

*PROTECTING THE VULNERABLE FROM
'PROPERTY GRABBING': THE REALITY OF
ADMINISTERING SMALL ESTATES*

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INTRODUCTION

One consequence of the HIV/AIDS epidemic in South Africa is that the number of vulnerable widows and orphans has soared. Weakened by disease and poverty and where no legally recognized will exists, they are often unable to protect their rights to inherit property and may even be unaware that they have any such rights. In common with much of Africa, anecdotal evidence of illegal seizure of intestate deceased estates abounds in South Africa, despite an array of legal measures which are meant to prevent these events from occurring. The Centre for Socio-Legal Research¹ ('the Centre') is attempting to study how such seizures — colloquially known as 'property grabbing' — occur and how they can be prevented.

There are, however, major difficulties in undertaking such a study. As criminologists are well aware, locating instances of illegal behaviour before they reach the courts poses problems, and very few of these estate cases ever reach the courts. Furthermore, interviewers asking unwelcome questions in the relevant communities face a very real threat of violent action. The

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Centre has found from its pilot study that interviews with those in official positions who are likely to encounter victims of estate seizures — ranging from social workers and the police to bank managers and housing officials — can provide only a partial substitute for interviews with victims and perpetrators. The 'official' interviews produce much relevant information on procedures and many illuminating anecdotes but too little detailed information on actual cases to form the basis of a general understanding of the mechanics of such seizures. To supplement these sources, the Centre therefore went through the records of service points at magistrates' courts, where small intestate estates are administered. Although most estates involving the worst cases of property-grabbing may never reach a service point, a study of the service point procedures and records reveal legal loopholes which may allow property-grabbing to occur. This paper discusses how the records provide information for the study and what they indicate of changing attitudes and behaviour relating to customary law on inheritance.

THE LEGAL BACKGROUND

The system of administration of estates has undergone radical reform in recent years. Prior to 2001, all 'black' intestate estates were administered by magistrates, under the Black Administration Act.² Following the *Moseneke* judgment in 2001,³ a distinction was made between two types of 'black' intestate estates and the institutions to which they were to be reported.⁴ Cases where an intestate estate devolved according to customary law continued to be administered by magistrates. For estates governed by civil law — primarily, the estates of deceased individuals who were partners to civil marriages — which could now be reported to the Master's Office, service points were established at magistrates' offices, where designated officials were authorized by the Master to process registration of small intestate estates. This arrangement sought to increase access to the Master's Office for beneficiaries of small estates while maintaining some supervision.

In 2004, the decision of the Constitutional Court in *Bhe v Magistrate, Khayelitsha*⁵ resulted in the state being required to provide — at least temporarily — a unitary system for the administration of estates. All estates now come under the jurisdiction of the Master's Office. Under s 18(3) of the Administration of Estates Act,⁶ the Master may dispense with the appointment of an executor in estates worth up to R125 000. In such cases the Master will appoint a representative to whom letters of authority will be issued, who will be authorized to distribute the estate. Under the Intestate

² Section 23 of the Black Administration Act 38 of 1927.

³ *Moseneke v The Master* 2001 (2) SA 18 (CC).

⁴ Section 2A of the Administration of Estates Act 66 of 1965, amended by the Administration of Estates Amendments Act 47 of 2002, which came into operation on 5 December 2002.

⁵ 2005 (1) SA 580 (CC) at 633.

⁶ Act 66 of 1965, as amended.

Succession Act,⁷ a surviving spouse is entitled to the first R125 000 of an estate, so spouses should inherit all assets in small estates.⁸

At the time of writing Service Points were authorized to administer all deceased intestate estates up to the value of R50 000, subject to certain conditions.⁹ Given the poverty in South Africa, many deceased estates devolve intestate and are of low value and thus come within the jurisdiction of the service points. It was therefore widely expected after the *Bhe* decision that service points would experience a great increase in the number of registered estates. Our research, however, has been inconclusive in this respect. While some jurisdictions may have seen a marked increase in the number of cases handled by service points post-*Bhe*, this seems neither to have been a universal trend, nor solely attributable to an influx of customary cases.¹⁰ The current situation means that many small estates go unregistered and are distributed outside the system, potentially resulting in the denial of inheritance rights to many vulnerable individuals.

THE SERVICE POINT PROJECT

At the end of 2005 the Centre instigated a pilot project study of sixty estate files from three Cape Town service points. From this study it became evident that it would be difficult to identify actual cases of property grabbing from the information on file. This was not unexpected, as our preliminary research had indicated that most property grabbing occurs when property is not distributed through the formal institutions. Moreover, property grabbing sometimes occurs through the use of force even where legal documents have been issued to the legitimate heirs by the service points. Nevertheless, in some cases assets will be misappropriated through the service points system

⁷ Intestate Succession Act 81 of 1987.

⁸ Section 1(1)(c).

⁹ 'Service points must refer all cases to the Master of the High Court when any one of the following conditions applies:

- The deceased left a will, or
- the value of the estate, before any debts are paid or other deductions are made, is above R50 000, or appears to be above R50 000, or
- one of the assets in the estate is cash to the value of more than R 20 000, AND one or more of the beneficiaries is a minor, or
- the estate is insolvent or there is a danger that the estate may be insolvent.'

M M Meyer, M B E Rudolph & M B Cronjé *Policy and Procedural Manual: Administration of Intestate Deceased Estates at Service Points* October 2004 section 9.1 (hereafter referred to as the 'Policy and Procedural Manual').

¹⁰ Statistics were unavailable from the Master's Office for the pre-*Bhe* period. An official in the Master's Office indicated, in a telephone conversation, that she did not think that the expected increase following the *Bhe* decision had materialized. Factors such as changed municipality boundaries and the impact of HIV/Aids on the population were mentioned in interviews conducted in September 2005 with service point personnel in East London as other factors thought by them to have influenced their increased case-load.

— most likely through fraudulent representations. We also knew these cases would be difficult to identify from a review of the files.

