage certificate or registration of the marriage as proof of the existence of a marriage.<sup>82</sup> Where the marriage was unregistered, parties were referred to the Department of Home Affairs to have their marriage registered.<sup>83</sup>

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<sup>79</sup> State officials completed an MBU-16 Minutes of a family meeting form regarding a customary marriage.

<sup>80</sup> Interview with official at the Master's Office, 10 September 2015.

<sup>81</sup> Interview with senior official at the Master's Office, 10 September 2015.

<sup>82</sup> The analysis of the sample of case files evinced this shift in policy. Individuals reporting estates were directed to furnish proof and have their unregistered marriages registered. Family meetings were no longer held to determine the existence of a customary marriage.

<sup>83</sup> Interview with official at service point, 19 October 2016 and interview with official at the Master's Office, 10 September 2015.

From the sample of files analysed, it appears that in some instances, receipt of an application to register the marriage is accepted as proof and letters of authority issued thereon.

The posthumous registration of a marriage at the Department of Home Affairs conflicts with other recent findings that the Department of Home Affairs refuses to register such marriages.<sup>84</sup> Himonga and Moore found that the Master's Office holds a family meeting to confirm the existence of a marriage and disputed cases are referred to court for adjudication.<sup>85</sup> The variation in findings may be due to differing practices among offices of the Department of Home Affairs<sup>86</sup> or indicate an evolution in practice since the previous studies were conducted.<sup>87</sup> Initially, the Master's Office held family meetings to determine the existence of a customary marriage and it is likely that at that time, the Department of Home Affairs refused to posthumously register marriages. When the Master's Office ceased holding family meetings in or about 2014 and required marriages to be registered, the Department of Home Affairs most likely changed its practice to permit the registration of such marriages. This is supported by the Master's Office recommencing with family meetings for the first 6 months of 2017 when the period for registration of marriages expired and the Department of Home Affairs was not registering marriages. In June 2017 the period for registration was extended until April 2019.<sup>88</sup>

Even seemingly straightforward claims of marriage may complicate succession matters. For example, a civil marriage contracted with a third party during the subsistence of a customary marriage is invalid.<sup>89</sup> The civil wife, however, in possession of a marriage certificate can easily prove the existence of her marriage. If she reports the estate as the surviving spouse before the customary wife, the civil wife inherits the estate to the exclusion of the customary wife. This leaves the customary wife frustrated and bereft and there is little the state can do to prevent this

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On 31 December 2016, the date for registration of customary marriages at the Department of Home Affairs passed and was not renewed until June 2017 when it was extended until 30 April 2019; Notice in terms of section 4(3)(b) of the Act prescribing a further period of registration in GN 484 GG 40883 of 2 June 2017 and Notice in terms of section 4(3)(a) of the Act prescribing a further period of registration in GN 483 GG 40883 of 2 June 2017. In the interim period, the Master's Office held family meetings to confirm the existence of a marriage but has since reverted to referring individuals in unregistered marriages to the Department of Home Affairs.

<sup>84</sup> Women's Legal Centre (note 49) 11; Himonga and Moore (note 4) 271 and Mamashela and Xaba (note 4).

<sup>85</sup> Himonga and Moore (note 4) 271.

<sup>86</sup> The Reform Act is silent on the posthumous registration of marriages and it is governed by the practical norms of each office.

<sup>87</sup> For example, Himonga and Moore's study was conducted from 2011–2013 and practice is likely to have evolved since then.

<sup>88</sup> See fn 67 above.

<sup>89</sup> See Chapter 6 of this thesis at 136–137.

usurping of the customary wife's rights. Accordingly, state officials promote the registration of customary marriages as the best way to secure the rights of the widow.

The preceding discussion illustrates the importance of proof of the existence of a marriage. Those who possess the necessary documentation or family support are likely to inherit to the exclusion of others. Women frequently seek to benefit from their husband's estates and are thus more vulnerable to the dangers of unregistered marriages. The Reform Act, disappointingly then, offers no additional protection in this regard.

#### 7.3.4.2 Descendants

Descendants are also required to prove their status as such to inherit from the deceased. This is generally easy as children produce their birth certificates as proof of paternity. Where the parents are unmarried, the father is generally not listed on the birth certificate, the children must adduce affidavits attesting that the deceased is their biological father. If this is not disputed by other beneficiaries, it is accepted by the Master's Office as proof of paternity. In rare cases where paternity is disputed, the child may be required to undergo a paternity test to prove his or her status as a descendant. The Master's Office convenes a meeting with the executor and beneficiaries to discuss the matter. The executor arranges for the paternity test to be conducted at a nearby hospital, the costs of which are usually borne by the estate. The executor informs the Master's Office about the results who then informs the heirs.

More frequently, the estate is reported without disclosing the existence of the child. The result is that the child is overlooked for inheritance purposes. However, given that most estates in the case study were smaller than R250 000, this was not a contentious issue as the surviving spouse was the sole heir.

#### 7.3.5 *Urban / rural divide*

The migrant labour system established during apartheid where African men sought work in cities and returned home to the village periodically persists in Kwelanga today. Men tend to work in cities anywhere between 30 km and 1 200 km away from the village and their families. If these men die in the city, the surviving family often struggles to determine the deceased's financial assets. The assets may range from pension funds, insurance policies, funeral policies or other savings or financial products.

The physical distance between the deceased's place of work and the village is a hindrance to reporting an estate. To appreciate these difficulties, it is important to bear in mind the socio-economic context of Kwelanga discussed in Chapter 2. Kwelanga is a poor, rural village where most individuals live hand-to-mouth. While most people have a cellular phone, they may not have funds to make calls or access the internet. Thus, simple tasks that are taken for granted in a growingly connected world, such as finding telephone numbers and contacting individuals, are difficult for residents. Telecommunications and electricity supply to the nearby towns are insecure and often disrupted, which means that there is no guarantee that travelling to town for services is beneficial. The administration process requires the predominantly elderly community to engage with the state and financial institutions in often sophisticated financial and legal terminology. These generalisations do not apply to everyone in the village but provide a broad overview of the experiences of most residents in Kwelanga.

Where a deceased dies in the city, the surviving family in Kwelanga cannot easily travel to the city and speak to an employer or liaise with the deceased's bank regarding the deceased's cash. Individuals discussed the expense and time such travel entails and noted that they often return disappointed without having been helped and with no greater clarity as to how and when they would benefit from the deceased's assets. Calling these institutions is also difficult as individuals often do not have the telephone numbers and finding them without readily accessible internet is difficult. In addition, placing the telephone calls costs money. Often the surviving family depends on friends and family in the city to act as a conduit of information in determining the deceased's assets and the submission of claims.

Himonga and Moore also highlighted these practical difficulties and noted that the lack of legal knowledge and unfamiliarity with official procedures is a problem in inheritance matters. A participant in their study whose claim to her husband's estate was under threat explained that she did not know who to consult about her problem and was reluctant to travel to Johannesburg, being another city, as she feared getting lost.<sup>90</sup> Burman *et al* also underscored the lack of legal knowledge as to 'where to access the relevant institutions; how to access them; and what his or her substantive legal rights are in relation to intestate inheritance' as a hindrance in the reporting of estates.<sup>91</sup>

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<sup>90</sup> Himonga and Moore (note 4) 262.

<sup>91</sup> Burman, Carmody and Hoffman-Wanderer (note 62) at 140.

A further complication of the migrant labour system is that it often results in the conclusion of overlapping civil and customary marriages. A man in an existing customary marriage frequently concludes a civil marriage with another woman while working in the city. While the civil marriage is legally invalid, the civil 'wife' possesses the civil marriage certificate and other documentation necessary to report an estate. The civil 'wife' may report the estate as the surviving spouse, either ignorant of or deliberately concealing the existence of any surviving spouse or descendants in the village. As customary marriages are often not registered, the Master's Office has no way of ascertaining the existence of the customary marriage and the estate is distributed to the exclusion of any heirs in the village. De Souza also noted this problem in Msinga in the KwaZulu-Natal province and aptly observed that in such circumstances 'whichever wife is first able to make a claim and prove her marriage's existence will officially be recognised as his spouse.'<sup>92</sup> Himonga and Moore note that the usurping of rights by the civil 'wife' echoes the apartheid era's approach of non-recognition of customary marriages.<sup>93</sup>

The consequences of the migrant labour system permeate the customary law of succession. At its worst, it facilitates property grabbing by a civil 'wife' in the city despite her marriage being invalid. More innocuously, it frustrates surviving family members in the village from reporting the estate and realising benefits.

### 7.3.6 *Polygynous marriage*

While polygyny is rare in Kwelanga, one woman in a polygynous marriage discussed the difficulties associated with such marriages.<sup>94</sup> The woman explained that both she and the second wife were married according to customary law and neither marriage was registered. Upon the husband's death, the second wife 'married' the husband and while it was unclear what this meant, it appeared that the second wife registered her marriage. The second wife had all the 'documents' and the support of the husband's family who did not support the first wife in her claim as a surviving spouse. The deceased's family's lack of support in the assertion of the woman's marriage frustrated the recognition of her marriage. The woman complained that the second wife received the 'car, everything' while she 'did not get anything'.

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<sup>92</sup> De Souza (note 50) at 246.

<sup>93</sup> Himonga and Moore (note 4) 123.

<sup>94</sup> Focus group with women over 40 years of age, 18 October 2016.

The woman was unable to explain the family's position and support of the second wife over herself. A family's relationship with the wife or her willingness to share benefits with the family may determine family support. The woman must negotiate her own rights within the space to ensure family recognition as a surviving spouse. The experience illustrates how the combination of risk factors discussed above – such as cash in the estate, proof of marriage and the urban rural divide – are exacerbated in a polygynous marriage where there are surviving spouses with competing interests. Each spouse seeks to have her marriage recognised, and where one spouse cannot prove her marriage, the estate is distributed to her exclusion.

This of course does not mean that property grabbing occurs in all polygynous marriages. Himonga and Moore discuss a polygynous marriage where upon the death of the husband, each wife retained her own house and property and the widows inherited the cash in equal shares.<sup>95</sup> The houses were kept intact and male primogeniture was overlooked in favour of the deceased's widows as heirs.<sup>96</sup> This is an apt example of a more equitable distribution of property in a polygynous marriage but caution should be had in essentialising this experience to all women in polygynous marriages. Women in polygynous marriages do not necessarily enjoy harmonious relationships and property interests are unlikely to induce harmony. The findings from Kwelanga provide limited insight into the issue as polygyny was not prevalent in the village.

#### **7.4 Conclusion**

Property grabbing is a dangerous and violent phenomenon in which heirs are usurped of their property rights. Women are not only victims but perpetrators as well as they navigate their rights within the system. Physical violence, threats and allegations of witchcraft are all used in this regard. Succession disputes are usually resolved at the family level, but it is ineffectual when the perpetrators are outsiders of the community. Matters are escalated to the state courts, but individuals perceive it as futile and regard the heir's relinquishing of rights as the only recourse.

Often, property grabbing manifests itself in a subtle manner. Extravagant funerals, payments for assistance in reporting an estate and corruption by state officials are all means by which money is extracted from beneficiaries. While these forms are less violent, their pervasive nature

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<sup>95</sup> Himonga and Moore (note 4) 263.

<sup>96</sup> Ibid 263–264.

and framing as acceptable norms renders them more threatening and effectual as a form of property grabbing. These manifestations are perpetrated by ‘outsiders’ of the family in contrast to the traditional understanding of property grabbing which usually entails the involvement of the deceased’s family members.

The case study suggests that the most significant factors in property grabbing are gender, the nature of the estate, the type of marriage, proof of status as a beneficiary, the urban / rural divide and the existence of a polygynous marriage. Women remain the victims of property grabbing, and the legislative overhaul has proved incapable of correcting this phenomenon. Furthermore, the larger the estate and the greater degree of liquidity of assets in the estate, the more likely property grabbing is to occur. Homes located in the village are not the subject of fierce contestation despite their devolution without state oversight.

The type of marriage concluded, namely whether it is a customary or civil marriage, and the ability to prove the existence of a marriage also influence the likelihood of property grabbing. On the one hand, the absence of a customary marriage means that a woman is less likely to be treated as a widow, with the corresponding rights and status, or be supported by the families in the assertion of her property rights. On the other hand, a woman in a civil marriage can easily prove the existence of her marriage and claim benefits as a surviving spouse regardless of the validity of the marriage. Proving the existence of the marriage, however, is no guarantee that the widow enjoys her rights. Widows may be pressurised to hand over money after receipt thereof and state structures remain largely oblivious thereto.

The migrant labour system continues to perpetuate a vast distance between the rural areas and the cities where men work. The result is that the deceased’s family members often experience difficulties in ascertaining information regarding the deceased’s assets or lodging claims. Furthermore, estates may be reported in the city and distributed to the exclusion of any dependents in the village. While the online system of reporting and collaboration with the Department of Home Affairs is meant to prevent such fraud, it is unable to identify unregistered customary marriages or where men are not recorded as the fathers of children, as is frequently the case. Furthermore, logistical difficulties, communication barriers and sophisticated processes all hamper the institution of claims. The pervasive nature of these seemingly banal difficulties renders them more threatening to the realisation of rights than infrequent incidents of property grabbing.

These matters are further complicated in polygynous marriages. Here widows face the typical problems of proving the existence of the marriage as well as competing claims from another spouse. Families may choose to support one spouse's assertion of a marriage over the other due to a personal preference or belief that it would benefit them. The competing nature of claims means that women in these marriages remain vulnerable to property grabbing.

Chapter 8 surmises the answers to the research questions and makes recommendations for the improvement of the system in light of the findings above.

## **CHAPTER 8      SUMMARY OF FINDINGS AND RECOMMENDATIONS**

### **8.1      Introduction**

The administration of customary law estates was investigated post the enactment of the Reform Act.<sup>1</sup> Recent literature and findings from fieldwork conducted in a rural village in South Africa were relied upon to address the research question of how customary law estates are administered. The data was analysed and presented under four themes namely:

- the patriarchal nature of the customary law of succession;
- the group nature of the customary law of succession;
- beneficiaries under the Reform Act; and
- property grabbing and risk factors.

The research findings in relation to the research objectives, discussed to some extent elsewhere in the thesis, are now presented with recommendations for reform.

### **8.2      Summary of findings in relation to research objectives**

Chapter 1 articulated the following research objectives:

- Examine the institutions and persons who administer customary law estates.
- Explain the current sources, including repertoires, norms, practices or law used to administer customary law estates.
- Explain how the Reform Act and associated law reforms are given effect in practice.
- Explain how individuals experience the administration of a customary law estate.
- Identify and understand the factors that hinder or promote compliance with the Reform Act.

The findings on each of these objectives are discussed separately below.

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<sup>1</sup> Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009.

### *8.2.1 Institutions and persons that administer customary law estates*

The process of administration of customary law estates is best segregated into the administration process and the dispute resolution process, and the role of institutions and persons within these two streams are discussed below.

#### 8.2.1.1 Administration process

The Master's Offices and service points are the primary state institutions responsible for the administration of estates. The Master's Office comprises:

- the office of the Chief Master;
- the Master's Offices;
- sub-offices of the Master; and
- service points.<sup>2</sup>

To promote greater accessibility of services among people, certain magistrate's courts are designated as service points and administer small, straightforward estates.<sup>3</sup> Individuals from court services staff the service points and receive training from the Master's Office and Justice College.<sup>4</sup> Due to the few number of cases reported at service points, there is usually only one official responsible for the administration process. Services are thus interrupted when the official is sick or on leave and individuals are referred to the relevant Master's Office.<sup>5</sup>

The Master's Office has concurrent jurisdiction with the service points in their respective areas and exclusive jurisdiction where:

- there is a will;
- the estate is insolvent;
- there are minors not represented by their guardians;
- the value of the estate is more than R125 000 and the paperless estates administration system ('PEAS') has not been fully implemented at the service point;
- the value of the estate is more than R250 000; or

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<sup>2</sup> Chapter 3 of this thesis at 51.

<sup>3</sup> Ibid 55.

<sup>4</sup> Ibid 58.

<sup>5</sup> Ibid.

- PEAS has not been implemented and one or more of the beneficiaries is a minor and the entire estate or part thereof consists of cash exceeding R20 000.<sup>6</sup>

Such estates are administered at the Master's Office by estate controllers, the assistant master and master. Estate controllers and the assistant master deal with the public daily and are responsible for capturing estates. The assistant master approves the letters of authority in estates smaller than R250 000 (or letters of executorship in estates over R250 000) which authorises an individual to act as the administrator of the estate by realising assets and distributing it to heirs.<sup>7</sup> In addition, the assistant master supervises the reporting of estates at service points to ensure the reporting documents are in order and authorises the issuing of the letter of authority.<sup>8</sup> The master exercises an oversight function dealing with problematic cases and reports to the Office of the Chief Master.

The legislation does not confer a role on chiefs or other traditional fora in the administration process. Nonetheless, deaths are reported to the chief as the caretaker of the community who offers emotional support to the family, administrative assistance in obtaining a death certificate and confirms the existence of a customary marriage at state offices.<sup>9</sup> As the first port of call after the death of an individual, the chief advises individuals regarding the first steps in the administration process, namely reporting the estate to a state office. Given the chronic lack of knowledge regarding the new succession laws,<sup>10</sup> the chief plays a critical role in the commencement of the administration process.

#### 8.2.1.2 Mediation process

Disputes regarding succession matters and the resolution thereof indirectly form part of the administration process as disputes often revolve around who should be issued the letter of authority or recognised as a beneficiary. Officials at the Master's Office – and not the service point – mediate disputes. In terms of the Reform Act, the Master is meant to consult with a traditional leader in the area before making a recommendation for the resolution of a dispute.<sup>11</sup>

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<sup>6</sup> Ibid 55.

<sup>7</sup> Ibid 52.

<sup>8</sup> Ibid 53.

<sup>9</sup> Chapter 2 of this thesis at 27.

<sup>10</sup> C Himonga and E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015) 249 and 251 and 309.

<sup>11</sup> Chapter 3 of this thesis at 58.