The pilot study did, however, identify important loopholes in the service-point procedures which may allow individuals to claim estate property fraudulently, despite there being legal heirs. At least one means of detecting possible cases of property grabbing was also identified. It was therefore decided to extend the pilot to a review of four Cape Town service points and all available files at each service point at the time of visiting. In total 171 files were reviewed during May and June 2006.

Hypotheses

Following the pilot project we had formulated the following primary hypothesis: service point procedures, as implemented in practice by service points in the greater Cape Town area, create loopholes that enable property grabbing to occur and, therefore, provide insufficient protection against would-be property grabbers.

With respect to property grabbing, there were two secondary hypotheses:

- (1) Property grabbing occurs even when estates are reported to the formal institutions, that is, the service points.
- (2) Property grabbing may be more frequent with respect to estates that would have been administered, prior to October 2004, in accordance with customary law, due to the expectations of potential heirs being based on conflicting customary practice and civil law. Customary practices may continue to influence who is appointed as the Master's representative of the estate.

Methodology

The investigation was carried out at service points situated at the Wynberg, Khayelitsha, Mitchell's Plain, and Bellville Magistrates' Courts. We had hoped to include a rural sample for contrast, but lack of adequate funding precluded that. However, given current estimates of 16 000 families migrating to Cape Town every year, a substantial majority of them from the Eastern Cape, our sample may reflect both urban and rural practices.¹¹

For purposes of investigating the primary hypothesis of this project — that service-point procedures create loopholes — the demographic profile of the population residing in the jurisdictional area of the service point was deemed irrelevant. This was because it was primarily the procedures that were being studied rather than the practices of those using the system. In order to investigate the secondary hypotheses, however — that property grabbing does occur even when estates are administered through the formal institutions and that customary practices may impact upon such administration and on the problem of property grabbing — it was necessary to look at the practices of people involved in the administration of deceased intestate

¹¹ Figures taken from *The Herald* 17 March 2006.

estates. It was, therefore, important to select research sites where the population demographics were suitable for testing the hypotheses. The foregoing sites were selected for the following reasons:

- (1) The four service points had the highest case loads within the Cape Town Area.¹²
- (2) It was thought that property grabbing is more likely to occur in jurisdictions that have a very poor population (such that the importance of property even of relatively low value is much greater). Since service points are authorized to handle only those estates where the value does not exceed R50 000, the fact that a particular service point handles a large number of estates is one indication that the service point serves a relatively poor population.
- (3) Anecdotal evidence had suggested that property grabbing often involved immovable property. It was also anticipated that findings associated with immovable property could later be followed up and checked against registration in the Deeds Office. It was, therefore, thought useful to conduct the investigation in an area where deceased estates are more likely to include immovable property of a value under R50 000. Information from the South African Census 2001¹³ showed that the jurisdictions of Bellville, Mitchell's Plain and Wynberg had the highest rates of home ownership from among the magisterial districts in the Cape Town area (excluding the jurisdiction covered by the Cape Town Magistrate). From the pilot study of the estate files, however, the greatest number of files containing immovable property was found at the Khayelitsha service point. This is most likely related to the value of property in the Khayelitsha area coming within the jurisdiction of the service points.
- (4) In order to investigate the possible influence of customary law on property grabbing, it was necessary to ensure that at least one research site had a large African¹⁴ population. The suburb of Khayelitsha has a

¹² The Master's Office had included these four courts in a list of the service points with the greatest case load. Service points are required to send completed, closed files to the Master's Office on a tri-monthly basis so it was important for obtaining data that the service points should have a large number of files at any given time. At the time of our visit, Wynberg had sent one batch of files to the Master's office since 1 January 2006 and so had Bellville. Mitchell's Plain had only completed 16 estate files in 2006 and Khayelitsha had not yet sent any of the completed files for 2006 to the Master. This explains why files from Khayelitsha account for the majority of files reviewed in this project.

¹³ Statistics South Africa: Census 2001 (hereafter referred to as 'the 2001 Census').

¹⁴ The use of the term 'African' replaces the use of 'Blacks' as contained in the Black Administration Act, and will be used throughout this paper. To this extent the guidance of the Constitutional Court in *Bhe* has been followed and the term 'African' is therefore used to describe a member of one of the indigenous races in South Africa. We repeat the disclaimer of the Court that, '[the term African] should not be construed as conferring legal or constitutional validity for its exclusive use to describe one

very high concentration of Africans (99.6 per cent)¹⁵ and also has its own magistrate’s court. Furthermore, under the 2001 Census, Khayelitsha was recorded as having the highest number of customary marriages within the Cape Town area. Although Khayelitsha is a sub-district of the Mitchell’s Plain magisterial district, and its jurisdiction therefore covers the same geographical area as the Mitchell’s Plain court, it was deemed likely — for reasons of proximity and transport as well as of language — that Africans living in Khayelitsha would register deceased estates in the Khayelitsha court rather than in the Mitchell’s Plain court. Indeed, the case load to date from 2006 illustrates that Khayelitsha experiences a far higher number of cases than Mitchell’s Plain: 90 files compared to 16. Furthermore, all 13 files which listed a marriage as customary were found at Khayelitsha. It was thought, therefore, that the Khayelitsha court would offer the highest number of African estates.

Evaluating the hypotheses

Having undertaken a second, and more substantial review of estate files, it is possible to conclude that aspects of the procedures indeed allow an opportunity for would-be property grabbers to manipulate the system of registering estates. An in-depth discussion of some of these loopholes follows.

With regard to the secondary hypotheses, however, not all of our expected outcomes were met:

- (1) Although, as anticipated, it was difficult to identify actual cases of property grabbing from our review of the files, it was possible to identify several instances of post-death withdrawals of bank account funds before letters of authority were issued. Some of these may have been cases of property grabbing. Other possible instances of property grabbing may have been evident if statements of estate bank accounts were insisted upon by the service points.
- (2) Prior to 2004, customary law would have applied to at least 32 of the files reviewed during the project: in 13 files, the deceased was a partner in a customary marriage; and in a further 19 files the deceased was single and African.¹⁶ There is no evidence that these estates provoked

race group, nor is it intended to exclude persons of other race groups who are entitled to or describe themselves as “Africans” per Langa DCJ in *Bhe* para 1 footnote 2.