The case study, however, revealed that the chief played no role in the state dispute resolution process illustrating a clear discrepancy between the state law and practice.<sup>12</sup>

Individuals also rely on the police to mediate disputes and enforce rights although not expressly provided for under the new system of administration. The police are called upon indiscriminately whether customary law or statutory law is seeking to be enforced. They may speak to an heir who is not taking care of his / her family or ask family members to respect the rights of an heir to administer property. This goes beyond the jurisdiction of the police but is not necessarily a point of criticism. The police are stakeholders in the community who have an interest in resolving contestations before they evolve into violent disputes. Thus, the management and resolution of disputes at an early stage is in the interests of all involved.

The family council is the primary forum for the resolution of inheritance disputes.<sup>13</sup> The family council usually consists of the elder males in the husband's family though there may be some participation by elder females.<sup>14</sup> In mediating disputes, the family council may reinforce the statutory distribution, apply customary law or offer an acceptable compromise for the parties. As the forum is dominated by men, there is a risk that the solutions are male-centric and marginalise the interests of women and children.<sup>15</sup> However, there is no compulsion to use the forum, and the continued patronage of the forum by women suggests their confidence in the forum to proffer acceptable solutions. In rare cases, the matter may be escalated to the chief or headman, who in Kwelanga played no significant role in resolving succession disputes.

The findings reveal that customary law estates are administered (referring to both the administration and the mediation process) by a number of institutions, namely the Master's Office, service point, police, family council and chief. Unfortunately, the multitude of institutions involved in the process is not leveraged to support successful law reform. With the exception of the service point, which communicates with and receives support from the Master's Office, there is no collaboration among the other institutions. For example, property grabbing poses a real threat to the life and safety of individuals, and state officials acknowledged their inability to address the problem. Surprisingly then, officials have not met with other institutions such as the chief, police and residents in the community to canvass solutions. This reflects a degree of short-sightedness on the part of the state which fails to

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<sup>12</sup> Ibid.

<sup>13</sup> Chapter 4 of this thesis at 86–87.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

effectually use these institutions to enforce the law. More successful reform is likely to be found when there is greater collaboration among all stakeholders.

### 8.2.2 *Practical implementation of the Reform Act*

Himonga notes the risk that formal, legal interventions are a veneer of change where nothing changes in reality.<sup>16</sup> Thus the pressing question to be addressed is whether the Reform Act has been successfully implemented in South Africa.

As a preliminary point, it should be noted that the lack of litigation on the Reform Act should not be interpreted as favourable reception of the Act. Access to justice is problematic in South Africa and litigation is beyond the means of most ordinary South Africans.<sup>17</sup> Thus, even if there are valid objections to the Act, they are unlikely to materialise in litigation unless a wealthy individual or public interest group supports it.

#### 8.2.2.1 Compliance with statutory provisions

There is generally compliance with the Reform Act and the administration process. Officials implement the statutory provisions which are effected in practice through the distribution of the estate. A driving force behind the Act's implementation is South Africa's heavily regulated financial industry in which banks only release funds to the administrator of estate after the estate has been reported. Many individuals have at some time worked in the formal sector and have a bank account<sup>18</sup> which forces the surviving family members to report the estate to access funds.

Reporting the estate and the issuing a letter of authority, however, is no guarantee that the estate will be correctly distributed. Himonga and Moore note that the brevity of the letter of authority, which merely states that the estate be distributed to the lawful heirs without specifying the identity of heirs, may undermine the statutory distribution of the estate.<sup>19</sup> The novelty of the

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<sup>16</sup> C Himonga 'Constitutional rights of women under customary law in Southern Africa: Dominant interventions and "Old Pathways"' in B Baines, D Barak-Erez and T Kahana (eds) *Feminist constitutionalism: Global perspectives* (2012) 317 at 325.

<sup>17</sup> Himonga and Moore (note 10) 305 and F Osman and C Himonga 'The constitutionality of section 7 (1) of the Recognition of Customary Marriages Act: *Ramuhovhi v President of the Republic of South Africa*' 2017 (49) *The Journal of Legal Pluralism and Unofficial Law* 166 at 180.

<sup>18</sup> About 77 per cent of South Africans have a bank account, FinScope Consumer Survey South Africa 2016 available at <https://finmark.org.za/finscope-consumer-survey-south-africa-2016/> [accessed on 14/11/18] and Media release: FinScope South Africa 2017 Are financial services excluding the poor? Available at [http://www.mfsa.net/wp-content/uploads/2017/11/FinScope\\_SA\\_Press\\_release\\_21\\_Nov\\_2017\\_draft\\_8.docx](http://www.mfsa.net/wp-content/uploads/2017/11/FinScope_SA_Press_release_21_Nov_2017_draft_8.docx) [accessed on 14/11/18].

<sup>19</sup> Himonga and Moore (note 10) 241.

laws may mean that individuals, unfamiliar with the reform, assume the estate is to be distributed in accordance with traditional customary laws.<sup>20</sup> While several officials stated the change in laws is explained to the administrator, Himonga and Moore argue that unless it is done consistently and in sufficient detail, administrators may not understand the implications of the change in law.<sup>21</sup>

The case study built on Himonga and Moore's research and investigated the distribution of the estate after the administrator's appointment. It found that the administrator as heir usually receives the benefit. Officials and individuals in the study revealed that the change in law is consistently explained to the administrator, also typically the sole heir. In most instances, this was the widow as estates were smaller than the R250 000 threshold. Widows understood their entitlement to the estate and confirmed receipt of the estate benefits attesting to the practical implementation of the statutory provisions. Where beneficiaries had been usurped of their rights, it was due to fraud rather than ignorance of the lawful heir's rights of inheritance.

Conversely, where a letter of authority is not required to access the estate, such as when it comprises a home in the village or livestock, it is unlikely to be reported. Generally, in Kwelanga, the estate devolves to the widow and not according to the principle of male primogeniture. This development of living customary law, which responds to socio-economic changes as well as changes in the law, accords with the spirit and objectives of the Reform Act. Thus, while the process of administration is side-stepped, there is arguably substantive compliance with the regulatory framework in Kwelanga.

The most significant area of dissonance between the Reform Act and practice is in the devolution of property in the village after the widow's death and the gendered differences in the nature of the rights to the property. Evincing the patriarchal nature of the law, the devolution of the property after the widow's death favours the principle of male primogeniture with the eldest son being the preferred heir.<sup>22</sup> This represents a significant deviation from the Act which would ordinarily require the home to be sold and proceeds distributed among all children as heirs. However, compliance may not be feasible or desirable in the instance. First, the non-titled nature of the property means that it cannot be sold and distributed among heirs.<sup>23</sup> Second, the

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid 249.

<sup>22</sup> Chapter 5 of this thesis at 104.

<sup>23</sup> Chapter 6 of this thesis at 119.

sale of the property would likely provide each heir with a meagre monetary amount but render them homeless.<sup>24</sup> Thus the dissonance with the Act is arguably necessary for the effective devolution of the property.

The preference of sons over daughters as heirs is more problematic. Daughters and younger siblings generally only assume control of the estate where the family considers the eldest son irresponsible or incapable of looking after the family. Furthermore, the nature of a widow's or daughter's rights to the property differs substantially from their male counterparts.<sup>25</sup> Women cannot establish their families in the home. Upon marriage, or remarriage in the case of widows, women are expected to leave the home and the property is assumed by the closest male relative.<sup>26</sup>

The differences in the rights of men and women does not accord with the Reform Act which does not distinguish between genders in inheritance and the nature of their rights. The on-going distinction is a result of deeply embedded cultural beliefs and societal attitudes that are unlikely to be changed quickly by state interventions. There are clear limitations to what statutory law alone can achieve and the findings foreground the need for complementary measures, such as educational outreach programmes, to effect change in communities.

#### 8.2.2.2 Difficulties with implementation

The study further revealed patent difficulties which hinder the implementation of the statutory provisions. First, the surviving spouse is the primary beneficiary, but the Reform Act is silent on how to determine whether an individual qualifies as a surviving spouse. The problem arises because the Reform Act applies the common law Intestate Succession Act seemingly oblivious to the stark differences in the common law and customary law contexts. The concept of unregistered marriages does not exist under the common law as all civil marriages are recorded by the state, but they are a well-documented problem in customary law.<sup>27</sup> Disappointingly, the Reform Act does nothing to address this inherently customary law issue and surviving spouses face difficulties proving their marriages for inheritance purposes.

Earlier studies found that the Master's Office conducts meetings to determine the existence of a marriage and refers disputes to court as the Department of Home Affairs refuses to register

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<sup>24</sup> Chapter 4 of this thesis at 82.

<sup>25</sup> Chapter 5 of this thesis at 105–109.

<sup>26</sup> *Ibid* at 105–108.

<sup>27</sup> Chapter 7 of this thesis at 159–160.

marriages posthumously. On the contrary, the Master's Office in the case study required registration as proof of a customary marriage and referred all parties to the Department of Home Affairs to procure such registration. The conflicting findings may be due to variation in practice in different offices or a development since the previous studies were conducted. Nonetheless, they reveal the complexity of proving a customary marriage and how state offices struggle to address this problem.<sup>28</sup> The evidential difficulties further risk undermining the Act's new-found recognition of polygynous marriages. Women in polygynous marriages struggle to prove the existence of their marriage, rendering the realisation of rights precarious.

Second, the recognition of the customary practices in the Reform Act, such as polygynous marriages, seed raiser unions, woman-to-woman marriages and customary adoption, is no guarantee of the implementation of the provisions and realisation of rights. The practice of seed raiser unions and woman-to-woman marriages were not found in Kwelanga, but the Reform Act is likely to be ineffectual in regulating these practices. Maphalle's research, for example, found that the Act is not invoked by women in woman-to-woman marriages to assert their succession rights.<sup>29</sup> In this regard, the Act appears to suffer the common problem with formal interventions in customary law matters, namely a lack of knowledge regarding the Act.<sup>30</sup>

Third, the Act does not acknowledge the differences between immovable property situated in urban and rural areas. It ignores the practical issues associated with land located in rural areas in South Africa – such as its non-titled nature or the contested administration of land by traditional authorities<sup>31</sup> – and does not offer guidance on how such property would be administered.

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<sup>28</sup> Chapter 7 of this thesis at 161–163.

<sup>29</sup> KA Maphalle *Succession in woman-to-woman marriages under customary law: A study of the Lobedu kingdom* (unpublished LLM thesis, University of Cape Town, 2017) 85–109.

<sup>30</sup> Himonga and Moore (note 10) 249 and 251; J Bekker and D Koyana 'The judicial and legislative reform of the customary law of succession' 2012 (45) *De Jure* 568 at 583–584.

The South African Constitutional Court was cognisant of this problem in *MM v MN* (2013) (4) SA 415 (CC) (a decision that affected women in polygynous customary law marriages) and directed that a copy of the judgment and summary thereof be provided to the House of Traditional Leaders and Minister of Home Affairs with a request that they distribute it appropriately, para 89.

<sup>31</sup> For example see, N Branson 'Land, law and traditional leadership in South Africa' 2016 *Africa Research Institute* available at <https://www.africaresearchinstitute.org/newsite/publications/briefing-notes/land-law-and-traditional-leadership-in-south-africa/> [accessed on 29/11/18] and T Madia 'Land: The people speak – "Traditional leaders are making us suffer"' 18/07/2018 available at <https://www.news24.com/SouthAfrica/News/land-the-people-speak-traditional-leaders-are-making-us-suffer-20180718> [accessed on 19/11/18].

In the case study, immovable property in the village did not have a title deed which led to its exclusion from the state administration process and its devolution in accordance with customary law with no state oversight. This is problematic as there is no check on whether there is compliance, even at a substantive level, with the Reform Act. In Kwelanga, the property devolves to the surviving spouse and there is substantive compliance with the Reform Act, but such practices cannot be extrapolated to all communities. In some communities, the principle of male primogeniture may dictate the devolution of the property which would be problematic given that the Reform Act was enacted to give effect to the constitutional declaration of invalidity of the principle.<sup>32</sup> The current framework unfortunately provides no oversight mechanism and officials have not formulated any practical norms to oversee the implementation of customary law. This is a significant oversight given that in some instances, homes in the village may be the most valuable, if not only, asset in the estate.

In summary, the evidential difficulties associated with proving a customary marriage, ignorance regarding the Act and lack of distinction between urban and rural property hinder the implementation of the Act. In most cases, the burden falls to state officials to formulate practical norms to ensure the Act's efficacy. This is undesirable, and it should be the legislature, with the necessary expertise, that formulates a comprehensive framework to address difficulties peculiar to customary law succession.

#### 8.2.2.3 Accessibility of services

In contrast to the approach above, the state has adopted a more nuanced approach, sensitive to the socio-economic circumstances in which the system operates, for the delivery of services. This approach is evident in several ways. First, magistrate's courts located closer to communities are designated as service points for reporting estates. Second, estates are captured online to, among others, guard against the double reporting of estates. This is a legacy of the migrant labour system which often sees estates being reported in both the urban and rural areas. Third, assistant masters are seconded to service points allowing them to deal with matters over which the Master's Office has exclusive jurisdiction. Finally, the truncated section 18(3) procedure in the Administration of Estates Act provides a faster, cheaper and easier process for reporting estates.

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<sup>32</sup> Preamble to the Reform Act.

Despite the concerted effort by the South African state to bring services to people, the Master's Office is often the preferred point for reporting estates. This may be due to the lack of knowledge regarding the services provided by the service points and their limited jurisdiction.<sup>33</sup> Frequent disruptions in service delivery may also be an issue. For example, the service point in the case study had one staff member, which meant that services were offered once a week and were unavailable when the official was off or there was a disruption in the electrical supply, which was frequently the case. Thus, many individuals preferred the better staffed Master's Office, which was open five days a week, to report estates. Unfortunately, travel to the Master's Office entails significant time and cost which impede the reporting of estates. The distance of approximately 45 km at a cost of about R40 serves as a barrier to services for the generally poor community.

Finally, language may also pose a barrier to the accessibility of services. Administrative forms for reporting estates are available in English and Afrikaans but not in any of the vernacular languages, in particular isiXhosa, the language spoken by most individuals living in the area. However, neither individuals nor officials raised this as a hindrance in the administration process. Officials stated that they explain the forms to individuals who in most cases cannot read, thereby rendering the language of the forms irrelevant. The availability of forms in isiXhosa, however, would improve the accessibility of the reporting process and, in some cases, reduce the lengthy consultation times necessary to explain the forms to clients. This would also confer a degree of agency and autonomy on individuals in the administration process.

Individuals reported estates with relative ease in Kwelanga, suggesting the success of significant state efforts to bring services to people. These findings are important, but it must be borne in mind that Kwelanga is not a deeply remote rural village. It is situated relatively close to the service point and the main road linking the area to the nearby major town and Master's Office. Thus, accessibility is more likely to be an issue in more remote rural areas.

### *8.2.3 The experience of the administration of a customary law estate*

An important finding in the study is the significant difference in the experience of men and women in the administration of estates. The research question investigated the administration of estates with no distinction in gender. The data, however, quickly revealed that inheritance in Kwelanga was a particularly female experience. Officials explained that more women than men

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<sup>33</sup> Chapter 3 of this thesis at 55.

reported estates. Women sought to benefit from their husband's estates, who were predominantly the breadwinners in the family, rather than vice-versa. In 93 of the 210 files analysed, the estate was meant to be inherited by the surviving spouse. In 86 out of these 93 files the surviving spouse was a widow rather than widower, further suggesting that in most cases women seek to benefit from their husband's estates. Women also inherited to the exclusion of children as most estates tended to be smaller than R250 000, rendering the surviving spouse the sole heir.<sup>34</sup> The widow's entitlement to the estate was not experienced as foreign or unexpected as living customary law had evolved to reflect similar entitlements. Succession and the administration of estates thus had the greatest impact on women in the case study.

Unfortunately, this meant that it was women who suffered the difficulties of implementing the Act or were the victims of property grabbing. Women struggled to prove their marriages for the purposes of inheritance and bore the brunt of the non-registration of their marriages.<sup>35</sup> Moreover, a woman's death did not trigger an inheritance question as men regarded themselves as the owner of the estate.<sup>36</sup> There was an automatic and seamless assumption of the estate by widowers which was not challenged by family members. Men were never the victims of property grabbing – neither violent threats nor coercion to forsake the property – and enjoyed secure rights to the property.

The administration process was experienced differently by women, but the experiences of some women should not be essentialised to all. Women in monogamous customary marriages, who had registered their marriages or had the support of the deceased's family in claiming the existence of the marriages, were generally able to report their estates and realise their rights. On the other hand, women in civil or unregistered marriages or in polygynous marriages were more likely to struggle to assert their rights.

Most estates in the case study were wound up in accordance with the truncated procedure set out in section 18(3) of the Administration of Estates Act. Considering South Africa's poor population, many estates fall below the R250 000 threshold for administration in terms of section 18(3). The process is quick and easy and without the costly fees found in the full administration process. The chief in Kwelanga was well-versed in the process of reporting

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<sup>34</sup> Chapter 6 of this thesis at 118.

<sup>35</sup> Chapter 7 of this thesis 159–163.

<sup>36</sup> Chapter 5 of this thesis at 103.

estates and advised individuals unfamiliar with the process. Consequently, the administration process was thought to be easy and relatively straightforward.

From a state perspective, the administration process is completed after the letter of authority is issued to the administrator. The administrator does not account for the distribution of the estate nor do beneficiaries confirm receipt of benefits. For individuals, however, obtaining a letter of authority is not an end in itself and the process continues with the realisation of benefits with the relevant institution. In some cases, lodging claims with a financial institution or employer is complex. Individuals may not have the relevant institution's details, be unaware of the process to follow or lack the necessary documentation to submit the claim. The realisation of assets is thus often a greater source of frustration for individuals that goes unseen by state officials who consider the matter closed after the letter of authority has been issued. Individuals in Kwelanga frequently requested help with the practical difficulties of lodging claims rather than property grabbing. While property grabbing is violent and threatens the safety of individuals, the practicalities are more pervasive and pose a real stumbling block to realising benefits. The dismissal of these issues as banal administrative concerns undermines individuals' experiences thereof and is a threat to effectual reform.

#### *8.2.4 Factors that promote or hinder the realisation of rights*

The case study revealed several factors that promote the realisation of inheritance rights. As most estates were smaller than R250 000 and fell to be inherited by the surviving spouse, in particular the widow, the factors spoke to the protection of the widow's rights.

Officials advocated the registration of customary marriage as the most significant factor in the realisation of inheritance rights. Registration secures the recognition of the widow's marriage post her husband's death, precludes a husband from marrying another woman in civil law and averts the reporting of the estate without disclosing the existence of the surviving spouse. The factor underscores the need for law reform to be undertaken holistically and not in silos and how improving marriage laws and matters such as the registration of marriages has an impact on the realisation of inheritance rights.

The type of marriage concluded is also a factor. At first glance, the factor appeared contradictory as the conclusion of a civil marriage alone both promoted and hindered the realisation of rights. For example, the conclusion of a civil marriage – and no customary marriage – meant the deceased's family may not recognise the woman as the deceased's widow

with the status and power this entails. Control of the deceased's funeral may be seized by the deceased's family and used by the family to coerce the widow into relinquishing property in return for attending the funeral. This was done effectually in the case study to usurp the rights of the widow, evincing that the conclusion of a civil marriage alone is a hindrance to realisation of inheritance rights.

On the other hand, the conclusion of a civil marriage facilitates proof of the marriage by the production of a marriage certificate, regardless of the validity of the marriage. The civil 'wife' may claim the estate before any legitimate customary widow stakes her claim. Thus, the conclusion of a civil marriage promotes the realisation of inheritance rights (albeit in a fraudulent manner).

The contradictory experience of the factor illustrates the importance of this qualitative study, which examines in detail individuals' experiences of the administration process. Factors are experienced in a nuanced and sometimes opposing manner by individuals and ignoring this rich experience yields shallow and ambivalent results. This reinforces the recommendation for the examination of customary law in its social context as abstracted from this, the norms and principles provide a superficial representation of the state of affairs.<sup>37</sup>

A further obstacle in the realisation of rights is the vast distance between the village and places of work perpetuated by the migrant labour system which continues today. Where the deceased worked in a city, the surviving family in Kwelanga was often uncertain as to the extent of the deceased's assets in the city, where to lodge claims to realise benefits and how to obtain the necessary documentation to do so. Travelling to the city to liaise with an employer or financial institution is costly and timely and, in many cases, unfeasible. This delays the reporting of the estate and risks a civil 'wife' in the city claiming the estate to the exclusion of rightful heirs in the village. The migrant labour system thus continues to be a significant hindrance to the realisation of rights under the Reform Act.

As mentioned previously most individuals experienced the administration process itself as simple and straightforward. This is despite only one individual in Kwelanga having attended a community outreach programme in respect of succession and the administration of estates. Individuals obtained their information on the administration process from other community members or the chief. The chief's familiarity with the process and substantive law meant he

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<sup>37</sup> D Ndima 'The African law of the 21st century in South Africa' 2003 (36) *CILSA* 325.

was able to advise individuals on the process and assist with reporting estates. It thus appears that support from traditional fora is an important factor in the successful dissemination and implementation of state law.

The factors that promote the realisation of inheritance rights, discussed above, underscore the need for holistic law reform. To promote inheritance rights, other issues such as the registration of marriages, submission of claims after the letter of authority is issued, narrowing the urban / rural divide, the consequences of the migrant labour system and the inclusion of traditional institutions (both the family and chief) must be addressed. Recommendations for reform reflect the need for a more inclusive approach.

### **8.3 RECOMMENDATIONS**

There are limitations to state interventions, and it is overly optimistic to believe that statutory reform on its own is capable of changing the customary law of succession. Socio-cultural practices are unlikely to be changed by a statute often viewed as ‘forced Westernisation’ and thus met with resistance and scepticism.<sup>38</sup> Several recommendations to improve the effectiveness of the intended reform are now set out.

#### *8.3.1 Move to a functional fact-based approach for protection*

The Reform Act adopts a formal approach where individuals only have rights to an estate when they satisfy the statutory definition of a spouse or descendant.<sup>39</sup> While the definitions have been modified slightly to accommodate customary practices, inheritance remains hinged on a beneficiary’s status as a spouse or descendant.

The focus on marital status is problematic for three reasons. First, the declining rates of marriage, increased rates of cohabitation<sup>40</sup> and the problems associated with the registration of customary marriages<sup>41</sup> mean that a significant number of women find themselves in these relationships with no rights under the Reform Act. The lack of protection for women in these relationships is deeply problematic given that the decision of whether to marry or not in South

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<sup>38</sup> M Pieterse ‘Killing it softly: Customary law in the new constitutional order’ 2000 (33) *De Jure* 35 at 40.

<sup>39</sup> South Africa is not unique for its focus on the surviving spouse as an heir. For a discussion of the spouse’s favoured position and evolving family relationships in the United States of America see R Brashier *Inheritance law and the evolving family* (2008).

<sup>40</sup> Chapter 6 of this thesis at 134.

<sup>41</sup> Chapter 7 of this thesis at 160.

Africa is largely determined by ‘poverty, unemployment, the legacy of labour migrancy and unequal gender relations’.<sup>42</sup> Goldblatt argues that these factors concerning cohabitations affect predominantly poor, Black women which means that the most vulnerable in society bear the brunt of the state’s focus on an individual’s status as a spouse for inheritance.<sup>43</sup>

Second, the focus on marital status means that a widow’s property rights may be usurped by denying her marriage and status as spouse. The preoccupation with status renders women susceptible to property grabbing.

Finally, as discussed in Chapter 6, many women find themselves in technically invalid marriages because of the complex legislative framework. The Reform Act, nonetheless, offers these women no rights or protection regardless of whether they were in good faith or could not have reasonably been expected to know about the invalidity of the marriage.

In light of the above, Mwambene and Kruuse argue for the adoption of a functional approach for the protection of relationships.<sup>44</sup> The functional approach posits that where relationships fulfil the same function as marriage, such as the same social role and the creation of intimacy and economic dependency, individuals in those relationships should be protected.<sup>45</sup> This is argued to accord ‘with the protective rationale of family law, which requires that weaker parties should not be left impoverished “when long-term, mutually supportive, financially interdependent relationships end, whether or not they have formalised their relationships”’.<sup>46</sup>

The opposing libertarian argument to this approach is that individuals exercise a choice by not concluding a marriage and the intervention by the law to attach consequences to such a relationship impedes an individuals’ autonomy.<sup>47</sup> The counter argument is that gender inequality, patriarchy and the very different social position and degrees of bargaining power

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<sup>42</sup> L Mwambene and H Kruuse ‘Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa’ 2013 *Acta Juridica* 292 at 297. Also see B Goldblatt ‘Regulating domestic partnerships – a necessary step in the development of South African family law’ 2003 (120) *SALJ* 610 for an examination of the underlying reasons behind cohabitation.

<sup>43</sup> Goldblatt (note 58) at 616.

<sup>44</sup> Mwambene and Kruuse (note 58) at 311.

<sup>45</sup> *Ibid* at 311–312 and D Meyerson ‘Who’s in and who’s out? Inclusion and exclusion in the family law jurisprudence of the Constitutional Court of South Africa’ 2010 (3) *Constit. Ct. Rev.* 295; M Minow ‘Redefining families: Who’s in and who’s out?’ 1991 (62) *U. Colo. L. Rev.* 269 and *Volks v Robinson* (2005) 5 BCLR 446 (CC) para 171–174. For a general discussion of the trend internationally, see J Millbank ‘The role of functional family in same-sex recognition trends’ 2008 (20) *Child & Fam. LQ* 155.

<sup>46</sup> Mwambene and Kruuse (note 58) at 312.

<sup>47</sup> Goldblatt (note 58) at 615–616. This was the line of reasoning adopted by the majority in *Volks v Robinson* (note 61) para 55–56 and 91–94.

held by men and women mean that relationships are rarely equally negotiated.<sup>48</sup> It is because women, who are usually the weaker parties, are unable to protect themselves that the law is required to do so.<sup>49</sup>

The recommendation constitutes a radical shift in South African family law which offers exclusive protection to the institution of marriage. The courts have expanded the definition of 'spouse' to include different forms of marriages but have not prohibited the state from identifying marriage for special privileges.<sup>50</sup> In light of changing society needs, however, such as the declining rates of marriage and an increase in cohabitation, it is questionable why marriage continues to be privileged over other family forms.<sup>51</sup> The recommendation is to expand the protection to other relationships which function in a similar manner to marriage.

In the context of the Reform Act, the thesis recommends that a beneficiary should be allowed to inherit if he or she can prove a dependent relationship regardless of whether he or she satisfies the definition of spouse or descendant. The recommendation could be effected through an amendment to section 5 of the Reform Act which expands the Master's discretion to determine the devolution of property where there is a claim of factual dependency. This amendment would accomplish two objectives. First, it would provide recourse to women and children who experience evidential difficulties in proving their status as a 'spouse' or 'descendant' for the purposes of inheritance. Women must still prove the dependent relationship but are no longer at the mercy of the deceased's family to support their claims of a customary marriage and are not left unprotected where the marriage is declared invalid because of the complex legislative framework. Similarly, it allows children who can prove a dependent relationship to avoid having to make contested paternity and adoption claims.

Second, it encapsulates broader relationships of support such as where the deceased supports his parents, siblings, grandchildren or even nieces or nephews. This acknowledges that the

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<sup>48</sup> Goldblatt (note 58) at 616; the inequality in power relations was acknowledged by the majority in *Volks v Robinson* (note 61) para 64–65; B Meyersfeld 'If you can see, look: Domestic partnerships and the law' 2010 (3) *Const. Ct. Rev.* 271 at 282–283 and B Smith 'The interplay between registered and unregistered domestic partnerships under the Draft Domestic Partnerships Bill, 2008, and the potential role of the (contextualised) putative marriage doctrine' 2011 (128) *SALJ* 560 at 562.

<sup>49</sup> Goldblatt (note 58) at 616.

<sup>50</sup> *Daniels v Campbell* 2004 (5) SA 331 (CC); *Hassam v Jacobs* 2009 (5) SA 572 (CC) and *Govender v Ragavayah* 2009 (3) SA 178 (D). For a discussion of this see Meyerson (note 61) and Mwambene and Kruuse (note 58) at 312–313.

<sup>51</sup> Mwambene and Kruuse (note 58) at 311.

direction of dependent relationships is not constrained to parental and spousal relationships<sup>52</sup> and gives effect to Mnisi's recommendation for a broader concept of dependent.<sup>53</sup> It nonetheless conflicts with the SALRC's rejection of a dependent's right of inheritance because it 'would be casting the net too wide'.<sup>54</sup> The SALRC's reasoning, however, is unpersuasive as the inclusion of factual dependents protects such dependency where it exists rather than creates it. Where there are no factual dependents, its inclusion does not diminish the inheritance rights of the spouse and descendants. Furthermore, the conferral of a discretion on the Master to determine the devolution of property where there are factual dependents means that all factors including the existence of other heirs and the dependent's relationship to the deceased can be considered before making a just and equitable order.

There is support for such an approach in South African law in the Pension Funds Act.<sup>55</sup> Section 37C of the Pension Funds Act empowers the trustees of the pension fund to effect an equitable distribution of benefits among the deceased's nominated beneficiaries and dependents. The section is noteworthy as it allows the trustees to disregard the deceased's nominated beneficiaries in favour of the dependents of the deceased who are defined as the deceased's legal and factual dependents.<sup>56</sup> Legal dependents are uncontroversial and refer to individuals to whom the deceased may owe a legal duty of support such as a spouse, parent, grandparent, child, grandchild or sibling.<sup>57</sup> A factual dependent encapsulates anyone the deceased maintained though there was no legal duty to do so.<sup>58</sup> The rationale for this section is to ensure that individuals dependent on the deceased are not left destitute after the deceased's death.<sup>59</sup>

Similarly, South African courts have focused on family relationships and social practices in determining whether a duty of support exists between parties rather than the deceased's legal obligations.<sup>60</sup> For example, in *JT v Road Accident Fund*, the court held that an adopted child

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<sup>52</sup> Moore notes that intergenerational financial support is common though not reflected in law; available at <http://www.cssr.uct.ac.za/cssr/pub/wp/415> [accessed on 19/11/18].

<sup>53</sup> S Mnisi *The interface between living customary law(s) of succession and South African state law* (unpublished PhD thesis, Oxford New College, 2009) 346.

<sup>54</sup> South African Law Reform Commission (Project 90) *Report on the Customary law of succession* (2004) 59.

<sup>55</sup> Pension Funds Act 24 of 1956 (Pension Funds Act).

<sup>56</sup> Section 37C of the Pension Funds Act as read with the definition of dependant.

<sup>57</sup> L Nevondwe 'The distribution and payment of a death benefit in terms section 37C of the South African Pension Funds Act, 24 of 1956' 2010 (15) *Pensions: An International Journal* 38 at 40.

<sup>58</sup> *Ibid* at 40–41.

<sup>59</sup> *Ibid* at 39.

<sup>60</sup> E Moore 'Intergenerational family dependence: Contradictions in family policy and law' 2018 *CSSR Working Paper No. 415* 9.

acquired an enforceable right of support against her biological father because he had voluntarily assumed an obligation to support her financially after the adoption.<sup>61</sup> The courts have also held that voluntarily undertaking to support a relative creates an enforceable duty of support even where there is another living relative under a legal duty of support.<sup>62</sup> The courts recognise social practices and intergenerational relationships of support rather than legal duties and the specific relationships between parties.<sup>63</sup>

The functional approach accords with the current jurisprudence on the recognition of a duty of support. It recognises individuals whom the deceased supported as having a claim against the deceased's estate. It may, however, be criticised for casting the net too wide by allowing partners in same sex relationships who establish factual dependency to inherit from each other. The recognition of these relationships is controversial under customary law and the protection of such relationships may be perceived as the imposition of foreign beliefs and values on customary law. There is a dearth of research on these relationships despite a few such marriages having made headlines in recent years.<sup>64</sup> The recommendation, however, does not recognise these marriages or opine on its validity. Rather it posits that where an individual has voluntarily supported another to create a relationship of factual dependency and dies, the survivor may inherit from the deceased's estate. This protects against desertion and is applicable regardless of the form of the relationship. The recommendation may be achieved through a relatively simple amendment of the Act and most importantly it addresses many of the shortcomings of the Reform Act.

### 8.3.2 *Greater role for traditional institutions*

As discussed above, the accessibility of state offices remains an important consideration in the administration process. While significant strides have been made in trying to bring services to people, the sheer distance and cost to travel from the village to the service point and Master's Office remains an obstacle to reporting estates. For the elderly and poor community in Kwelanga, the distance of 15 km–20 km and costs varying from R10–R15 to the nearest service

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<sup>61</sup> *JT v Road Accident Fund* 2015 (1) SA 609 (GJ).

<sup>62</sup> *Keforilwe v Road Accident Fund* [2016] JOL 35680 (NWM) and *M v Road Accident Fund* (44393/2012) [2017] ZAGPPHC 247.

<sup>63</sup> Moore (note 76) 10.

<sup>64</sup> G Nkosi 'Indigenous African marriage and same-sex partnerships: Conflicts and controversies' 2007 (2) *International Journal of African Renaissance Studies* 200 at 205–207; T Wesi 'Lobolo from a gay perspective' 26 /11/2015 available at <https://citizen.co.za/news/south-africa/883829/lobola-from-a-gay-perspective/> [accessed on 20/11/18] and 'Gay wedding – Traditional African gay wedding first' ENCA 6 April 2013 available at <https://www.youtube.com/watch?v=1ZLB9Y7IPw8> [accessed on 20/11/18].

point is a barrier to accessing services. This is important to note as Kwelanga is not a deep rural village but rather located relatively close to the service point and nearest town. Many rural communities in South Africa are more remote and the difficulties with the distance and cost of travel to service points is exacerbated for them.

In the long term, wide systemic change is required to uplift the impoverished rural economy. The state must develop the rural economy which includes the construction of roads and the provision of basic services such as water, sanitation, reliable public transportation and telecommunications. The stimulation and growth of the economy would offer greater prospects of employment within the locality, which would reduce the need for individuals to leave their home in search of work and address the problems associated with the migrant labour system.

The development of the rural economy means that the accessibility of state offices would improve and the location of services at a service point and Master's Office may be feasible. Now, however, where communities are characterised by untarred roads, an informal taxi system, poverty and unemployment, the provision of services at a service point and Master's Office is problematic.

The issue of accessibility in the administration process may be addressed by involving traditional institutions such as the chief and family who are situated in the village and closer to people. For instance, individuals should be afforded the additional option of reporting their estates to the chief who would then be responsible for lodging the estates and relevant documents with the service point on a weekly basis. In this way individuals would not have to travel to the service point and would have the choice to report the estates within their community, which would save time and costs especially where individuals are missing documents and must return home to obtain them.

The service point and Master's Office should still exercise oversight in the administration process and the chief should be required to lodge the estates at the service point. Chiefs, of course, would have to be trained in the administration process as envisaged under the recommendation for further education of the reform process below.

The incorporation of chiefs, however, would create the opportunity for exploitation as was illustrated in the thesis where the chief solicited payments from widows for assistance in the administration process. It would therefore be necessary to institute regular audits and checks to ensure the accountability of chiefs in the process. The recommendation is further complicated

by the fact that traditional leadership is a complex issue in South Africa. Communities may not always have a chief or headman or the legitimacy and authority of the chief or headman may be in dispute.<sup>65</sup>

The objections discussed above are undeniable issues well-beyond the scope of this thesis. These problems, however, do not trump the need for accessible services which is an equally pressing issue. The recommendation seeks to leverage the services of chiefs who are salaried government employees and located within communities to deliver services. It recognises that traditional leadership is a recognised institution in South Africa<sup>66</sup> whose potential could be unlocked to alleviate the over-burdened state system in service delivery.<sup>67</sup> The details of such implementation, however, require further consideration in conjunction with the reform and regulation of traditional leadership institutions.