¹⁵ According to data supplied by Statistics South Africa on 13 March 2006, the population by group in Khayelitsha breaks down to 327402 Black African, 1501 Coloured, 38 Indian or Asian, and 69 White.

¹⁶ Racial demographics were noted only in some files, depending upon the Death Notice form used by the service point at the time the file was opened. Given the racial demographics in the research sites, however (particularly in Khayelitsha — 99.6 per cent African — which provided more than half of the files reviewed) and the fact that the deceased in 56 of the files was single, there may have been more pre-*Bhe* customary law cases.

increased property grabbing or greater conflict among family members than those estates governed, even before 2004, by civil law. Furthermore, customary practices did not seem to impact upon the appointment of the estate representative. Although, traditionally, customary law would apply the rule of primogeniture so that the eldest male child, or other male relative, would, in effect, represent the estate,¹⁷ this was not the case in any of the files in which a customary marriage was noted. Out of the 94 cases where the deceased was survived by a spouse, in only 3 — each of them an instance of civil law marriage — was the spouse not appointed.

FINDINGS AND RECOMMENDATIONS

1 *Limited circumstances of registration*

As noted above, it is unclear whether the expectation, following the *Bhe* decision, of a great increase in the number of estates registered at service points has materialized. In fact, it appears that some estates that would have been reported to the magistrates' courts under the customary law regime are not currently being reported to the service points and that overall, therefore, it is possible that fewer estates are actually being reported.¹⁸

There are various possible explanations for this, and the first is lack of knowledge. An individual's ability to protect his or her interests as a beneficiary of an estate requires knowledge of the system of administration: where to access the relevant institutions; how to access them; and what his or her substantive legal rights are in relation to intestate inheritance. Many people in disadvantaged sectors of society have little knowledge of these matters.

Earlier research, for example, had highlighted much confusion relating to the entitlement of family members to an estate. Interviews elicited a wide disparity of views relating to inheritance. Some interviewees stated that, if there is no will, the family must decide what happens to the deceased's estate;¹⁹ others that the 'family home' is a special type of property which does

¹⁷ In fact, based on our interviews conducted during 2004–2006, the rule of primogeniture does not seem currently to be the customary practice followed in the Cape Town area. In reality, practices vary among communities and different family members may be designated to inherit property and/or to take over the responsibilities of the deceased.

¹⁸ According to an interview on 2 July 2004 with a clerk at the Wynberg Magistrate's Court, approximately three times more customary law estates were reported on a daily basis than civil law estates. Of the 37 estate files reviewed during our research at the Wynberg service point, only 11 estates would have been customary law estates prior to October 2004. Thus there appears to be a drop in the number of such estates being reported.

¹⁹ For example, interviews with a Nyanga social worker on 7 September 2004 and with a Phillippi widow on 28 June 2004. Although prior to the *Bhe* decision, this perception had the same basis in reality, people may not have become aware of the changes wrought by the case law in this regard.

not belong to an individual family member.²⁰ Minors from a deceased's previous marriage were sometimes thought to be excluded from inheritance of certain property.²¹ A perception also emerged that a 'common law' union could be established once a couple had lived together for more than five years (such that the 'common law' spouse would acquire inheritance rights).²²

Misconceptions and cultural attitudes relating to the role of the courts in the administration of deceased estates may further perpetuate the reluctance of individuals to register the estate. In some interviews, courts were seen as an institution to which one would go only in the case of a dispute,²³ and it was expected that matters should first be resolved between the family and community.²⁴ For example, one interviewee stated that she had been prevented from going to court by her family council, as it would disgrace and humiliate the family.²⁵ Other interviewees expressed the belief that one would go to court only in cases where there was a will.²⁶

A second explanation for estates not being reported to service points is possibly that, for those who were familiar and comfortable with the application of customary law through the previous system, the invalidation of that law by the Constitutional Court and the unification of the administration of estates system provided reasons to withdraw from the formal system, thereby reducing the overall number of registered estates.

Given the lack of knowledge, distrust or rejection of the system, the impetus to register an estate and acquire formal ownership of estate property may be limited to three main situations:

- (i) where formal legal ownership is necessary in order to gain physical access;
- (ii) where ownership of the asset requires formal registration and the person wishes to dispose of, or transact with, such assets; or

²⁰ For example, interviews with a Guguletu social worker on 21 September 2004 and with three members of a Guguletu section of the South African National Civic Organization (SANCO) on 21 September 2004. The concept of 'family home' may apply only to 'old township stock' houses.

²¹ An interview with a Cape Town woman on 10 September 2004 regarding her father-in-law's estate. There is some indication in the interview that the deceased may have had a will in the case discussed, so it is not clear whether this was a case of an intestate estate. The interviewee seemed to be referring to a council house in the Eastern Cape, which may not be part of the estate in any event.

²² For example, interviews with a Tafelsig woman on 3 September 2004; with three members of SANCO on 21 September 2004; and with a Cape Town social worker on 14 September 2004.

²³ For example, in an interview with a Guguletu police captain on 27 August 2004.

²⁴ For example, interviews with a Nyanga social worker on 7 September 2004 and a Guguletu social worker on 21 September 2004.

²⁵ Interview with a Phillippi woman on 28 June 2004.

²⁶ For example, interviews with a Phillippi woman on 9 May 2004 and with a Guguletu social worker on 21 September 2004.

- (iii) where physical access to the property is threatened by others and the person wishes to protect his or her right to access the property.

Where the above compelling conditions do not exist, the individual's own pre-conceptions of estate administration may affect whether he or she is willing to register the estate.