In addition, given that the thesis found families play a significant role in customary dispute resolution, the state administration process should include families in its dispute resolution process. Currently, state officials may at their discretion include families in mediating disputes, which means that they may in instances be overlooked. Mandating such involvement would leverage an important traditional mechanism for the generation and enforcement of solutions. The involvement of families through state offices would ensure oversight and guard against unwanted family coercion to forsake benefits. Ultimately, the incorporation of traditional institutions would strengthen the administration process.

### 8.3.3 Education

Ignorance of the statutory provisions is a significant problem in customary law reform.<sup>68</sup> In this regard, dissemination of reform of the law is important to promote the reporting of estates and ensure individuals are receptive to the implementation of the law. It may also influence how

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<sup>65</sup> C Himonga and T Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (2014) 235–251 and J Peires ‘History versus customary law: Commission on Traditional Leadership: Disputes and claims’ 2014 (49) *SACQ* 7.

<sup>66</sup> Sections 211(1) and (2) of the Constitution of the Republic of South Africa, 1996.

<sup>67</sup> It echoes the recommendation for the involvement of traditional leaders in the registration of customary marriages see South African Law Commission (Project 90) *Report on customary marriages (The harmonisation of the common law and the indigenous law)*(1998) 70. Himonga and Moore similarly argue that the critical role played by chiefs be recognised and they be designated to officially register customary marriages. In some areas traditional leaders register customary marriages in a separate but parallel system to that of the Department of Home Affairs which registration is used as proof of the customary marriage. There is, however, no co-ordination between the state and traditional leaders, and the authors recommend that the relationship be regularised; Himonga and Moore (note 10) 118–122.

<sup>68</sup> Himonga and Moore (note 10) 309–311.

individuals think about inheritance and promote the development of living customary law practices in accordance with state values and norms. This bottom up approach is more likely to ensure compliance with law reform.

There are currently significant efforts to disseminate knowledge regarding the new succession framework generally. The Master's Office along with non-governmental organisations run educational outreach programmes in rural areas to educate people, in among others, succession laws. The chief in Kwelanga had attended such a programme and was well-versed in the new dispensation. Only one woman in the case study, however, had attended an educational outreach programme on the change in the succession laws. The woman's house was within walking distance of the king's place where the programme was held, and it is speculated that residents from the surrounding homes were invited to the programme.

The capacity to conduct programmes is limited by budgetary and personnel constraints. While further programmes are desirable, they are not always feasible. In the current socio-economic context in which poverty and unemployment are rife, such programmes may understandably not be a priority of the South African state. As such, creative means may be required to achieve the dissemination of information.

The Department of Justice and Constitutional Development, responsible for the administration of estates, details the process on how to report an estate and how the property will devolve on its website.<sup>69</sup> The internet is perhaps one of the best tools for the dissemination of information as it is an effectual means of reaching a wide audience. While the cost of accessing the internet is problematic, the state may consider bearing the costs of such access and allow individuals to access these websites for free. In poor, deep rural areas access to devices such as computers or smart phones may nonetheless be problematic and the use of the internet alone to disseminate information is unlikely to be successful.

As the administration process involves other institutions such as the police, family council, chief and headman, these institutions should be brought into the fold in the dissemination process. For example, the police currently play a role in the administration process by mediating disputes and the recommendation is that they are educated in the regulatory framework so that

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<sup>69</sup> See <http://www.justice.gov.za/master/deceased.html> [accessed on 10/09/18].

their mediation aligns with state efforts. This places no additional burden on resources but better equips the institutions involved in the administration process to enforce statutory law.<sup>70</sup>

Similarly, the education of persons in customary institutions, such as the chief, headman and elders in the family, means that they can disseminate knowledge within the community which may be more receptive to traditional institutions. These institutions are also then more likely to enforce state law by mediating disputes in accordance with state norms and values.

#### *8.3.4 Condemnation of fraudulent state practices*

The study revealed that property grabbing usually manifests as coercion on a beneficiary to share benefits from the estate rather than outright violence. The misadministration and corruption by state officials is particularly alarming as it happens through state channels. The risk is that it is established as a ‘legitimate’ practical norm and that individuals are unable to report their estates without compliance with corrupt and unlawful norms. The serious risk this poses for property grabbing necessitates a condemnation of fraudulent state practices.

It is thus recommended that the Master’s Office and Department of Home Affairs issue an explicit condemnation of bribery and fraudulent practices by state officials. Such condemnation should be published on the relevant websites and in the offices frequented by the public. The public must be informed that such conduct is unlawful and not condoned. Furthermore, the public must be informed of their rights of recourse and encouraged to escalate such issues to a higher authority with the assurance that their interests would not be prejudiced. The outright and explicit condemnation of corrupt practices and encouragement to report them if they occur will hopefully prevent such practices from taking root as ‘legitimate’ practical norms. While this alone is unlikely to combat corruption, it is recommended as a practical action that may be easily implemented.

#### *8.3.5 Further research into customary law practices*

The findings of this study demonstrate a glaring need for further research into the administration of customary law estates. First, focused research is required with respect to polygynous marriages, seed raiser unions and woman-to-woman marriages, which are specifically protected

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<sup>70</sup> Himonga and Moore similarly recommend that the police be used as a conduit of correct information regarding the Recognition of Customary Marriages Act 120 of 1998 and its consequences. Individuals were found to turn to the police to resolve marital conflicts upon exiting a marriage and thus Himonga and Moore recommended that the police be educated and empowered to disseminate correct information; Himonga and Moore (note 10) 181.

in the Reform Act. These practices are not prevalent in Kwelanga and appear to be on the decline. Nevertheless, research is required to understand how these relationships are practised today, not only in Kwelanga, but in other ethnic groups, and whether the provisions adequately protect parties involved in them.

Second, the study did not examine the administration process from the perspective of individuals who live according to customary law in urban areas and further study in this area is required. It is speculated that individuals in urban areas do not struggle to access services or ascertain information that protects them from property grabbing and subtle encroachments of their rights. Further research is urgently needed to understand differences, if any, in the rural and urban experience and how the rights of individuals in rural areas can be bolstered.

The recommendation is not oblivious to the costs of research. The SALRC declined a comprehensive investigation into the customary law of succession because it would be too costly.<sup>71</sup> It did, however, maintain that effectual reform cannot be achieved without understanding the nuanced experiences of people. Furthermore, successful reform necessitates research into the law which cannot be dispensed with when difficult or costly. Targeted and strategic research projects and partnerships between state and non-state institutions must be investigated and promoted to yield valuable information to shape reform.

## **8.4 Conclusion**

The findings of the case study have been summarised in relation to the research questions. Administration of estates comprises the processing of the estate and mediating of disputes. Customary law estates are administered by a combination of institutions such as the Master's Office and service point, as well as the family council, chief and police, not expressly provided for in the legislation. However, there is a distinct lack of collaboration among the institutions which should in future be promoted to improve the administration process.

Institutions administer estates through a combination of state law and customary law, including norms, policies and repertoires generated by state officials and ordinary individuals. The Reform Act has not replaced the customary law of succession which regulates the devolution of homes in rural areas, often the most important asset in the estate. These properties devolve outside the purview of the state. In Kwelanga, customary law dictates that the widow assumes

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<sup>71</sup> South African Law Commission Discussion Paper 93 (Project 90) *Customary law of succession* (2000) xiv.

the home, but this may not be representative of all communities. For this reason, oversight mechanisms should be incorporated into the administration process to guard against homes devolving in accordance with the principle of male primogeniture, previously declared unconstitutional.

Furthermore, institutions have for the most part been successful in the implementation of the Reform Act. A significant driver in compliance is the heavily regulated financial industry in South Africa. Individuals are forced to report estates to access bank accounts which has in turn allowed for the state administration of estates. The implementation of the Act, however, has not been without difficulties. One of the most significant problems has been proving the existence of a customary marriage, particularly where the marriage is unregistered and the deceased's family denies the existence of the marriage. The administration process has not been adapted to cater for the inherently customary law problem of unregistered marriages and officials have had to grapple with how to address the resultant evidential difficulties.

On the other hand, the state appears to be acutely aware of the difficulties experienced by individuals living in rural areas in reporting estates and addresses the problem head on. Magistrate's courts, which are situated in closer proximity to communities, have been designated as service points that can administer estates within certain parameters. In addition, several targeted interventions in this arena, such as the secondment of assistant masters to service points, the online system of capturing estates and the linking of the databases of the Master's Office and the Department of Home Affairs, facilitate the administration process.

Nonetheless, the experience of the administration of estates differs among individuals. Women report estates more frequently than men but are vulnerable to violent, property grabbing. The subtle encroachments on property rights which are more pervasive and not perceived as dangerous are equally threatening to women's property interests. Extravagant funerals, solicited payments and corruption all separate the widow from her property leaving an impoverished estate to support the widow and her children. On the other hand, men enjoy secure title to estates and are generally immune to property grabbing.

Several factors promote the realisation of inheritance rights such as proof of marriage, the type of marriage concluded, the rural / urban divide and finally the involvement of traditional fora in the administration process. Importantly, the study underscored how individuals experience these factors differently and qualitative research is essential to understand the operation of the factors.

Finally, the chapter made several recommendations for the improvement of the reform process. First, it recommended a move to a functional approach to family relationships and the extension of the right to inheritance to factual dependents. This extends protection to all relationships of support. Second, to provide greater accessibility of services, the chapter recommends that chiefs are incorporated into the administration process. Third, it argues for greater dissemination of the new laws to shape the evolution of living customary law practices. Fourth, it advocates for the explicit condemnation of fraudulent state practices as a first step to combat corruption. Finally, it argues that the thesis should be a springboard for greater research into customary law practices to improve the Reform Act itself and effectual customary law reform generally.

## **CHAPTER 9      CONCLUSION**

### **9.1      Introduction**

The findings from the case study were presented and research objectives addressed in Chapter 8. A succinct summary of the thesis is now provided as the conclusion.

### **9.2      Theoretical framework**

The South African state recognises customary law but articulates the parameters for its recognition and application in statute and precedent known as official customary law. The state regulation of customary law accords with the notion of weak or state legal pluralism. This description, however, belies the legal reality revealed in the thesis through an examination of the administration of customary law estates.

The Reform of Customary Law of Succession Act<sup>1</sup> regulates the devolution of estates of individuals who lived according to customary law but died without a will. Living customary law applies alongside the Reform Act and regulates the devolution of homes situated in the rural areas. This application of customary law is not apparent from the Reform Act but is a result of the practical norms formulated by state officials in the implementation of the Act. Officials exclude homes in the village because the homes are non-titled and cannot be valued and transferred in the same manner as other immovable property. The result is that customary law – living customary law, that is – plays a significant role in regulating the devolution of property.

Living customary law, the system of law found in the practices of a community, is best understood in terms of the theoretical concepts of strong legal pluralism and the semi-autonomous social field. While it emanates from people and operates independently of state recognition, it is nonetheless influenced by the state and evolves to reflect outside socio-economic and legal developments. The application of living customary law alongside official customary law and practical norms formulated by officials and individuals suggests that the administration of estates is a multi-faceted affair.

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<sup>1</sup> Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 ('the Reform Act').

Ignoring the legal reality in favour of the constructed veneer that state law is supreme results in blind spots in the law and ineffectual reform. For example, customary law regulates the devolution of homes in the village, yet state officials exercise no oversight thereof nor do they, at the very least, have knowledge as to the content of the law. This risks homes devolving in accordance with the unconstitutional principle of male primogeniture. Furthermore, state officials focus on the implementation of the statutory provisions and ignore the operation of other laws and norms which may result in a usurpation of a beneficiary's inheritance rights. Moreover, they fail to effectively mobilise other institutions such as the police, traditional leaders and ordinary individuals to formulate safeguards against property grabbing.

The thesis thus adopts the theoretical framework of strong legal pluralism as it represents a more realistic picture (on the ground) of the current South African legal system. It takes cognisance of the multiple laws, norms, practices, institutions and actors active in the administration of estates to obtain a comprehensive understanding of the process.

### **9.3 Socio-economic context and overview of state process**

South Africa is a country with high levels of poverty and inequality. The consequences of years of state-imposed apartheid linger as the rural areas or former homelands remain largely underdeveloped regarding access to transportation, education, employment and telecommunications. The migrant labour system continues as men frequently leave the rural areas in search of work in cities.

The thesis examined the administration of estates through a case study of a village, referred to as Kwelanga, in South Africa. The prevailing socio-economic conditions in Kwelanga contextualise the study and explain many of the findings such as the difficulties in travelling to state offices to report an estate or an individual having a civil 'wife' in the city and a customary wife in the village. Thus, the case study provides insights into the administration process for individuals living in rural areas. The experience may differ significantly for individuals in urban areas and follow-up research on this is required.

The Master's Office has exclusive jurisdiction over estates larger than R250 000 or when there are complex or disputed issues. This entails a comprehensive administration process that requires the estate be advertised, accounts drawn up and the executor account for the distribution of the estate. The sophisticated nature of the process means that an attorney is usually required to act as an executor or assist with reporting the estate, adding to the

administration costs. The protracted process of administration is a rarity in Kwelanga and thus the thesis focused on the administration of small estates.

Kwelanga is serviced by a nearby service point and Master's Office. Certain magistrate's courts are designated service points with jurisdiction to administer estates smaller than R250 000, referred to as small estates. Most estates in the case study were small estates and administered in accordance with the truncated administration process set out in section 18(3) of the Administration of Estates Act.<sup>2</sup> The abridged process is efficient and inexpensive, but there is no accountability after a letter of authority has been issued to the administrator authorising him or her to take charge of the estate. The administrator does not explain the distribution of the estate nor do beneficiaries confirm receipt of benefits. Consequently, individuals may under report an estate or report assets in stages in order to use the preferred section 18(3) process.

Finally, the Reform Act is meant to apply to individuals who are subject to customary law, who die after its commencement date and whose estates do not devolve in terms of a will. The Act does not provide any guidance as to when an individual is subject to customary law. In adjudicating such matters, the courts are likely to rely on previously judicially formulated indicators of when to apply common law or customary law. In the case of succession, the type of marriage concluded (whether it is a common law or customary law marriage) is likely to be determinative. In the absence of a marriage, the court may draw distasteful inferences from the lifestyle of the parties, their schooling, residence and even religion. In reality, officials responsible for the administration of estates overlook the question of whether an individual is subject to customary law and apply the Intestate Succession Act<sup>3</sup> to regulate the devolution of property. Customary law practices, such as polygyny, are automatically accommodated when encountered. Similarly, officials apply the Reform Act to all new intestate estates reported regardless of the date of death. The approach reveals the pragmatism of state officials who are meant to implement the Act. The easiest and most efficient approach is adopted rather than embarking on difficult judgments on whether an individual is subject to customary law.

#### **9.4 The communal nature of the customary law of succession**

Customary law succession was historically premised on the perpetuation of the family and the best interests of the group. The communal nature continues to manifest itself in Kwelanga in

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<sup>2</sup> Administration of Estates Act 66 of 1965.

<sup>3</sup> Intestate Succession Act 81 of 1987 ('Intestate Succession Act').

the devolution of homes in the village to the widow who administers the property for the benefit of her family. The application of the principle of male primogeniture has been diluted in favour of the selection of an heir to ensure the best interests of the family.

Individuals also use verbal dispositions of property which take effect upon the deceased's death to secure the well-being of the family. While the Reform Act abolishes such dispositions, they remain an important means to share property with non-heirs, circumvent disputes regarding the property and fortify the well-being of family members.

An important finding in the case study was the discovery of funerals as elaborate and costly events. The funeral proceedings are a significant burden on the estate as a substantial amount of money and livestock is used in the funeral process leaving very little to sustain the surviving family thereafter. At this critical point, the family and community at large provide financial and emotional support to the bereaved family in the form of physical assistance, funds and groceries to conduct the funeral.

The administration of customary law estates thus evinces communitarian aspects despite the adoption of the common law Intestate Succession Act which favours the individualised inheritance of property.

## **9.5 The patriarchal nature of the customary law of succession**

The principle of male primogeniture, where the closest male relative succeeds as head of the household and usually to the exclusion of females, has notoriously characterised customary law succession in the past. Patriarchal features of the law were exaggerated and entrenched during the apartheid era leaving the system in dire need of revision.

Under the new legislative regime, the principle of male primogeniture has been abolished and the common law Intestate Succession Act adopted which does not distinguish between genders in inheritance. In small estates, the estate is inherited by the surviving spouse, usually the widow, which is generally given effect to in practice. Moreover, the widow inherits the home in the village and uses it to care for her family. Verbal disposition of property by the deceased prior to his death further dilutes the principle of male primogeniture.

The emergence of greater egalitarian practices of succession in Kwelanga points to a dilution of patriarchal norms and greater rights for women. The practice cannot definitively be attributed

to the adoption of the Reform Act and is likely to be due to developments in living customary law, which by its nature responds to changes in the external legal order.

Nonetheless, patriarchal practices persist as sons remain the favoured heirs and there are substantial differences in the nature of rights across the genders. Women are precluded from establishing their families in the homes in the village which are expected to devolve through the male line. Consonant with these patriarchal influences, mourning customs are much more restrictive for widows than for widowers, thereby placing women, who are expected to adopt a demure and submissive demeanour, at risk of property grabbing. Indeed, the most striking difference in the nature of rights between the genders is the secure rights of widowers to the property. Where widowers stand to inherit, they do so automatically and face no challenges from other family members. The widower is generally regarded the owner of the entire estate and the death of his wife does not trigger any inheritance questions. Only widows were at risk of property grabbing, illustrating the security of men in inheritance. Thus, the study revealed the limitations of state interventions and how more is required to change deeply-held beliefs which favour and secure the interests of men over women.

## **9.6 Beneficiaries under the Reform Act**

Customary law intestate estates devolve in accordance with the Reform Act as read with Intestate Succession Act. Beneficiaries under customary law succession are akin to those under the common law. The devolution of property occurs in accordance with rigid pre-determined rules rather than on need or taking into account the particular family structure. Thus, individuals who may have been supported while the deceased was alive may find themselves with no support upon the deceased's death.

In estates smaller than R250 000 – which most estates in the case study were – the estate is inherited by the surviving spouse. As men tend to be the breadwinners, widows seek to benefit from the estate more frequently than widowers. The definition of spouse has been amended to accommodate polygynous marriages, seed raiser arrangements and woman-to-woman marriages. These arrangements were not prevalent in Kwelanga, leaving uncertainty as to their practical effect. The findings suggest that the definition of a spouse is under inclusive as it fails to protect cohabitants and unmarried partners, which have emerged as growing practices across South Africa.

Unmarried partners may have greater rights under living customary law. Where parties have children or have cohabited for a significant period, they are likely to be treated as married by the community and inherit the property. The recognition, however, does not extend to the formal sector and some women formalise their marriage to the deceased after his death to secure their precarious rights while others remain at risk of property grabbing.

Family property is not defined in the Act but is generally understood to be property which serves the interests of multiple family members. The Act appears cognisant that it may be inappropriate for such property to devolve to a single heir and provides for its devolution in accordance with the directions of the Master. There is scant evidence of the application of such provisions in reality. Thus, there are many unanswered questions such as: Does family property exist today? How is it identified? How does it devolve? The only excluded property unearthed were homes in the village on the pragmatic basis that they did not have title deeds and were not transferable in the normal course, the intimation being that had the homes been titled they would have devolved in accordance with the Reform Act.

## **9.7 Property grabbing and risk factors**

The statutory protection of rights is no guarantee of the realisation of rights. Individuals may be usurped of their rights through property grabbing. Property grabbing usually manifests itself in physical violence, threats thereof and allegations of witchcraft for which there is perceived to be no solution. These violent measures endanger the life and safety of individuals but remain invisible to state officials and the formal state administration.

More subtle forms of coercion are extravagant funerals, solicited payments by chiefs for assistance in reporting an estate and corruption by state officials. These are nuanced measures through which beneficiaries may be separated from their inheritance rights. These forms of coercion are not presented as property grabbing but are pervasive and pose a significant danger to individuals enjoying their inheritance rights.

Gender, the nature of the estate, the type of marriage, proof of status as a beneficiary, the urban / rural divide and the existence of a polygynous marriage have been identified as the greatest risk factors for property grabbing. The recommendation for a functional approach in the identification of beneficiaries, incorporation of chiefs in the administration process and greater educational drives regarding the succession process are meant to address the risk factors and

ameliorate the risk of property grabbing. These are long-term measures to a problem for which there is no easy and immediate solution.

## **9.8 Concluding remarks**

In September 2010, South Africa brought into force the much-anticipated Reform Act. After years of judicial activism in the arena, the Act was meant to reform the customary law of succession in line with constitutional norms. The Act applies a modified version of the Intestate Succession Act to regulate the devolution of property of individuals who live according to customary law and die without a will.

As is discussed above, the study examined the implementation of the Reform Act through a case study of a rural village in South Africa. It provided invaluable insights into the implementation of the Act and people's experiences thereof. It revealed how living customary law remains a resilient and robust system of law which interacts with the Reform Act to regulate the devolution of property. It is hoped that the study provides a springboard for further research and the recommendations are effected to improve the law that affects the lives of millions of South Africans.

## Annexure A – Reform Act

### REFORM OF CUSTOMARY LAW OF SUCCESSION AND REGULATION OF RELATED MATTERS ACT, NO. 11 OF 2009

[ASSENTED TO 19 APRIL, 2009]  
[DATE OF COMMENCEMENT: 20 SEPTEMBER, 2010]  
(English text signed by the President)

This Act has been updated to Government Gazette 37254 dated 22 January, 2014.

as amended by

Judicial Matters Amendment Act, No. 42 of 2013  
[with effect from 22 January, 2014, unless otherwise indicated]

#### ACT

To modify the customary law of succession so as to provide for the devolution of certain property in terms of the law of intestate succession; to clarify certain matters relating to the law of succession and the law of property in relation to persons subject to customary law; and to amend certain laws in this regard; and to provide for matters connected therewith.

#### PREAMBLE

SINCE a widow in a customary marriage whose husband dies intestate does not enjoy adequate protection and benefit under the customary law of succession;

AND SINCE certain children born out of a customary marriage do not enjoy adequate protection under customary law;

AND SINCE section 9 of the Constitution provides that everyone has the right to equal protection and benefit of the law;

AND SINCE social circumstances have so changed that the customary law of succession no longer provides adequately for the welfare of family members;

AND SINCE the Constitutional Court has declared that the principle of male primogeniture, as applied in the customary law of succession, cannot be reconciled with the current notions of equality and human dignity as contained in the Bill of Rights,

#### ARRANGEMENT OF SECTIONS

1. Definitions
2. Modification of customary law of succession
3. Interpretation of certain provisions of Intestate Succession Act
4. Disposition of property allotted or accruing to woman in customary marriage
5. Dispute or uncertainty in consequence of nature of customary law
6. Disposal of property held by traditional leader in official capacity
7. Property rights in relation to certain customary marriages
8. Amendment of laws
9. Short title and commencement  
Commencement of this Act  
Schedule

Parliament of the Republic of South Africa therefore enacts as follows:—

**1. Definitions.**—In this Act, unless the context indicates otherwise—

“**customary law**” means the customs and practices observed among the indigenous African people of South Africa which form part of the culture of those people;

“**descendant**” means a person who is a descendant in terms of the Intestate Succession Act, and includes—

- (a) 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; and
- (b) a woman referred to in section 2 (2) (b) or (c);

**"house"** means the family, property, rights and status which arise out of the customary marriage of a woman;

**"Intestate Succession Act"** means the Intestate Succession Act, 1987 (Act No. 81 of 1987);

**"spouse"** includes a partner in a customary marriage that is recognised in terms of section 2 of the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998);

**"traditional leader"** means a traditional leader as defined in section 1 of the Traditional Leadership and Governance Framework Act, 2004 (Act No. 41 of 2004);

**"this Act"** includes any regulation made under section 5; and

**"will"** means a will to which the provisions of the Wills Act, 1953 (Act No. 7 of 1953), apply.

**2. Modification of customary law of succession.**—(1) The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2).

(2) In the application of the Intestate Succession Act—

- (a) where the person referred to in subsection (1) is survived by a spouse, as well as a descendant, such a spouse must inherit a child's portion of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of justice by notice in the *Gazette*, whichever is the greater;
- (b) a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased;
- (c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.

**3. Interpretation of certain provisions of Intestate Succession Act.**—(1) For the purposes of this Act, any reference in section 1 of the Intestate Succession Act to a spouse who survived the deceased must be construed as including every spouse and every woman referred to in paragraphs (a), (b) and (c) of section 2 (2).

(2) For the purposes of this Act and in the application of section 1 (1) (c) of the Intestate Succession Act, the following subparagraph must be regarded as having been added to that section:

"(iii) where the intestate estate is not sufficient to provide each surviving spouse and woman referred to in paragraphs (a), (b) and (c) of section 2 (2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, with the amount fixed by the Minister, the estate shall be divided equally between such spouses;"

[Sub-s. (2) amended by s. 42 of Act No. 42 of 2013 deemed to have come into operation on 20 September 2010.]

(3) In the determination of a child's portion for the purposes of dividing the estate of a deceased in terms of the Intestate Succession Act, paragraph (f) of section 1 (4) of that Act must be regarded to read as follows:

"(f) a child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived the deceased or have died before the deceased but are survived by their descendants, plus the number of spouses and women referred to in paragraphs (a), (b) and (c) of section 2 (2) of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009."

[Sub-s. (3) amended by s. 42 of Act No. 42 of 2013 deemed to have come into operation on 20 September 2010.]

**4. Disposition of property allotted or accruing to woman in customary marriage.**—(1) Property allotted or accruing to a woman or her house under customary law by virtue of her customary marriage may be disposed of in terms of a will of such a woman.

(2) Any reference in the will of a woman referred to in subsection (1) to her child or children and any reference in section 1 of the Intestate Succession Act to a descendant, in relation to such a woman, must be construed as including any child—

- (a) born of a union between the husband of such a woman and another woman entered into in accordance with customary law for the purpose of providing children for the first-mentioned woman's house; or
- (b) born to a woman to whom the first-mentioned woman was married under customary law for the purpose of providing children for the first-mentioned woman's house.

(3) Nothing in this section is to be construed as preventing any person subject to customary law, other than the woman referred to in subsection (1), from disposing assets in terms of a will.

**5. Dispute or uncertainty in consequence of nature of customary law.**—(1) If any dispute or uncertainty

arises in connection with—

- (a) the status of or any claim by any person in relation to a person whose estate or part thereof must, in terms of this Act, devolve in terms of the Intestate Succession Act;
- (b) the nature or content of any asset in such estate; or
- (c) the devolution of family property involved in such estate,

the Master of the High Court having jurisdiction under the Administration of Estates Act, 1965 (Act No. 66 of 1965), may, subject to subsection (2), make such a determination as may be just and equitable in order to resolve the dispute or remove the uncertainty.

(2) Before making a determination under subsection (1), the Master may direct that an inquiry into the matter be held by a magistrate or a traditional leader in the area in which the Master has jurisdiction.

(3) After the inquiry referred to in subsection (2), the magistrate or a traditional leader, as the case may be, must make a recommendation to the Master who directed that an inquiry be held.

(4) The Master, in making a determination, or the magistrate or a traditional leader, as the case may be, in making a recommendation referred to in this section, must have due regard to the best interests of the deceased's family members and the equality of spouses in customary and civil marriages.

(5) The Cabinet member responsible for the administration of justice may make regulations regarding any aspect of the inquiry referred to in this section.

**6. Disposal of property held by traditional leader in official capacity.**—Nothing in this Act is to be construed as amending any rule of customary law which regulates the disposal of the property which a traditional leader who has died held in his or her official capacity on behalf of a traditional community referred to in the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003).

**7. Property rights in relation to certain customary marriages.**—(1) A marriage under the Marriage Act, 1961 (Act No. 25 of 1961), does not affect the proprietary rights of any spouse of a customary marriage or any issue thereof if the marriage under the Marriage Act, 1961, was entered into—

- (a) on or after 1 January 1929 (the date of commencement of sections 22 and 23 of the Black Administration Act, 1927 (Act No. 38 of 1927)), but before 2 December 1988 (the date of commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988 (Act No. 3 of 1988)); and
- (b) during the subsistence of any customary marriage between the husband and any woman other than the spouse of the marriage under the Marriage Act, 1961 (Act No. 25 of 1961).

(2) The widow of the marriage under the Marriage Act, 1961, referred to in subsection (1), and the issue thereof have no greater rights in respect of the estate of the deceased spouse than she or they would have had if the marriage under the Marriage Act, 1961, had been a customary marriage.

**8. Amendment of laws.**—The laws mentioned in the Schedule are hereby amended to the extent indicated in the third column of that Schedule.

**9. Short title and commencement.**—This Act is called the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, and comes into operation on a date fixed by the President by proclamation in the Gazette.

#### COMMENCEMENT OF THIS ACT

<i>Date of commencement</i>	<i>The whole Act/ Sections</i>	<i>Proclamation No.</i>	<i>Government Gazette</i>	<i>Date of Government Gazette</i>
20 September, 2010	The whole Act	R.54	33576	17 September, 2010
This Act was published in <i>Government Gazette</i> 32147 dated 21 April, 2009.				

#### Schedule AMENDMENT OF LAWS

(Section 8)

<i>No. and year of law</i>	<i>Short title</i>	<i>Extent of amendment</i>
Act 66 of 1965	Administration of Estates Act, 1965	1. Amends section 4 as follows:—paragraph (a) substitutes the words preceding paragraph (a) in subsection (1); and paragraph (b) deletes subsection (1A).

		2. <i>Amends section 7 (1) by substituting paragraph (a).</i>
		3. <i>Amends section 9 (1) by substituting the words preceding paragraph (a).</i>
Act 81 of 1987	Intestate Succession Act, 1987	1. <i>Amends section 1 as follows:—paragraph (a) substitutes subsection (2); paragraph (b) substitutes subsection (4) (b); paragraph (c) inserts subsection (4) (eA); and paragraph (c) inserts subsection (5A).</i>
Act 27 of 1990	Maintenance of Surviving Spouses Act, 1990	1. <i>Amends section 1 by substituting the definition of "survivor".</i>



## Annexure B – Intestate Succession Act

### INTESTATE SUCCESSION ACT NO. 81 OF 1987

[View Regulation]

[ASSENTED TO 30 SEPTEMBER, 1987]  
[DATE OF COMMENCEMENT: 18 MARCH, 1988]  
(English text signed by the State President)

This Act has been updated to Government Gazette 33576 dated 17 September, 2010.

#### as amended by

Law of Succession Amendment Act, No. 43 of 1992

Reform of Customary Law of Succession and Regulation of Related Matters Act, No. 11 of 2009

#### ACT

To regulate anew the law relating to intestate succession; and to provide for matters connected therewith.

#### ARRANGEMENT OF SECTIONS

- |          |                              |
|----------|------------------------------|
| 1.       | Intestate succession         |
| 2.       | Repeal of laws               |
| 3.       | Short title and commencement |
| Schedule | Laws repealed                |

**1. Intestate succession.**—(1) If after the commencement of this Act a person (hereinafter referred to as the “deceased”) dies intestate, either wholly or in part, and—

- (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
- (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
- (c) is survived by a spouse as well as a descendant—
  - (i) such spouse shall inherit a child’s share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister of Justice by notice in the Gazette, whichever is the greater; and
  - (ii) such descendant shall inherit the residue (if any) of the intestate estate;
- (d) is not survived by a spouse or descendant, but is survived—
  - (i) by both his parents, his parents shall inherit the intestate estate in equal shares; or
  - (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or
- (e) is not survived by a spouse or descendant or parent, but is survived—
  - (i) by—
    - (aa) 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
    - (bb) descendants of his deceased parents who are related to the deceased through both such parents; or
    - (cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb),

the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or

- (ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;

- (f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.

(2) Notwithstanding the provisions of any law or the common or customary law, but subject to the provisions of this Act and sections 40 (3) and 297 (1) (f) of the Children's Act, 2005 (Act No. 38 of 2005), having been born out of wedlock shall not affect the capacity of one blood relation to inherit the intestate estate of another blood relation.

[Sub-s. (2) substituted by s. 8 of Act No. 11 of 2009.]

(3) A notice mentioned in subsection (1) (c) (i) shall not apply in respect of the intestate estate of a person who died before the date of that notice.

(4) In the application of this section—

- (a) in relation to descendants of the deceased and descendants of a parent of the deceased, division of the estate shall take place *per stirpes*, and representation shall be allowed;

- (b) **"intestate estate"** includes any part of an estate which does not devolve by virtue of a will;

[Para. (b) substituted by s. 8 of Act No. 11 of 2009.]

- (c) . . . . .

[Para. (c) deleted by s. 14 (a) of Act No. 43 of 1992.]

(d) the degree of relationship between blood relations of the deceased and the deceased—

- (i) in the direct line, shall be equal to the number of generations between the ancestor and the deceased or the descendant and the deceased (as the case may be);

- (ii) in the collateral line, shall be equal to the number of generations between the blood relations and the nearest common ancestor, plus the number of generations between such ancestor and the deceased;

(e) an adopted child shall be deemed—

- (i) to be a descendant of his adoptive parent or parents;

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

(eA) a person referred to in paragraph (a) of the definition of "descendant" contained in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, shall be deemed—

- (i) to be a descendant of the deceased person referred to in that paragraph;

- (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, as envisaged in the said definition, or was, at the time when the child was accepted, married to the parent who so accepted the child; and

[Para. (eA) inserted by s. 8 of Act No. 11 of 2009.]

- (f) a child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to the number of children of the deceased who have either survived him or have died before him but are survived by their descendants, plus one.

(5) If an adopted child in terms of subsection (4) (e) is deemed to be a descendant of his adoptive parent, or is deemed not to be a descendant of his natural parent, the adoptive parent concerned shall be deemed to be an ancestor of the child, or shall be deemed not to be an ancestor of the child, as the case may be.

(5A) If a person referred to in paragraph (a) of the definition of "descendant" contained in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009, is deemed to be a descendant of the deceased person referred to in that paragraph, 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 the person referred to in that paragraph, or shall be deemed not to be an ancestor of that person, as the case may be.

[Sub-s. (5A) inserted by s. 8 of Act No. 11 of 2009.]

(6) If a descendant of a deceased, excluding a minor or mentally ill descendant, 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.

[Sub-s. (6) added by s. 14 (b) of Act No. 43 of 1992.]

(7) If a person is disqualified from being an heir of the intestate estate of the deceased, or renounces his right to be such an heir, any benefit which he would have received if he had not been so disqualified or had not so renounced his right shall, subject to the provisions of subsection (6), devolve as if he had died immediately before the death of the deceased and, if applicable, as if he was not so disqualified.

[Sub-s. (7) added by s. 14 (b) of Act No. 43 of 1992.]

**2. Repeal of laws.**—The laws specified in the Schedule are hereby repealed to the extent set out in the third column of the Schedule.

**3. Short title and commencement.**—This Act shall be called the Intestate Succession Act, 1987, and shall come into operation on a date to be fixed by the State President by proclamation in the *Gazette*.