2 Disparity in the format of the letters of authority

Letters of authority are the instrument issued by the service points authorizing the estate representative to access and distribute the estate property. According to the Policy and Procedure Manual, the letters of authority should contain the following information: a file number; name of the appointed representative; name, identity number and date of death of the deceased (as well as the name of a surviving spouse, if married in community of property); and a list of assets to which the authority granted therein relates.²⁷ Although the sample letters of authority annexed to the Policy and Procedure Manual do not appear to require the identity number of the appointed representative, it should clearly be included so that a family member with the same name cannot impersonate the representative.

The majority of institutions that hold property for third parties will require the presentation of letters of authority before they will release assets of a deceased person to another individual. Such institutions should insist that the person to whom assets are released is the person appointed by the letters of authority and that the assets being released are specifically listed in the relevant section. Should the letters of authority not clearly indicate the identity of the estate representative, or should they fail to identify precisely the estate assets, the authority granted by the letters will be open to abuse. Thus, as suggested above, if the representative's identity number is not stated in the letters, a family member with the same name may obtain a copy of the letters and impersonate the representative in order to gain access to estate property. Similarly, if an itemized list of estate property is not insisted upon, the representative may use the letters to gain access to estate property that has been intentionally concealed so as to avoid its distribution among a number of heirs. For example, if a bank account branch and number is not specified (in clear, typed format), the letters may be used to access other bank accounts held in the deceased's name without them being revealed to service point officials or to other potential heirs.

When asked to provide copies of the standard form used for the issuance of letters of authority, officials at the Wynberg and Khayelitsha service points provided documents which were almost identical to the generic format provided by the Master's Office in the Manual. Crucially, however, neither form indicates an itemized list of assets as required by the generic format. The Wynberg form includes a space for inclusion of an account number — in an odd place, directly below the representative's identity number. We were

²⁷ Annexure M: Form J 170 of the Policy and Procedure Manual *op cit* note 9.

informed in an interview with a Wynberg service point official this addition was prompted by complaints from the banking institutions. As far as we know, it has been added in this way only at the Wynberg service point.

Although the blank forms provided did not indicate a space for the itemization of assets, there was practical improvement in this regard between the 2005 pilot study and the 2006 project. In contrast to the practice pertaining at the time of the 2005 pilot, our 2006 research showed greater uniformity, in practice, both in the listing of specific assets in the letters of authority and in the typed manner in which this was done. This will be discussed below in greater detail.

Wynberg

In 2005 we had been concerned that the letters of authority issued at the Wynberg service point were hand-written and contained no detail of the estate assets. As suggested above, this presented the opportunity for an individual to use the letters to gain access to property which he or she had not declared on the estate inventory. This also meant that there was no incentive for the representative to declare all estate assets in the required inventory — since blanket authority was in any case being given — so that the value of the estate could potentially have been far greater than the R50 000 jurisdiction of the service points. Although, in theory, third parties, such as financial institutions and the Deeds Office, should refuse to act upon letters of authority that do not specifically note the relevant property, it is not clear that this is always the case. Further study of this point is required.

This is a critical loophole, particularly where there is a surviving spouse and children who are unrelated, ie children of the deceased from another woman. In such circumstances, the surviving spouse may wish to undervalue the estate so that she is deemed the sole heir, avoiding the obligation even to submit a next-of-kin affidavit.²⁸

On returning to the court in 2006 it was noted that the format of the letters of authority had changed. Now all assets were listed, and typed, on the letters. As noted, the amendments were made at the behest of financial institutions that had refused to accept the handwritten format. Representatives were returning to the service point requesting replacement typed forms. The service point official informed us that he had designed the new form himself (he seemed unaware of the fact that a generic form, requiring a specific list of assets, was provided in the Policy and Procedure Manual). The assets were now listed along with the values and where bank accounts were

²⁸ Next-of-kin affidavits, which identify family members — and potential heirs — of the deceased, were not required in estates where the spouse was the sole heir (ie all estates that fall within the service point jurisdiction where there is a surviving spouse). We would suggest that the service point should require such an affidavit in all cases and should provide notice of the application to all possible heirs, thereby putting such family members on notice and enabling them to lodge an objection as to the declarations made by the surviving spouse.

listed, the account numbers were included. One anomaly with the letters (which indicates perhaps that there has been no supervision of the revision of this form) was that the bank account details of the deceased were entered underneath the name and ID number of the appointed representative, and not within the section of the form which listed the estate assets.

Bellville

The Bellville service point form had also improved greatly since the pilot study in 2005. While previously only the total rand value of the estate was handwritten at the bottom of the letters of authority, in 2006 the form was typed and included a box where assets were listed under sub-headings of 'claims in favour', 'movable property' and 'immovable property', in correlation with the headings from the estate inventory. Erf numbers were provided for immovable property and bank account numbers were listed.

Mitchell's Plain and Khayelitsha

During the 2005 pilot study, the letters of authority issued by the Khayelitsha service point were the only ones to include an itemized list of assets. This practice persisted at the time of the 2006 review. The Mitchell's Plain service point used a similar, though not identical, format for its letters of authority.

Once letters of authority have been issued, a file is considered closed and there are no further checks on how the estate is, in fact, administered. If letters of authority have been issued in error or fraud comes to light, it will be almost impossible to rescind the original letter and stop its further use. We have been told that when beneficiaries did not receive the inheritance to which they were entitled, they were left with the unrealistic option to initiate civil proceedings, impossible for many given the costs involved and their limited legal knowledge. In practice, we have found that the appointed individual holds great power over the other beneficiaries.²⁹ It is therefore imperative that a suitable and legitimate individual is appointed from the beginning. The disparity between the supervision of the Master over appointed executors and those holding letters of authority for small estates has led to a recommendation by the Law Commission that section 18(3) appointments be abolished, and one system of executorships encompassing greater oversight from the Master's Office be implemented for all estates.³⁰ It should further be noted that estate representatives receive no explicit

²⁹ In an interview on 10 April 2006, at one leading legal advice office, we heard of a case where the sister of a deceased woman had given her boyfriend the necessary paperwork for him to register the estate of the deceased in Cape Town. He was instructed to have the sister appointed as representative but completed a false affidavit stating he was a relative and was appointed as the representative. The letters of authority were in his name and he was therefore able to access the deceased's bank account. He disappeared with all the money and the family of the deceased had no way of rescinding the letters.