**Schedule**  
**LAWS REPEALED**

<i>No. and year of law</i>	<i>Title, subject or heading</i>	<i>Extent of repeal</i>
The Political Ordinance of 1 April 1580 ("Groot Placaet-Boek", Part 1)	"Ordonnantie van die Policien binnen Hollandt."	Sections 19 to 28, inclusive
Interpretation of 13 May 1594 ("Groot Placaet-Boek", Part 1)	"Verklaringe van de Heeren Staten van Hollandt en de Wes-Vrieslandt op de Ordonnantie van de Successien."	The whole
Octrool of 10 January 1661 ("Groot Placaet-Boek", Part 2)	"Octroy, by haer Hoogh Mog: Verleent aende Oost-Indische Compagnie deser Landen op 't recht van de Successien ab intestato in Oost-Indien, ende op de reyse gints ende herwaerts."	The whole
Act No. 13 of 1934	Succession Act, 1934	The whole
Act No. 93 of 1962	General Law Further Amendment Act, 1962	Section 15
Act No. 44 of 1982	Succession Amendment Act, 1982	The whole
Act No. 88 of 1984	Matrimonial Property Act, 1984	Section 27

## **Annexure C – Pre-screening questionnaire**

Name:

Age:

Occupation:

- 1 Have you benefited from the property of a deceased person?
- 2 Do you know the other beneficiaries or people affected by it, even if they didn't benefit?
- 3 Can you provide me with their details so I can interview them as well?
- 4 Do you know the process of how the deceased person's property was distributed?
- 5 Do you know rules which determine who will benefit from a deceased person's property?

## **Annexure D – Individual interview questions**

Name:

Age:

Occupation:

Where do you work:

Schooling:

Marital status:

- 1 Who was the individual who died?
- 2 How were they related to you?
- 3 Describe the deceased. Was he / she married, have children, employed and where did they live?
- 4 How was the deceased's property distributed after his / her death?
  - a. Was there a family meeting?
  - b. Who attended the meeting? Were women and children present and allowed to speak?
  - c. What kind of property was involved? Family / individual / house property? Movable / immovable?
  - d. Did the deceased have a pension fund, bank account or money with an employer?
  - e. If yes, how was this property accessed and distributed?
  - f. What was the allocation of property?
- 5 Was the estate reported to a service point / Master's Office?
- 6 If yes, who reported it?
- 7 Who was given the letter of authority?
- 8 Do you understand what the letter of authority is?
- 9 Do people in the community understand what the letter of authority is?
- 10 Did the person with the letter authority oversee the distribution of the property?
- 11 Did the person with the letter of authority benefit from the deceased's property?
- 12 If no, why did you not report it? Did you know about the need to report it?
- 13 Do you think that if people knew an estate had to be reported they would do so?
- 14 Are you aware of the Reform Act or state law regulating succession?
- 15 If yes, what does it say?

- 16 Are you aware of the *Bhe* decision?
- 17 If yes, what does it say?
- 18 How does the distribution of property accord with the state law?
- 19 Were there any disputes regarding the distribution of property?
- 20 How were the disputes resolved?
- 21 If people were still unhappy, was there anything they could do?
- 22 Was the matter reported to a traditional leader / headman?
- 23 When would a matter be reported to a traditional leader or headman?
- 24 What is the role of the traditional leader / headman in succession disputes?
- 25 Is the ruling of the traditional leader / headman followed?
- 26 If the deceased only had a wife and daughters, and no male sons, how would the property be distributed? Would his father and brothers have a claim?
- 27 Would the wife and daughters be looked after?
- 28 Would they have any recourse if they were unhappy?
- 29 What would happen if an heir took property but did not look after the family members?

## Annexure E – Questions for focus group

Name:

Age:

- 1 Can you explain how a deceased's property is distributed after his / her death?
  - a. Is there a family meeting?
  - b. Who attends the meeting? Are women and children present and allowed to speak?
  - c. Does it matter what kind of property is involved? Family / individual / house property? Movable / immovable? Where is the property situated (city or rural area)?
  - d. How is the property distributed?
- 2 Are you aware of the need to report estates to a service point?
- 3 If yes, who should report it?
- 4 Who should be given the letter of authority?
- 5 Do you understand what the letter of authority is?
- 6 Do people in the community understand what the letter of authority is?
- 7 Do you think that if people knew an estate had to be reported they would do so?
- 8 Are you aware of the Reform Act / the state law regulating succession?
- 9 If yes, what does it say?
- 10 Are you aware of the *Bhe* decision?
- 11 If yes, what does it say?
- 12 How does the actual distribution of property accord with the state law?
- 13 How are disputes regarding distribution resolved?
- 14 What is the role of the traditional leader / headman in succession disputes?
- 15 Is the ruling of the traditional leader / headman followed?
- 16 If the deceased only had a wife and daughters, and no male sons, how would the property be distributed? Would his father and brothers have a claim?
- 17 Would the wife and daughters be looked after?
- 18 Would they have any recourse if they were unhappy?
- 19 What would happen if an heir took property but did not look after the family members?
- 20 Can you explain the rituals / ceremonies that are performed when somebody dies?
  - a. What is the role of men / women / children?

- b. How long does a woman go into mourning? What does that entail?
  - c. Are there any places she is precluded from going to, ie like the chief's or king's place? Can she travel to town?
  - d. Is a woman experiencing problems free to go to the chief's / king's place?
  - e. Can you explain the nature of funerals today?
- 21 Who is the household head? What kind of role / duties does the household head have?
- a. Is the son regarded as the household head?
  - b. If there are no sons in the house, who assumes the role? Could it be the wife or daughter?
  - c. If a husband dies and leave behind his wife and very young children. Who performs those functions of the household head?
    - i. Would the husband's brother have any role?
- 22 Where are the deceased from the village buried?
- a. Who uses the communal burial grounds?
  - b. Is there an importance or significance of burying the deceased on your property?
- 23 Explain the nature of family meetings held after the death of a deceased?
- a. Where is it held?
  - b. Who attends it? Who is the family? If the deceased is a man, is it only the husband's family or wife's family as well?
  - c. Does the chief come to the first meeting?
  - d. Do women / children / spouse speak?
  - e. Who and how are issues of the funeral decided? For example, when it would be held, how many sheep you will use, etc?
- 24 What is decided at the second meeting?
- a. Who attends it? Does the chief attend? Who decides who should be there? Do females who attend speak at the meeting?
  - b. Is there a risk that if some people are not there, like brothers and uncles, they would fight about it?
- 25 What role does the chief play?
- a. What does the chief do at the police station?
  - b. Does the chief travel regularly to town and the police station?

- 26 Who assumes control of the homestead after the husband's death?
- a. What do you mean by homestead? What is that made up of?
  - b. If the deceased's younger brother also has a house on that property, how would that be dealt with? Could the wife tell him to leave?
  - c. When the younger brother dies what happens?
  - d. Would it be different if it was the deceased's son, could she make him leave and what would happen if he dies?
- 27 Some women marry their husbands after his death to secure their inheritance. What does this entail?
- 28 Is there a council in the village?
- a. What is their role?
  - b. What is the composition? Men / women / ages?
  - c. Is membership by appointment or heredity?
  - d. How often does it change?
  - e. What kind of disputes do they deal with?
  - f. What kind of powers do they have and what kind of orders can they make?
    - i. Can they order beating or flogging or banishment?
  - g. Do they hear succession disputes?
  - h. What is the process before the council? Who speaks? Men, women, young?
    - i. Are people happy with their proposed solutions?
- 29 What's the role of the king in the village?
- a. Do people ever take their inheritance disputes to the king?
  - b. Is it common for people to go to the king with succession disputes?
  - c. What's the process / procedure for going to the king?
    - i. Do you have to make an appointment?
    - ii. How do you contact him?
    - iii. Is it open to everybody?
    - iv. Can women in mourning go?
  - d. What could the king do? How would he resolve it?
    - i. Would people follow the order?
    - ii. What powers does the king have and what orders can he make?
    - iii. Can he order beating or flogging or banishment?

- iv. Are people happy with the way the king resolves disputes?
  - e. What kind of matters are taken to the king, can you explain? Can you give me examples?
- 30 Are homes in the village sold? Is it possible to do so?
- a. Does it make a difference whether it is a man or woman purporting to sell it?
  - b. Say a woman receives the homestead upon the death of her husband. She wants to leave the village? Can she sell the home / property?
  - c. To who can it be sold?
  - d. If it cannot be sold, what happens to the house if you want to leave?
  - e. If you say close the house, does anybody else move in?
  - f. If yes, even if some of the family is buried there?
  - g. If no, is that fair, what if she put a lot of money into the home?
- 31 Who allots land in the village?
- a. What is the process to get a piece of land?
  - b. How much does it cost?
  - c. Is it allotted to men / women? Is their marital status relevant?
  - d. What happens to closed houses?
- 32 If the chief dies what would happen to his things?
- a. Would his wives inherit?
  - b. Is there any property that would be treated differently because he is the chief? Like is it held for the community?
- 33 Do women in the village remarry after their husband passes away and can you tell me about that?
- a. Who would the *lobolo* be paid to?
  - b. Could her new husband move into her house? What if the deceased husband was not buried on the property but was buried somewhere else, could her new husband move in?
  - c. How do you think the new husband would feel about moving into the wife's house?
  - d. What if she spent a lot of money on the house, is it fair that she must give it up? What else could she do?
  - e. Could she bring a man into the house without marrying him?
  - f. Does it ever happen that she brings a man to stay in the house without marrying him?

- g. Is it the same for men? Can he remarry, and bring a new wife?
- 34 Do people often marry people from here or also from other villages?
- a. Is it from other groups like Sotho, Zulu, etc?
  - b. Does that have any effect on what happens to the property when one of them dies here?
  - c. Does it change the practices in any way?
- 35 Does a husband's family (parents or siblings) ever try to claim the home because it is family property and cannot be inherited by the wife?
- a. Would it make a difference if the house was situated in a village or town?
- 36 Do children born out of marriage inherit?
- a. Are children outside of marriage treated the same as children born from a marriage?
  - b. Is the first-born son (born outside of marriage) treated as the first-born son for inheritance?
  - c. Does gender affect inheritance in anyway?
  - d. If the father has married another woman, would the child outside of the marriage inherit from him?
  - e. Where do the children stay?
- 37 What happens to the property of a divorced woman when she dies?
- a. Would the ex-husband have any claim?
- 38 Do brothers of the deceased have any claim on the deceased's property, will they get anything?
- 39 Do you know of any cases where the wife / child got some property and some relatives tried to convince her to share? Explain.
- 40 Do any men in the village take two (or more) wives?
- a. If so, what happens when the husband dies?
  - b. Is the first wife treated better, does she have better claims?
  - c. Where would the wives stay? Share a house? All have own house? Different plots or same plot? Would this be feasible or too expensive?
- 41 Does a woman ever marry her husband's brother / relative after his death to produce children or for any other reason?
- a. Who would decide?

- i. Family (who)?
    - ii. Woman's choice? Can she say no?
  - b. Would the child of this inherit from the deceased and how?
    - i. Any rights to the biological father?
  - c. The man the woman was *ukugena'd* to, can you tell me about him?
    - i. Does he move into the house?
    - ii. Would he be a relative?
    - iii. What would happen to him when the son grew up?
    - iv. What would happen if he never had sons?
  - d. When would this end?
    - i. Could he ever marry someone else?
- 42 Are there any woman-to-woman marriages?
- 43 Do men marry women to have a child when their wives cannot have children?
- a. When he dies, what happens to the property?
  - b. Do the women, children and wives inherit?
- 44 Do men live with their girlfriends here but without getting married, no *lobolo* paid?
- a. If so, what happens to the property if one of them dies?
- 45 Do they know whether people live together in the town without getting married? How would the girlfriend be treated? Would she get any property?
- a. If they lived together for a long time and had children, would she and the children inherit?
  - b. If they only had civil marriage, could the wife or children claim his property?
- 46 Where an unmarried woman dies how does her property devolve?
- a. Is it shared with both the mother's and father's family? Anything in particular that must go to a particular person?
- 47 Typically, what kind of things would people leave behind? Money, house, cattle or sheep?
- a. What's the most important thing?
  - b. What would be a lot of money for someone to leave behind?
  - c. What do people often fight about?
- 48 In the following hypothetical example what would you tell the person to do?

- a. Akhnoa and Bonani are married and build the house together in the village. Bonani puts a lot of her time and effort into the house. Akhona dies. Bonani reports his death at the service point, receives a letter of authority and is told that she is entitled to the house. Akhona's brother however refutes this and states that he is charge of the house, and Bonani must go. What would you tell her?
    - i. Who could help her?
    - ii. Can she tell Akhona's brother to go?
    - iii. Do you think it's fair?
  - b. At a family meeting, it is decided that some of the money must go the husband's parents. However, when the estate was reported officials said the widow is to receive all the money. What would happen?
    - i. Would the widow be able to keep the money?
    - ii. What would the family and deceased's parents say?
    - iii. What would they do?
    - iv. Do you think that's fair?
    - v. Could the state officials help? Would you advise her to go there?
    - vi. Would people listen to state officials if they came here to explain it?
    - vii. Would they listen to the police?
- 49 A husband and wife are married with children and live in town. The husband dies. How does the property devolve (house, furniture, etc)?
- a. Can the home be sold?
  - b. Would family here in the village claim the house?

## **Annexure F – Interview of official at service point**

Location:

Date:

Time:

Describe setting:

Number of people:

Name:

Surname:

Sex:

Address:

Indigenous group:

Contact No:

Email address:

1<sup>st</sup> Language:

Language of interview:

Designation / rank:

- 1 Can you tell me a little about yourself, like your name and what you do here?
- 2 What level of schooling do you have? What other training do you have?
- 3 How long have you worked in this position? What did you do before this?
- 4 What is your position here?
- 5 Can you describe your duties in your position?
- 6 How many areas does your office service?
- 7 How many officials are responsible for the administration of estates in this office?
- 8 How many estates are reported daily? How many files do you oversee?
- 9 Are you aware of the RCLSA and what it requires?
  - a. Did you receive any training in the RCLSA?
  - b. Have you attended any training by the Justice College? If so, when was this?
  - c. Can you explain to me what the RCLSA does?
- 10 Do many people from the [REDACTED] village report the deceased's estate?
- 11 What do you do when an estate is reported / what is the process that is followed?
  - a. Who must report the estate?

- b. Must the traditional leader accompany them? Why?
  - c. What forms must be filled in?
  - d. What language is the form in? Who fills out the form?
  - e. Once you issue the letter of authority do you still oversee the process?
  - f. Do you pay the money to the person with the letter of authority or the beneficiary themselves?
  - g. Do you have any supervision about what is done with the property once it is released? Do you have any way of supervising whether people have complied with your directions?
- 12 Have you ever dealt with a dispute regarding the existence of a customary marriage?
- a. What do you do about it?
  - b. Do you try to ascertain whether the customary marriage exists?
- 13 Have there been any disputes regarding children?
- a. What kind of disputes?
  - b. How are they resolved?
- 14 Are you aware of any disputes / problems that arise in the distribution of property?
- 15 Is the process different for a customary law estate or common law estate?
- 16 Do you keep any records of how many customary law estates are reported?
- 17 Can you see any shortcomings in the manner in which these estates are administered?
- 18 Is there anything that can be done to improve the manner in which these estates are administered? [i.e faster, cheaper, more transparent, in accordance with instructions]

### **Follow up questions**

- 1 Can you clarify your training and experience?
- a. What degree do you have, when did you get that?
- 2 Can you elaborate on the training offered by the Master's Office?
- a. What kind of training is offered by their office?
  - b. How often is it offered?
  - c. Who attends the training?
  - d. Do you also receive training at the Justice College?
  - e. Are you given a copy of the Master's Manual?
- 3 Can you clarify the chief's role in reporting an estate?

- a. Why is the chief needed and what does he do?
  - b. Does your office pay him any subsistence?
  - c. How much was previously paid and by whom?
  - d. Why did it end?
  - e. Why do you need the chief to come with to report the estate? It is not in the Reform Act nor required by the Master's Office?
  - f. Do you think it makes it difficult for people? Do people have to pay the chief?
- 4 Can you clarify the jurisdiction of your office please?
- 5 How many people report per day / per month?
- a. What do they do when you are not here?
- 6 Is the monetary benefit paid directly to the beneficiary or to the holder of the letter of authority?
- a. Does the holder of the letter of authority operate a separate bank account?
- 7 If in reporting an estate, people claim the deceased was their husband, what do you do?
- a. Do you hold a family meeting to confirm the existence of the marriage?
  - b. Do you require them to go to Home affairs to register the marriage?
- 8 Has the estate of a chief even been reported?
- a. How would that be administered?
  - b. Is there not some property that belongs to the community would that also form part of his estate?
- 9 When you send the files to the Master's Office, what do you send?
- 10 Were you consulted on the drafting of the Reform Act?
- a. If you were, what did you say?
  - b. If not, is there anything you think that should be included?
- 11 The forms for reporting an estate are in English and Afrikaans, can you clarify how they are used amongst the predominantly isiXhosa speaking community?
- a. Where do you get the forms from?
  - b. People who report estates, are they generally literate?
  - c. Can people read English / Afrikaans? How do they fill in the forms?
  - d. Do you talk to them in isiXhosa? Was it a requirement of the job that you speak isiXhosa? What happened if you could not speak isiXhosa?
  - e. Do people read isiXhosa? Would it better for the forms to be in isiXhosa?

- f. Is there an opportunity for you to talk to the Department who creates the forms to translate it into isiXhosa?
  - g. Generally, what would you do if your thought something in the administration process was not working or had to be changed, who could you talk to about it?
- 12 Do you allow the withdrawal of money for funeral expenses before the estate is wound up?
- a. How much would you authorise?
  - b. To who would you pay it?
  - c. How do you know that it is used for funeral expenses?
- 13 The threshold for the section 18 process is R250 000.
- a. What do think about that amount, is it adequate? Or do you think it is too high or too low?
  - b. There is no oversight with the section 18 process, do you think that works or are there any problems with it?
- 14 You indicated that you think people follow the instructions of the office as to the distribution of the estate. Why, what gives you the sense / indication that people follow instructions?
- a. Is it likely that they ignore your instructions once they receive the money?

## **Annexure G – Interview of office manager at service point**

Location:

Date:

Time:

Describe setting:

Number of people:

Name:

Surname:

Sex:

Address:

Indigenous group:

Contact No:

Email address:

1<sup>st</sup> Language:

Language of interview:

Designation / rank:

- 1 Can you tell me a little about yourself, like your name and what you do here?
- 2 What level of schooling do you have? What other training do you have?
- 3 How long have you worked in this position? What did you do before this?
- 4 What is your position here?
- 5 Can you describe your duties in your position?
- 6 How many areas does your office service?
- 7 How many officials are responsible for the administration of estates in this office?
- 8 How many estates are reported daily? How many files do you oversee?
- 9 Are you aware of the RCLSA and what it requires?
  - a. Did you receive any training in the RCLSA?
  - b. Have you attended any training by the Justice College? If so, when was this?
  - c. Can you explain to me what the RCLSA does?
- 10 Do many people from the [REDACTED] village report the deceased's estate?
- 11 What do you do when an estate is reported / what is the process that is followed?
  - a. Who must report the estate?