³⁰ South African Law Reform Commission Discussion Paper 110 (Project 134) *Administration of Estates* (2005) para 5.4.3.

instruction from the service point as to the identity of the legal heirs and distribution of the estate. Representatives are apparently presumed to know who is legally entitled to inherit the estate and in what proportion. Thus, even where there is no devious intent, mistakes may occur, particularly among beneficiaries who are more familiar with the customary practice of a single heir who steps into the shoes of the deceased.

3 Property Valuations

From the pilot project it emerged that immovable property valuations were frequently entered in the estate inventories without any authority for the valuation estimates. In only one-fifth of cases was authority for the valuation provided: it appeared acceptable for individuals to estimate the value, and their word was taken.

Following subsequent interviews with lawyers, conveyancers, estate managers, and service point officials, it came to our attention that valuations were often based on municipal valuations; the amount used by the local authority to estimate rates.³¹ Such valuations are generally far below the free market value of the property.

On returning to the service points in 2006, we found that use of the municipal valuation seemed to have become more widespread. Municipal rate accounts were included in the estate files and the value of immovable property listed in the inventory matched that of the property on the back of the account. Use of the municipal valuation is encouraged by the Master's Office. Officials at the office allegedly advise using this valuation as it means lower conveyancing rates (which are proportionate) for the beneficiaries.³²

In cases where the immovable property is of very low market value, using the municipal value will have little impact on distribution of the estate. Indeed, in such cases it may be unduly expensive to require individuals to obtain an independent valuation and may negatively impact on heirs from disadvantaged sectors of the community.

The danger of using valuations which are so far beneath the market value relates mainly to cases where the estate is worth more than R125 000. As noted above, this is the value threshold which distinguishes small estates, currently administered under s 18(3) of the Administration of Estates Act, which provides for less supervision over the distribution of estate assets and offers fewer safeguards to protect the beneficiaries. While the Law Commission has proposed to abolish the distinction in the administration processes,³³ thereby increasing protection for all estates, no matter what the value, applicants for letters of authority may currently avoid official scrutiny over the distribution of sizable assets by intentionally underestimating their

³¹ Interviews, for example, with an Estate Manager on 3 April 2006 and with a Cape Town attorney and conveyancer on 31 March 2006.

³² Interview with an Estate Manager on 3 April 2006.

³³ See Discussion Paper 110 op cit note 30.

true value. Given the difficulty of rescinding letters of authority once they have been issued, this ability to evade scrutiny is worrying.

A second, crucial danger relates to cases where both a widow and children have survived the deceased, especially where the children of the deceased are not the children of the surviving spouse. Given the spousal right to the first R125 000 of the estate, it would be in his or her interest to ensure that the entire estate is valued below this amount, making him or her the sole heir. The spouse will then be able to register the immovable property — which may in fact have a true market value that is much greater than R125 000 — entirely in his or her own name, denying the children their rightful portion of the inheritance. In cases where the spouse is the mother or father of the children in question, the impact of this situation may not seem significantly adverse. Things do, however, change over time. While the needs of children may be met by a parent while they are young and while the parent is alive, the parent may remarry and acquire additional heirs, or may lose the property while alive, leaving the children with nothing. Certainly it is preferable for such children to inherit their rightful portions of immovable property separately from their parents and for such property to be safeguarded by the Guardian's Fund until they reach majority.

Furthermore, even where there is no risk of disinheriting anyone, as a matter of best practice, a standard should be established as to what constitutes an acceptable valuation. Valuations which are several years old, such as the 1996 purchase prices given as the estimated property values in some of the files reviewed, should not be permitted, as they certainly do not reflect the current true value of the estate. Municipal valuations, while preferable to such out of date estimates, should be accepted only where they pose no risk to potential beneficiaries of the estate. Where the number of heirs, or their due proportion of the estate, turns on the value of immovable property (i e, if it might raise the estate value to an amount in excess of the spousal share of R125 000), a free market valuation should be required at the estate's expense.

4 Movable property

One major finding from the research has been the lack of recording of movable property. Property which does not need to be recorded within the estate for it to be accessed (i.e. where no letters of authority are required to acquire physical possession, e.g. cell phones, electronic equipment, furniture or jewellery) is rarely listed in the estate files. The practice of recording movable property varied among service points, with Bellville recording general categories of property, such as furniture and electronic equipment, while the other service points recorded movable property only if registration was required by law, such as for the transfer of a vehicle registration licence, or of a firearm licence. Thus, for example, movable property was only listed in 11 of the 90 files reviewed from Khayelitsha. Of these files, 7 related to motor vehicles and 4 to firearms (although one file from Khayelitsha did also register 5 cows and 14 sheep). It is difficult to believe that the deceased in all

the other cases did not own any personal possessions. There is a need for an increased awareness that movable property does indeed form part of the deceased's estate.

Individuals working with estates have expressed concerns, during interviews, that movable property is highly vulnerable to 'grabbing'.³⁴ Interviewees repeatedly mentioned incidents where relatives of the deceased had come to the home and taken the furniture and personal items of the deceased.³⁵ In many cases furniture will be the main asset of the estate and of great relative worth. Ensuring the return of property which has been taken from the rightful beneficiaries involves resorting to the courts, a slow and expensive procedure, by which time the property, and the 'grabber', will almost invariably have disappeared. The Law Commission has proposed that sub-sections listing types of movable property be included within the estate inventory.³⁶ Our study shows that such additional guidance is advisable, as it highlights the fact that such items form part of the deceased's estate and should not be distributed or taken without authority. One commentator on the Law Commission's proposals has further suggested that with respect to all movable property listed on the estate, the inventory should state where the assets are held at the present time.³⁷ Although letters of authority may not be necessary in order to gain access to most movable property, it is again suggested, as discussed above, that all assets listed in the inventory be replicated on the letters of authority as this would highlight that it is the representative's responsibility and obligation to distribute all estate assets, including movable property, in accordance with the applicable law.