- b. Must the traditional leader accompany them? Why?
  - c. What forms must be filled in?
  - d. What language is the form in? Who fills out the form?
  - e. Once you issue the letter of authority do you still oversee the process?
  - f. Do you pay the money to the person with the letter of authority or the beneficiary themselves?
  - g. Do you have any supervision about what is done with the property once it is released?  
Do you have any way of supervising whether people have complied with your directions?
- 12 Have you ever dealt with a dispute regarding the existence of a customary marriage?
- a. What do you do about it?
  - b. Do you try to ascertain whether the customary marriage exists?
- 13 Have there been any disputes regarding children?
- a. What kind of disputes?
  - b. How are they resolved?
- 14 Are you aware of any disputes / problems that arise in the distribution of property?
- 15 Is the process different for a customary law estate or common law estate?
- 16 Do you keep any records of how many customary law estates are reported?
- 17 Can you see any shortcomings in the manner in which these estates are administered?
- 18 Is there anything that can be done to improve the manner in which these estates are administered? [i.e faster, cheaper, more transparent, in accordance with instructions]

## **Annexure H – Interview of official at Master’s Office**

Location:

Date:

Time:

Describe setting:

Number of people:

Name:

Surname:

Sex:

Address:

Indigenous group:

Contact No:

Email address:

1<sup>st</sup> Language:

Language of interview:

Designation / rank:

- 1 Can you tell me a little about yourself, like your name and what you do here?
- 2 What level of schooling do you have? What other training do you have?
- 3 How long have you worked in this position? What did you do before this?
- 4 What is your position here?
- 5 Can you describe your duties in your position?
- 6 How many areas does your office service? How many service points / magistrate courts are within your jurisdiction?
- 7 How many officials are responsible for the administration of estates in this office?
- 8 How many estates are reported daily? How many files do you oversee?
- 9 Are you aware of the RCLSA and what it requires?
  - a. Did you receive any training in the RCLSA?
  - b. Have you attended any training by the Justice College? If so, when was this?
  - c. Can you explain to me what the RCLSA does?
- 10 Do many people from the [REDACTED] village report the deceased’s estate?
- 11 What do you do when an estate is reported / what is the process that is followed?

- a. Who must report the estate?
  - b. Must the traditional leader accompany them? Why?
  - c. What forms must be filled in?
  - d. What language is the form in? Who fills out the form?
  - e. Once you issue the letter of authority do you still oversee the process?
  - f. Do you pay the money to the person with the letter of authority or the beneficiary themselves?
  - g. Do you have any supervision about what is done with the property once it is released?  
Do you have any way of supervising whether people have complied with your directions?
- 12 Have you ever dealt with a dispute regarding the existence of a customary marriage?
- a. What do you do about it?
  - b. Do you try to ascertain whether the customary marriage exists?
- 13 Have there been any disputes regarding children?
- a. What kind of disputes?
  - b. How are they resolved?
- 14 Are you aware of any disputes / problems that arise in the distribution of property?
- 15 Is the process different for a customary law estate or common law estate?
- 16 Do you keep any records of how many customary law estates are reported?
- 17 Can you see any shortcomings in the manner in which these estates are administered?
- 18 Is there anything that can be done to improve the manner in which these estates are administered? [i.e faster, cheaper, more transparent, in accordance with instructions]

### **Follow up questions**

- 1 Can you clarify your training and experience?
  - a. What degree do you have, when did you get that?
- 2 Can you elaborate on the training offered by the Justice College?
  - a. What kind of training is offered?
  - b. How often is it offered?
  - c. Who attends the training?
  - d. Do you also receive training at the Justice College?
  - e. Are you given a copy of the Master's Manual?

- 3 Who signs the letter of executorship?
  - a. Is there anything you need approval for from the assistant master?
- 4 Can you elaborate on educational outreach programmes in communities?
  - a. How are these programmes conducted?
  - b. How do you choose the communities?
  - c. Do you work with any organisations? Which ones?
  - d. Do you think the information campaigns are successful? Do you find people know about the laws? Why / why not? What could make them work better?
- 5 Were you consulted in the drafting of the Reform Act?
  - a. If you were, what did you say?
  - b. If not, is there anything you think that should be included?
- 6 The forms for reporting an estate are in English and Afrikaans, can you clarify how they are used amongst the predominantly isiXhosa speaking community?
  - a. Where do you get the forms from?
  - b. People who report estates, are they generally literate?
  - c. Can people read English / Afrikaans? How do they fill in the forms?
  - d. Do you talk to them in isiXhosa? Was it a requirement of the job that you speak isiXhosa? What happened if you could not speak isiXhosa?
  - e. Do people read isiXhosa? Would it be better for the forms to be in isiXhosa?
  - f. Is there an opportunity for you to talk to the Department who creates the forms to translate it into isiXhosa?
  - g. Generally, what would you do if your thought something in the administration process was not working or had to be changed, who could you talk to about it?
- 7 Do you allow the withdrawal of money for funeral expenses before the estate is wound up?
  - a. How much would you authorise?
  - b. To who would you pay it?
  - c. How do you know that it is used for funeral expenses?
- 8 The threshold for the section 18 process is R250 000.
  - a. What do think about that amount, is it adequate? Or do you think it is too high or too low?

- b. There is no any oversight with the section 18 process, do you think that works or are there any problems with it?
- 9 Can you elaborate on the paperless system of administration being introduced at the Master's Office?
    - a. How much progress has been made with the system? When was the system introduced? What is the plan for the full implementation of the system?
    - b. Do you work on the paperless system?
    - c. Has it been successful? What are the problems with it?
    - d. What happens if you do not have an internet connection, are you still able to work on the system?
    - e. Do you often experience problems with connectivity? What do you do?
    - f. How many of your service points are on the paperless system? Do they often have connectivity problems, how do they work around it?
  - 10 Explain the relationship between the Master's Office and the Department of Home Affairs in the registration of marriages.
  - 11 Explain difficulties with the registration of marriages.
    - a. Is this experienced differently between the genders?
  - 12 Explain the administration process when a minor child is involved.
    - a. How is the process affected by the presence of guardian / surviving spouse?
    - b. Is the attorney paid from the estate?
    - c. Where is the money paid to?
    - d. Can the guardian of the child access the money to look after the child? Is it accessible?
  - 13 Have you ever come across *ukungena* relationships? How does the property of the deceased in such a relationship devolve?
  - 14 Have you ever come across woman-to-woman marriages? How does the property of the deceased in such a relationship devolve?
  - 15 Have you ever come across a seed-raiser arrangement? How does the property of the deceased in such a relationship devolve?
  - 16 Do you enquire about these forms of relationships? Are people forthcoming about these relationships, or do they hide it?
  - 17 Have you encountered claims of customary law adoption?

- 18 Have you encountered the estate of a chief?
  - a. How is the estate administered?
  - b. Is there property that belongs to the community that does not form part of his estate?
- 19 Can you elaborate on the number of cases you see a day?
  - a. Do you turn people away?
  - b. Do they return?
  - c. How many active estate files are you responsible for?
- 20 Can you explain the contact / relationship you have with the service points?
  - a. Do they refer matters to you?
  - b. Do they ask you for advice?
- 21 Can you confirm the procedure when an individual claims to be married but the marriage is not registered?
  - a. Do you hold family meetings to determine the existence of the marriage?
  - b. Are people referred to the Department of Home Affairs even when no dispute?
  - c. Is there a relationship between the Department of Home Affairs and the Master's Office?
  - d. The date for registration of marriages was extended to December 2016, but that's fast approaching, what process will you follow thereafter?
- 22 How is livestock that is part of an estate administered by your office?
  - a. How is it valued?
- 23 Could you elaborate on how letters of executorship are issued?
  - a. Where there are two spouses, who is appointed as the executor? Is there any oversight with two spouses?
- 24 Please confirm how homes /land in the village are administered through the Master's Office.
  - a. Where / how was this decision taken to exclude such property from the administration process given that the Reform Act does not provide for it?
  - b. How does it accord with the notions of in community and out of community of property?
- 25 Have you encountered family property in the administration an estate?
- 26 Have you encountered a customary law oral will?

- 27 If a dispute regarding the heir's fulfilment of his /her customary duty of support was brought to your office, how would it be resolved?
- 28 Have you used the dispute resolution mechanism in section 7 of the Reform Act? Can you elaborate on this?
- a. Can you explain how it works?
  - b. How would you choose the magistrate? What if he is not from the community? What if does not know about the customary law of the community?
  - c. What if the community does not have a chief?
  - d. Would you ever listen to the family, or the elders in the family, in mediating disputes? Do you think that may help?
  - e. What do you think is the best way for resolving disputes?
- 29 A man in a civil marriage cannot enter into a customary marriage. If the customary wife does not know, does she have rights or recourse?
- a. Is this a common occurrence?
  - b. What do you think about it?
  - c. Can anything be done to resolve it?

## **Annexure I – Interview with Master**

Location:

Date:

Time:

Describe setting:

Number of people:

Name:

Surname:

Sex:

Address:

Indigenous group:

Contact No:

Email address:

1<sup>st</sup> Language:

Language of interview:

Designation / rank:

- 1 Can you tell me a little about yourself, like your name and what you do here?
- 2 What level of schooling do you have? What other training do you have?
- 3 How long have you worked in this position? What did you do before this?
- 4 What is your position here?
- 5 Can you describe your duties in your position?
- 6 How many areas does your office service? How many service points / magistrate courts are within your jurisdiction?
- 7 How many officials are responsible for the administration of estates in this office?
- 8 How many estates are reported daily? How many files do you oversee?
- 9 Are you aware of the RCLSA and what it requires?
  - a. Did you receive any training in the RCLSA?
  - b. Have you attended any training by the Justice College? If so when was this?
  - c. Can you explain to me what the RCLSA does?
- 10 Do many people from the [REDACTED] village report the deceased's estate?
- 11 What do you do when an estate is reported / what is the process that is followed?

- a. Who must report the estate?
  - b. Must the traditional leader accompany them? Why?
  - c. What forms must be filled in?
  - d. What language is the form in? Who fills out the form?
  - e. Once you issue the letter of authority do you still oversee the process?
  - f. Do you pay the money to the person with the letter of authority or the beneficiary themselves?
  - g. Do you have any supervision about what is done with the property once it is released?  
Do you have any way of supervising whether people have complied with your directions?
- 12 Have you ever dealt with a dispute regarding the existence of a customary marriage?
- a. What do you do about it?
  - b. Do you try to ascertain whether the customary marriage exists?
- 13 Have there been any disputes regarding children?
- a. What kind of disputes?
  - b. How are they resolved?
- 14 Are you aware of any disputes / problems that arise in the distribution of property?
- 15 Is the process different for a customary law estate or common law estate?
- 16 Do you keep any records of how many customary law estates are reported?
- 17 Can you see any shortcomings in how estates are administered?
- 18 Is there anything that can be done to improve how estates are administered? [i.e faster, cheaper, more transparent, in accordance with instructions]

### **Follow up questions**

- 1 Can you clarify your training and experience?
  - a. What degree do you have, when did you get that?
- 2 Can you elaborate on the training offered by the Justice College?
  - a. What kind of training is offered?
  - b. How often is it offered?
  - c. Who attends the training?
  - d. Do you also receive training at the Justice College?
- 3 Can you clarify your role in the supervision of administration of deceased estates?

- a. What does it entail?
  - b. Do you see the public?
  - c. Can you clarify the composition of your office?
    - i. How many estate controllers?
    - ii. Are you at your full staff?
    - iii. Is the staff composition very stable?
    - iv. What kind of training is available for new staff?
    - v. Was there particular training for the Reform Act?
- 4 Can you elaborate on the number of people your office services per day?
- a. Are people turned away and told to come tomorrow?
  - b. Is your office able to cope with the number of reported estates?
  - c. Do you have any documents which show how many estates are reported / or opened a day?
- 5 Can you elaborate on the relationship between the Master's Office and the Department of Home Affairs?
- a. Does the Master's Office investigate the existence of customary marriages or do you refer all such claims to the Department of Home Affairs?
  - b. Do you provide any assistance or have any role in the registration process?
  - c. What happens if one Home Affairs has refused to register a marriage and the other has, what would you do? How do you decide which to follow?
- 6 The last time you mentioned that it is hard for women to register their marriages, that the family may deny the existence of the marriage?
- a. Do you think it is easier for the husband to register the marriage?
  - b. From your experience, is it more men or women who seek to register the marriage upon death?
  - c. Why do you think this is so?
- 7 Can you explain the relationship with service points under your jurisdiction?
- a. Is it only the referral of matters and when they submit files, or is there any other sort of communication?
- 8 You said you go into communities to inform people about the Reform Act what does it entail?
- a. How do you do this?

- b. How do you choose the communities and the people?
  - c. Do you work with any organisations? Which ones?
  - d. Do you think the information campaigns are successful? Do you find people know about the laws? Why / why not? What could make them work better?
  - e. Do you have any records that you can show me here?
- 9 You know when the Reform Act was being drafted, were you ever consulted on it?
- a. If you were, what did you say?
  - b. If not, is there anything you think that should be included?
- 10 The forms for reporting an estate are in English and Afrikaans, can you clarify how they are used amongst the predominantly isiXhosa speaking community?
- a. Where do you get the forms from?
  - b. People who report estates, are they generally literate?
  - c. Can people read English / Afrikaans? How do they fill in the forms?
  - d. Do you talk to them in isiXhosa? Was it a requirement of the job? What happened if you could not speak isiXhosa?
  - e. Do people read isiXhosa, would it better for the forms to be in isiXhosa?
  - f. Is there an opportunity for you to talk to the department who creates the forms to translate it?
  - g. Generally, what would you do if your thought something in the administration process was not working or had to be changed, who could you talk to about it?
- 11 Can you elaborate on the paperless system of administration being introduced at the Master's Office?
- a. How much progress has been made with the system? When was the system introduced? What is the plan for the full implementation of the system?
  - b. Do you work on the paperless system?
  - c. Has it been successful? What are the problems with it?
  - d. What happens if you do not have an internet connection, are you still able to work on the system?
  - e. Do you often experience problems with connectivity? What do you do?
  - f. How many of your service points are on the paperless system? Do they often have connectivity problems, how do they work around it?

- 12 Please confirm how homes /land in the village are administered through the Master's Office.
  - a. Where / how was this decision taken to exclude such property from the administration process given that the Reform Act does not provide for it?
  - b. How does it accord with the notions of in community and out of community of property?
- 13 Have you encountered family property in the administration an estate?
- 14 Have you encountered a customary law oral will?
- 15 If a dispute regarding the heir's fulfilment of his /her customary duty of support was brought to your office, how would it be resolved?
- 16 Have you used the dispute resolution mechanism in section 7 of the Reform Act? Can you elaborate on this?
  - a. Can you explain how it works?
  - b. How would you choose the magistrate? What if he is not from the community? What if does not know about the customary law of the community?
  - c. What if the community does not have a chief?
  - d. Would you ever listen to the family, or the elders in the family, in mediating disputes? Do you think that may help?
  - e. What do you think is the best way for resolving disputes?
- 17 A man in a civil marriage cannot enter into a customary marriage. If the customary wife did not know about the civil marriage, does she have rights or recourse?
  - a. Is this a common occurrence?
  - b. What do you think about it?
  - c. Can anything be done to resolve it?
- 18 Can you elaborate on the subsistence allowance previously paid to chiefs for assistance in reporting estates?
  - a. Who was paying him?
  - b. How much were chiefs previously paid?
  - c. Why did this stop? When did this stop?
- 19 Do you think state officials would be in danger if they tried to follow up and check whether beneficiaries receive the money or were being pressurised to give the money over?

- a. Why would people in the village be antagonistic to you?
- b. What stops the people from ignoring your directions?
- c. Do people report problems to you? Do you think they think you could really help?

## Annexure J – Interview with chief

Name:

Age:

Date acting as chief:

- 1 Can you tell me about yourself?
- 2 Can you tell me about the history of the village?
  - a. How long ago was it established?
  - b. Predominantly what group lives here?
  - c. Since when have you been the chief?
  - d. Who was chief before you? Did you assume chieftaincy from your father?
  - e. Will your son become chief after you?
  - f. Are there any other groups or people from other groups in the village? And in the surrounding villages?
- 3 What are the rules that determine how property should be distributed when somebody dies?
  - a. Is there a family meeting?
  - b. Are women and children present and allowed to speak?
  - c. How is the property distributed?
  - d. Does this protect the interests of women and children?
  - e. Are males still regarded as the only heirs of property?
  - f. What can women and children do if they are unhappy?
- 4 Are estates reported to service points?
- 5 Are you aware of the need to report estates to service points?
- 6 Are you aware of the Reform of Customary Law of Succession Act?
- 7 If yes, what does it say?
- 8 Are you aware of the *Bhe* decision?
- 9 If yes, what does it say and how does distribution of property accord with it?
- 10 What is your role in the distribution of property?
- 11 Do people report deaths or disputes to you?
- 12 If a male heir took property but did not want to look after the family, is there anything that could be done?