5 Bank Accounts

Bank accounts were listed in 111 of the estate files reviewed but bank statements were provided in only 52 cases. Without a statement, it is impossible to discover whether any withdrawals were made from the account subsequent to the death of the account holder but prior to the issuance of letters of authority. Indeed, in cases where the service points failed to insist on statements, bank accounts may have been emptied before the estates were registered and money may not have reached the rightful beneficiaries. From the cases where statements were provided, nine indicated that post-death withdrawals had been made. Of these, five appeared to be legitimate and related to standing orders or payments authorized by the deceased prior to their death. In the other four cases,

³⁴ Interviews, for example, with an Estate Manager on 3 April 2006 and with a Cape Town legal advice office on 10 April 2006.

³⁵ Interviews, for example, with a Phillippi woman on 28 June 2004 and with a Cape Town legal advice office on 10 April 2006.

³⁶ 'Annexure 2: Amendments proposed to Inventory Form' in South African Law Reform Commission Discussion Paper 110 op cit note 30 at 122. See also the comments in the report in para 6.6.15.

³⁷ Op cit note 30 para 1.2.

however, the withdrawal amounts were for significant sums and significantly affected the subsequent value of the estate. For example, in one file over R8 207 had been withdrawn from the account in the three months following the death of the account holder. In this case each withdrawal related to payment of the deceased's pension which continued to be paid for the three months following his death.³⁸ Another file showed that the deceased's account held money at the time of his death but, by the time the estate was registered, all the money had gone; over R4 000 had been taken in ATM withdrawals. Another file similarly showed that numerous ATM withdrawals had been made following the death.

From interview information it is apparent that possession of the ATM card is seen as a means of power. A number of interviewees have suggested that it is common for a member of the family to withdraw funds from a deceased's bank account and, in some cases, to abscond with the money. However, as other interviewees have commented, the withdrawal of funds from the deceased's bank account may provide the only means of subsistence for the deceased's widow and children. In fact, one interviewee suggested 'there is a rumour that women in the townships tip each other off that you should withdraw all the money from the account before reporting husband's death'.³⁹

Banking institutions appear to be universally strict in their requirement that letters of authority be issued before they will release funds. (There is, however, provision for the immediate release of reasonable funeral expenses on production of a requesting letter from the service point).⁴⁰ Where there is delay accessing the letters, a widow or dependents may be left destitute. It is not our suggestion to make procedures so rigid as to result in deprivation for the dependents. A balance needs to be struck. Where the deceased left a widow, and the estate is worth under R50 000, she is the sole beneficiary and it is arguably of little import whether she accesses this money prior to registration of the estate. Where no statement is filed, however, it is impossible to know whether the estimated estate value is correct and whether the spouse is, indeed, the sole heir. If he or she is not, supervision over the withdrawal of subsistence funds is crucial in order to preserve the rights of all beneficiaries. It is suggested, therefore, that banks should be authorized to release to the widow a statutory subsistence allowance from the deceased's bank account, upon presentation of death and marriage certificates. The release of such funds should then be recorded in the account

³⁸ The pension does not appear to have been listed in the estate inventory and may, in fact, not form part of the deceased estate, as there may have been a designated beneficiary.

³⁹ Interview with attorney at the Women's Legal Centre on 14 July 2004.

⁴⁰ Section 11 of the Administration of Estates Act 66 of 1965 provides an exception for the release of funeral expenses prior to the issuance of letters of authority. A letter must still be provided from the service point and should be issued only after a quotation for or proof of payment of funeral expenses is provided by the requestor. See Section 8.2 Policy and Procedural Manual.

statement, together with the date upon which notice was given of the death. Upon application for letters of authority, and submission of bank account statements, the service point, or the Master's Office, will be able to determine if the widow is indeed the sole heir. If she is not, the relevant officials may instruct the estate representative to deduct the amount of the subsistence withdrawal from the share to which the widow is entitled.⁴¹

It is recommended, therefore, that in all cases where a bank account is listed as an estate asset, a valid statement of the account should be insisted upon. This would ensure that the stated value of the estate reflects the true value of any funds held by the deceased. It would also provide a mechanism through which subsistence withdrawals may be monitored. Finally, it would enable the service points to identify possible cases of property grabbing which may be brought to the attention of, and pursued by, the Master's Office. Indeed, in the cases reviewed for our study, if statements had been consistently filed where bank accounts were listed, a greater number of post-death withdrawals may have been evident — some of these possibly cases of property grabbing.

6 *Fraud*

Background research to the service point study has identified a widespread practice of false information being submitted within affidavits, leading to the issuance of letters of authority to an unentitled individual.⁴² Once this happens, it may be impossible to seize the letter of authority and prevent it being used to access the estate assets. There is an urgent need to change this culture. Policing every affidavit and all forms submitted at the service points and the Master's Office is impossible. It is therefore essential that the Master retains the authority to call the representative to account and that issuing false information to the Master remains a criminal offence.

The Law Commission suggests that the representatives of small estates be held personally liable if they do not distribute the assets in terms of the statement signed by the beneficiaries.⁴³ In light of the above findings, such a proposal is supported as a possible means of monitoring the conduct of the representative and ensuring his or her accountability, which is currently unavailable in small estates. It is important however, to realize that personal liability may not be sufficient where people have so few assets; 'grabbed property' may be quickly used — money spent or property sold — and the 'grabber' may have nothing with which to repay the legitimate heirs.

⁴¹ There may still be difficulties if there is more than one wife and insufficient funds in the deceased's bank account to provide subsistence funds for both. Also, there must be a way to prevent a widow from obtaining subsistence funds from more than one bank account (in more than one bank). This recommendation, therefore, requires additional thought.

⁴² Interviews, for example, with a legal aid officer, Legal Aid Board, Athlone, on 29 September 2004 and with an attorney at the Legal Resources Centre on 5 October 2004.

⁴³ *Op cit* note 30 para 5.2.34.

Raising the profile of the illegality and potential penalties for making false statements would be an important measure in changing the current culture. It is proposed that amendments be made to the inventory form in order to emphasize that issuing false information to the Master is a criminal offence. It is suggested that a statement to this effect should be read to applicants and their comprehension demonstrated by their signature at the end of a statement of understanding, in addition to their signature at the end of the document. This process would take minimal time and yet it has the potential of emphasizing the obligations and seriousness of the responsibility of the representative.

In addition, it seems crucial that the Master's Office actively pursue all claims of fraudulent misrepresentation in the context of small estates and ensure that those who commit fraud in this way are fully prosecuted, with the aim of deterring such acts in the future. Based on what we have been told by one knowledgeable interviewee, this is not currently the case.⁴⁴ Rather, it would be up to the rightful heirs or the estate executor to press charges. This may be unrealistic and may lead to the feeling among potential 'grabbers' that their actions will have no serious repercussions.

7 *Marriage*

In many of the files we reviewed there was inconsistency between the death certificate, which stated that the deceased was 'never married', and subsequent information in the files, including marriage certificates, which demonstrated that the deceased was, in fact, married. It appears that many marriages have not been registered at Home Affairs. In such cases the wife may be vulnerable to the deceased's family registering the estate — often without her knowledge — and denying her existence.⁴⁵ Anecdotal evidence from interviews suggested that such situations were known to occur, particularly in cases where a husband and wife had separated.⁴⁶ Widows who were married under customary law, and who are less likely to have a copy of their marriage certificate, were also particularly at risk.⁴⁷ Even in cases of

⁴⁴ Interview with an Estate Manager on 3 April 2006.

⁴⁵ See *Mahlala v Nkombombini* 2006 (5) SA 524 (SE) for an example of a case in which the mother of the deceased was appointed executor of the estate without the knowledge of the customary-law widow, whose marriage to the deceased was disputed.

⁴⁶ Interview, for example, with a Khayelitsha widow on 4 July 2004 (it is unclear in this case whether the marriage was registered — the marriage was a civil one; what the death certificate said; and whether the estate was indeed registered. Supposedly, however, a house registered in the widow's name was seized. The widow was separated from the deceased). In another case, the family of the deceased supposedly fraudulently obtained a pay-out from the employer of the deceased — instead of the widow — because the death certificate indicated that the deceased was not married (interview on 8 and 12 June 2004).

⁴⁷ 'Presently we have a case where the deceased was married customarily but the marriage was not registered and the family of the deceased deny the existence of such. The "nozakuzaku" admits having paid the lobola but does not want to accompany the

civil-law marriage, however, where the marriage has been registered and a certificate exists, the rights of the widow may be denied by the deceased's family. Moreover, where the family's claim is supported by the street committee, the widow may be unable to enforce her rights, in spite of having been to the service point and been recognized as the legal heir.⁴⁸ Once again, such cases appear to be more common when the deceased was separated from the surviving spouse.

In the files reviewed for this project, of the 94 deceased who were married, 13 were party to customary marriages. In each of these cases, a marriage certificate had been issued by Home Affairs and the surviving spouse was appointed as representative of the estate. This finding suggests that those using the service point system are aware of their inheritance entitlement. It may be that customary law widows whose marriages have not been registered — and particularly in cases where their marriages are being denied by the family of the deceased — are less likely to be aware of their rights and to approach the service points for administration of their husbands' estates. The loop-hole remains, however, that if the marriage is not registered and the surviving spouse does not have access to a marriage certificate then another family member may register the deceased as never married and apply to be appointed as the representative. It would be difficult for us to identify such cases from a review of the estate files. In these cases, the cheated spouse will have little practical recourse as by the time the spouse has been able to source a marriage certificate from Home Affairs and contest the appointment, it is likely that the deceased's assets will have been 'grabbed'.

In all but 3 of the 94 cases where the deceased was survived by a spouse, she was appointed as representative of the estate. In one of the 3 cases the sister of the deceased was nominated both by his widow from whom he had been separated for twelve years and by his girlfriend with whom he had been living for the last nine years of his life and with whom he had had two children. In another case, the surviving spouse had nominated her son as the representative. In the final case, a cousin of the deceased was appointed. We do not have enough information to determine whether customary principles impacted upon these three cases. As the spouse had nominated the representative, it was difficult to conclude that such instances constitute cases of property grabbing — if force or coercion had been used it would not be evident from a review of the records.

In only one case was a polygamous marriage identified. This case also followed the required procedure and was of interest as it appeared contrary

surviving spouse to home affairs or to attest to same as he will be acting against the wishes of his family.' Master at Bisho (M Zimkhitha) 'Comments on South African Law Commission Discussion Paper 110 on the review of the Administration of Estates; and informal minutes stakeholders' meeting 28 November 2005' 104 para 2.

⁴⁸ Interviews, for example, with a widow on 20 January 2004, and with a Cape Town bank manager on 15 July 2004.

to information which we had heard at interviews, namely that first wives were often disadvantaged. Indeed, several accounts had been put forward by interviewees who told of first wives left in the rural areas, uninformed of their husbands' deaths and excluded from their estates. In such cases the wife would have to come to Cape Town to assert her claim; and often the estate assets would have been already taken by the subsequent wife or partner of the deceased.⁴⁹

In the case at hand, however, the first wife had come from the Eastern Cape to register the death and had opened the file, signing the death notice. She had been married to the deceased under customary law and their marriage certificate was filed. Following his first marriage, the deceased had moved to Cape Town, where he subsequently married another wife in a civil marriage. The second marriage certificate was also provided. The estate assets included a house where the deceased had lived with his second wife, estimated (without authority) to be worth R15 000, and a bank account worth R1 500. The first wife nominated the second wife to represent the estate and both signed affidavits to this effect. The service point official explained that in this case the first wife had no use for a property in Cape Town as she wished to remain in the Eastern Cape.⁵⁰ Although it is not clear from the record, the implication seems to be that the second wife, who was appointed representative, would also inherit the house.