## Follow up questions

- 1 How do the elderly people live in the village?
    - a. Where do the younger people go?
    - b. Do they come back? Why?
  - 2 It appears that generally estates are reported to state offices and the wife inherits the property. Is this a change in customary law?
    - a. What has brought the change about?
  - 3 Can you explain the rituals / ceremonies that are performed when somebody dies?
    - a. What is the role of men / women / children?
    - b. How long does a woman go into mourning? What does that entail?
    - c. Are there any places she is precluded from going to, ie like the chief's or king's place? Can she travel to town?
    - d. Is a woman experiencing problems free to go to the chief's / king's place?
    - e. Can you explain the nature of funerals today?
  - 4 Who is the household head? What kind of role / duties does the household head have?
    - a. Is the son regarded as the household head?
    - b. If there are no sons in the house, who assumes the role? Could it be the wife or daughter?
    - c. If a husband dies and leave behind his wife and very young children. Who performs those functions of the household head?
      - i. Would the husband's brother have any role?
  - 5 Where are the deceased from the village buried?
    - a. Who uses the communal burial grounds?
    - b. Is there an importance or significance of burying the deceased on your property?
  - 6 Explain the nature of family meetings held after the death of a deceased?
    - a. Where is it held?
    - b. Who attends it? Who is the family? If the deceased is a man, is it only the husband's family or wife's family as well?
    - c. Does the chief come to the first meeting?
    - d. Do women / children / spouse speak?
    - e. Who and how are issues of the funeral decided? For example, when it would be held, how many sheep you will use, etc?
-

- 7 What is decided at the second meeting?
  - a. Who attends it? Does the chief attend? Who decides who should be there? Do females who attend speak at the meeting?
  - b. Is there a risk that if some people are not there, like brothers and uncles, they would fight about it?
- 8 What role do you play in the administration process?
  - a. What does the chief do at the police station?
  - b. Does the chief travel regularly to town and the police station?
  - c. Can you explain the previous subsistence allowance you obtained? How much was it? Who paid it? When did it stop?
  - d. Do people give money or gifts in gratitude for the assistance?
- 9 Who assumes control of the homestead after the husband's death?
  - a. What do you mean by homestead? What is that made up of?
  - b. If the deceased's younger brother also has house on that property, how would that be dealt with? Could the wife tell him to leave?
  - c. When the younger brother dies what happens?
  - d. Would it be different if it was the deceased's son, could she make him leave and what would happen if he dies?
- 10 Some women marry their husbands after his inheritance to secure their inheritance. What does this entail?
- 11 Is there a council in the village?
  - a. What is their role?
  - b. What is the composition? Men / women / ages?
  - c. Is membership by appointment or heredity?
  - d. How often does it change?
  - e. What kind of disputes do they deal with?
  - f. What kind of powers do they have and what kind of orders can they make?
    - i. Can they order beating or flogging or banishment?
  - g. Do they hear succession disputes?
  - h. What is the process before the council? Who speaks? Men, women, young?
    - i. Are people happy with their proposed solutions?

- 12 What's the role of the king in the village?
- a. Do people ever take their inheritance disputes to the king?
  - b. Is it common for people to go to the king with succession disputes?
  - c. What's the process / procedure for going to the king?
    - i. Do you have to make an appointment?
    - ii. How do you contact him?
    - iii. Is it open to everybody?
    - iv. Can women in mourning go?
  - d. What could the king do? How would he resolve it?
    - i. Would people follow the order?
    - ii. What powers does the king have and what orders can he make?
    - iii. Can he order beating or flogging or banishment?
    - iv. Are people happy with the way the king resolves disputes?
  - e. What kind of matters are taken to the king, can you explain? Can you give me examples?
- 13 Are homes in the village sold? Is it possible to do so?
- a. Does it make a difference whether it is a man or woman purporting to sell it?
  - b. Say a woman receives the homestead upon the death of her husband. She wants to leave the village? Can she sell the home / property?
  - c. To who can it be sold?
  - d. If it cannot be sold, what happens to the house if you want to leave?
  - e. If you say close the house, does anybody else move in?
  - f. If yes, even if some of the family is buried there?
  - g. If no, is that fair, what if she put a lot of money into the home?
- 14 Who allots land in the village?
- a. What is the process to get a piece of land?
  - b. How much does it cost?
  - c. Is it allotted to men / women? Is their marital status relevant?
  - d. What happens to closed houses?
- 15 If you die what happens to your property?
- a. Would your wives inherit?

- b. Is there any property that would be treated differently because he is the chief? Like is it held for the community?
- 16 Do women in the village remarry after their husband passes away and can you tell me about that?
- a. Who would the *lobolo* be paid to?
  - b. Could her new husband move into her house? What if the deceased husband was not buried on the property? He was buried somewhere else?
  - c. How do you think the new husband would feel about moving into the wife's house?
  - d. What if she spent a lot of money on the house, is it fair that she must give it up? What else could she do?
  - e. Could she bring a man into the house without marrying him?
  - f. Does it ever happen that she brings a man to stay in the house without marrying him?
  - g. Is it the same for men? Can he remarry and bring a new wife?
- 17 Do people often marry people from here or also from other villages?
- a. Is it from other groups like Sotho, Zulu, etc?
  - b. Does that have any effect on what happens to the property when one of them dies here?
  - c. Does it change the practices in any way?
- 18 Does a husband's family (parents or siblings) ever try to claim the home because it is family property and cannot be inherited by the wife?
- a. Would it make a difference if the house was situated in a village or town?
- 19 Do children born out of marriage inherit?
- a. Are children outside of marriage treated the same as children born from a marriage?
  - b. Is the first-born son (born outside of marriage) treated as the first-born son for inheritance?
  - c. Does gender affect it in anyway?
  - d. If the father has married another woman, would the child outside of the marriage inherit from him?
  - e. Where do the children stay?
- 20 What happens to the property of a divorced woman when she dies?
- a. Would the ex-husband have any claim?

- 21 Do brothers of the deceased have any claim on the deceased's property, will they get anything?
- 22 Do you know of any cases where the wife / child got some property and some relatives tried to convince her to share? Explain.
- 23 Do any men in the village take two (or more) wives?
  - a. If so, what happens when the husband dies?
  - b. Is the first wife treated better, does she have better claims?
  - c. Where would the wives stay? Share a house? All have own house? Different plots or same plot? Would this be feasible or too expensive?
- 24 Does a woman ever marry her husband's brother / relative after his death to produce children or for any other reason?
  - a. Who would decide?
    - i. Family (who)?
    - ii. Woman's choice? Can she say no?
  - b. Would the child of this arrangement inherit from the deceased and how?
    - i. Any rights to the biological father?
  - c. The man the woman was ukugena'd to, can you tell me about him?
    - i. Does he move into the house?
    - ii. Would he be a relative?
    - iii. What would happen to him when the son grew up?
    - iv. What would happen if he never had sons?
  - d. When would this end?
    - i. Could he ever marry someone else?
- 25 Are there any woman-to-woman marriages?
- 26 Do men marry women to have a child when their wives cannot have children?
  - a. When he dies, what happens to the property?
  - b. Do the women, children and wives inherit?
- 27 Do men live with their girlfriends here but without getting married, no *lobolo* paid?
  - a. If so, what happens to the property if one of them dies?
- 28 Do they know whether people live together in the town without getting married? How would the girlfriend be treated? Would she get any property?

- a. If they lived together for a long time and had children, would she and the children inherit?
  - b. If they only had civil marriage, could the wife or children claim his property?
- 29 Where an unmarried woman dies how does her property devolve?
- a. Is it shared with both the mother's and father's family? Anything in particular that must go to a particular person.
- 30 Typically, what kind of things would people leave behind? Money, house, cattle or sheep?
- a. What's the most important thing?
  - b. What would be a lot of money for someone to leave behind?
  - c. What do people often fight about?
- 31 Previously, the chief mentioned that where a man and woman are married and do not have any children, and he has property and passes away and does not have other family, then the wife's side of the family will benefit, can you explain?
- a. What about the wife?
  - b. Why does it happen? Can you show me where the government instruction is?
- 32 If a problem was brought to the chief, that the heir whoever it was, was not fulfilling his duties of caring for the family and looking after the family, what would / could you do?
- 33 You also mentioned that when someone dies without dependents, the estate goes to the deceased's siblings, can you explain this?
- a. Even where there is a wife? And parents?
  - b. Also mentioned something about it going to the wife's family and not husband's and people not being happy about this, can you explain this?
- 34 With the Reform Act, before it was drafted and put into place in 2010, were you ever consulted on it?
- a. Yes, what did you say?
  - b. No, what do you think it should have done?

## **Annexure K – Interview with headman**

Name:

Age:

Date acting as traditional leader:

- 1 What are the rules that determine how property should be distributed when somebody dies?
  - a. Is there a family meeting?
  - b. Are women and children present and allowed to speak?
  - c. How is the property distributed?
  - d. Does this protect the interests of women and children?
  - e. Are males still regarded as the only heirs of property?
  - f. What can women and children do if they are unhappy?
- 2 Are estates reported to service points?
- 3 Are you aware of the need to report estates to service points?
- 4 Are you aware of the RCLSA?
- 5 If yes, what does it say?
- 6 Are you aware of the *Bhe* decision?
- 7 If yes, what does it say and how does distribution of property accord with it?
- 8 What is your role in the distribution of property?
- 9 Do people report deaths or disputes to you?
- 10 If a male heir took property but did not want to look after the family, is there anything that could be done?

### **Follow up questions**

- 1 Can you tell me a little about yourself? Like your name and where you come from?
- 2 Age?
- 3 Married? Kids?
- 4 Where do you stay? How long have you lived there?
- 5 Have you lived anywhere else? Is that a city / town or another village? For how long? What did you do there? Why did you move there? Why did you move back?
- 6 Did you go to school? Until what standard? Do you have any other training / schooling?

- 7 Are you working? What kind of work do you do?
- 8 How long have you acted as the headman? When were you appointed as the headman?
  - a. Only headman in the village?
  - b. How many villages do you work in?
- 9 Who was the headman before you? Hereditary?
- 10 Can you tell me a bit about your role as the head man?
  - a. What kind of disputes do you normally hear?
- 11 When somebody dies in the village, what role do you play?
- 12 If there are fights about property after somebody dies, where do people go?
  - a. How would you resolve disputes?
  - b. How often do you hear disputes? Inheritance disputes?
  - c. How many in a day?
  - d. When do you hear them?
  - e. What is the process?
  - f. Who attends the hearings? Men, women, ages?
  - g. Who speaks at the gatherings
  - h. Can you tell me about some of the disputes that you have been involved in?
  - i. Record of decisions?
- 13 Why don't people take inheritance disputes to you?
- 14 Can you explain the rituals / ceremonies that are performed when somebody dies?
  - a. What is the role of men / women / children?
  - b. How long does a woman go into mourning? What does that entail?
  - c. Are there any places she is precluded from going to, ie like the chief's or king's place? Can she travel to town?
  - d. Is a woman experiencing problems free to go to the chief's / king's place?
  - e. Can you explain the nature of funerals today?
- 15 Who is the household head? What kind of role / duties does the household head have?
  - a. Is the son regarded as the household head?
  - b. If there are no sons in the house, who assumes the role? Could it be the wife or daughter?
  - c. If a husband dies and leave behind his wife and very young children. Who performs those functions of the household head?

- i. Would the husband's brother have any role?
- 16 Where are the deceased from the village buried?
    - a. Who uses the communal burial grounds?
    - b. Is there an importance or significance of burying the deceased on your property?
  - 17 Explain the nature of family meetings held after the death of a deceased?
    - a. Where is it held?
    - b. Who attends it? Who is the family? If the deceased is a man, is it only the husband's family or wife's family as well?
    - c. Does the chief come to the first meeting?
    - d. Do women / children / spouse speak?
    - e. Who and how are issues of the funeral decided? For example, when it would be held, how many sheep you will use, etc?
  - 18 What is decided at the second meeting?
    - a. Who attends it? Does the chief attend? Who decides who should be there? Do females who attend speak at the meeting?
    - b. Is there a risk that if some people are not there, like brothers and uncles, they would fight about it?
  - 19 What role does the chief play in the administration process?
  - 20 What role do you play in the administration process?
  - 21 Who assumes control of the homestead after the husband's death?
    - a. What do you mean by homestead? What is that made up of?
    - b. If the deceased's younger brother also has a house on that property, how would that be dealt with? Could the wife tell him to leave?
    - c. When the younger brother dies what happens?
    - d. Would it be different if it was the deceased's son, could she make him leave and what would happen if he dies?
  - 22 Some women marry their husbands after his inheritance to secure their inheritance. What does this entail?
  - 23 Is there a council in the village?
    - a. What is their role?
    - b. What is the composition? Men / women / ages?
    - c. Is membership by appointment or heredity?

- d. How often does it change?
  - e. What kind of disputes do they deal with?
  - f. What kind of powers do they have and what kind of orders can they make?
    - i. Can they order beating or flogging or banishment?
  - g. Do they hear succession disputes?
  - h. What is the process before the council? Who speaks? Men, women, young?
    - i. Are people happy with their proposed solutions?
- 24 What's the role of the king in the village?
- a. Do people ever take their inheritance disputes to the king?
  - b. Is it common for people to go to the king with succession disputes?
  - c. What's the process / procedure for going to the king?
    - i. Do you have to make an appointment?
    - ii. How do you contact him?
    - iii. Is it open to everybody?
    - iv. Can women in mourning go?
  - d. What could the king do? How would he resolve it?
    - i. Would people follow the order?
    - ii. What powers does the king have and what orders can he make?
    - iii. Can he order beating or flogging or banishment?
    - iv. Are people happy with the way the king resolves disputes?
  - e. What kind of matters are taken to the king, can you explain? Can you give me examples?
- 25 Are homes in the village sold? Is it possible to do so?
- a. Does it make a difference whether it is a man or woman purporting to sell it?
  - b. Say a woman receives the homestead upon the death of her husband. She wants to leave the village? Can she sell the home / property?
  - c. To who can it be sold?
  - d. If it cannot be sold, what happens to the house if you want to leave?
  - e. If you say close the house, does anybody else move in?
  - f. If yes, even if some of the family is buried there?
  - g. If no, is that fair, what if she put a lot of money into the home?
- 26 Who allots land in the village?

- a. What is the process to get a piece of land?
  - b. How much does it cost?
  - c. Is it allotted to men / women? Is their marital status relevant?
  - d. What happens to closed houses?
- 27 If you die, what happens to your property?
- a. Would your wives inherit?
  - b. Is there any property that would be treated differently because he is the chief? Like is it held for the community?
- 28 Do women in the village remarry after their husband passes away and can you tell me about that?
- a. Who would the *lobolo* be paid to?
  - b. Could her new husband move into her house? What if the deceased husband was not buried on the property? He was buried somewhere else?
  - c. How do you think the new husband would feel about moving into the wife's house?
  - d. What if she spent a lot of money on the house, is it fair that the must give it up? What else could she do?
  - e. Could she bring a man into the house without marrying him?
  - f. Does it ever happen that she brings a man to stay in the house without marrying him?
  - g. Is it the same for men? Can he remarry, and bring a new wife?
- 29 Do people often marry people from here or also from other villages?
- a. Is it from other groups like Sotho, Zulu, etc?
  - b. Does that have any effect on what happens to the property when one of them dies here?
  - c. Does it change the practices in any way?
- 30 Does a husband's family (parents or siblings) ever try to claim the home because it is family property and cannot be inherited by the wife?
- a. Would it make a difference if the house was situated in a village or town?
- 31 Do children born out of marriage inherit?
- a. Are children outside of marriage treated the same as children born from a marriage?
  - b. Is the first-born son (born outside of marriage) treated as the first-born son for inheritance?
  - c. Does gender affect it in anyway?

- d. If the father has married another woman, would the child outside of the marriage inherit from him?
  - e. Where do the children stay?
- 32 What happens to the property of a divorced woman when she dies?
- 33 Would the ex-husband have any claim?
- 34 Do brothers of the deceased have any claim on the deceased's property, will they get anything?
- 35 Do you know of any cases where the wife / child got some property and some relatives tried to convince her to share? Explain.
- 36 Do any men in the village take two (or more) wives?
- a. If so, what happens when the husband dies?
  - b. Is the first wife treated better, does she have better claims?
  - c. Where would the wives stay? Share a house? All have own house? Different plots or same plot? Would this be feasible or too expensive?
- 37 Does a woman ever marry her husband's brother / relative after his death to produce children or for any other reason?
- a. Who would decide?
    - i. Family (who)?
    - ii. Woman's choice? Can she say no?
  - b. Would the child of this inherit from the deceased and how?
    - i. Any rights to the biological father?
  - c. The man the woman was ukugena'd to, can you tell me about him?
    - i. Does he move into the house?
    - ii. Would he be a relative?
    - iii. What would happen to him when the son grew up?
    - iv. What would happen if he never had sons?
  - d. When would this end?
    - i. Could he ever marry someone else?
- 38 Are there any woman-to-woman marriages?
- 39 Do men marry women to have a child when their wives cannot have children?
- a. When he dies, what happens to the property?

- b. Do the women, children and wives inherit?
- 40 Do men live with their girlfriends here but without getting married, no *lobolo* paid?
  - a. If so, what happens to the property if one of them dies?
- 41 Do they know whether people live together in the town without getting married? How would the girlfriend be treated? Would she get any property?
  - a. If they lived together for a long time and had children, would she and the children inherit?
  - b. If they only had civil marriage, could the wife or children claim his property?
- 42 Where an unmarried woman dies how does her property devolve?
  - a. Is it shared with both the mother's and father's family? Anything in particular that must go to a particular person?
- 43 Typically, what kind of things would people leave behind? Money, house, cattle or sheep?
  - a. What's the most important thing?
  - b. What would be a lot of money for someone to leave behind?
  - c. What do people often fight about?
- 44 Previously, the chief mentioned that where a man and woman are married and do not have any children, and he has property and passes away and does not have other family, then the wife's side of the family will benefit, can you explain?
  - a. What about the wife?
  - b. Why does it happen? Can you show me where the government instruction is?
- 45 If a problem was brought to the chief, that the heir whoever it was, was not fulfilling his duties of caring for the family and looking after the family, what would / could you do?
- 46 You also mentioned that when someone dies without dependents, the estate goes to the deceased's siblings, can you explain this?
  - a. Even where there is a wife? And parents?
  - b. Also mentioned something about it going to the wife's family and not husband's and people not being happy about this, can you explain this.
- 47 With the Reform Act, before it was drafted and put into place in 2010, were you ever consulted on it?
  - a. Yes, what did you say?

b. No, what do you think it should have done?

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