It is unclear, in this case, whether the first wife received any money, or other compensation, for the portion of the house that she was entitled to inherit. Such an outcome may have been expected in a situation governed purely by civil-law attitudes and customs. Assuming no compensation was in fact paid, this result may have been influenced by customary law conceptions that conceived of the Cape Town house as the second wife's 'house property' to which the first wife had no real claim. Alternatively, the outcome may be related to poverty. It may have been unrealistic for the second wife to obtain cash or other assets with which to 'buy out' the first wife's portion of the house, without selling the house itself. Future study might attempt to determine whether the outcome seen here is a common one; what lies behind it; and what it teaches about the impact of customary law on the distribution of estate property, relationships between multiple wives, and the way in which each of these interact with conditions of poverty.

⁴⁹ In an interview on 10 April 2006, a paralegal from a leading NGO gave several examples from her cases of wives from the Eastern Cape arriving in Cape Town to try and claim their husbands' estates, and discovering he had married or been living with another woman in Cape Town who had already laid claim to the estate assets.

⁵⁰ The database record of this case differs slightly from the account offered here, which is based on a recalled conversation with the service point official. According to the database record, the first wife was already married when she allegedly married the deceased and was already living in Khayelitsha. The record stated that she gave up the house there as she wanted to move away. Information in the estate file was in Xhosa and was translated for the researcher by the service point official.

8 *Service point jurisdiction*

If the infrastructure of the system can be strengthened through investment and training, we would recommend raising the jurisdiction of the service points from R50 000 to R125 000. At present, the low threshold of authority at the service points is thought to contribute to the undervaluation of estate assets. In our sample, 32 files were valued at over R25 000. Given the inaccuracy of valuation methods and the exclusion of movable property from the estate assets, many of these estates may in fact be worth over R50 000. This is even more likely to be the case in the 15 files where estates were valued at over R40 000. Intentional undervaluation to ensure service point jurisdiction appears particularly evident in a number of cases where the estate assets are arbitrarily valued at exactly R50 000. In many cases this may not be done with the aim of committing fraud and grabbing estate assets. It does, however, create a situation where the distribution of larger estates may be going unsupervised.

At the same time, it would seem counter-productive to recommend that these higher value cases be sent to the Master's Office — if the service points are able reliably to oversee the appointment of the representative. To this extent the service points could be strengthened through staff training and regulation of the procedures from the Master's Office.⁵¹ Education within the community and for service providers is also necessary.

From interviews it is apparent that most attorneys continue to use the Master's Office, even when their offices are located within walking distance of the service points.⁵² It is important that these professionals are aware of the service points. It is suggested that training seminars be run for practitioners and service providers to increase knowledge and encourage the use of the service points where applicable. It is further suggested that the possibility of requiring the use of service points, for estates that fall within their jurisdiction, be considered. Greater awareness of the service points and greater scrutiny of their performance may be promoted if professionals regularly used the service. One way to make this happen is to give the service points exclusive jurisdiction over small estates, although they would remain subject to the Master's authority and supervision. This would, of course, be dependent on strengthening the service point infrastructure, as recommended above. There seems, however, to be no down-side to such an arrangement. Rather, it would relieve pressure on the Master's Office; may avoid the possibility of duplication of files in the Master's Office and service

⁵¹ During a telephone conversation with an official at the Master's Office on 11 October 2006, it was divulged that there is currently a proposal for an assistant Master to rotate through service points within his or her jurisdiction, providing supervision, advice, and training to the service point staff.

⁵² Interviews, for example, with a Wynberg attorney on 31 March 2006 and a Mitchell's Plain law office on 29 March 2006 (although legal services provided by this office are actually provided by staff in Cape Town, the Mitchell's Plain employee was unaware of the service point, located across the street).

points; and may also contribute to greater equality. If the use of service points were mandatory for small estates, it would not only be those people who cannot afford an attorney who use them, as is currently the case.

Similarly, jurisdictional issues and record-keeping methods must be reviewed and tightened. When speaking informally to one of the service point clerks we were told that the service point considers its jurisdiction to be the same as that of the Master's Office, since the service point authority derives directly from that of the Master. This means, for example, that a person living in the magisterial district of Bellville may register an estate in the Wynberg service point. While the relevant service point apparently follows this approach in order to make the service point more convenient to those people who, though technically living within one jurisdiction, actually live closer to the magistrate's court in another jurisdiction, this system is open to abuse. It means that duplication of letters of authority may occur not only by the issuance of letters from both the Master's Office and from the relevant service point, but also by the issuance of letters by two different service points.

The issue of duplication has itself been dealt with by the Law Commission. A central electronic database of deceased estates has been proposed for the long-term. In the interim, it has been recommended that reference numbers be issued by the Master's Office to service points as estate files are opened. It is not clear, however, how this will prevent the duplication of files before electronic cross-referencing, using the name and/or identity number of the deceased, is possible. Alternatively, the Law Commission has recommended that the death notice should require confirmation that the estate has not been reported previously to a Master or service point. Such declarations are already required by service points, though our research shows that different forms are used for this purpose by different service points. It is recommended that this practice continue, but that the declaration signed to this effect be in the form of an affidavit, explained and sworn to at the service point upon registration of the estate.⁵³

CONCLUSIONS

The intention behind the service points has been to bring the administration system of estates to the grass roots level. To this extent, the large caseloads of the courts at Khayelitsha, Wynberg and Bellville reflect the importance of the service. The advantage for many remains logistical: rather than travel into Cape Town city centre, they are able to access the service points with little cost and effort. The process is usually much swifter than at the Master's Office and often the service point official will speak the same first language as the applicant. Despite the loopholes identified in the service point system, it is suggested that the advantages of the service points outweigh their limitations.

⁵³ Discussion Paper 110 op cit note 30 para 4.4.4.

The service point infrastructure must, however, be strengthened. Greater uniformity of practice and guidance from the Master's Office is needed. Service points should have no discretion to revise official forms, such as letters of authority, on their own. Raising the service-point authority threshold should also be considered. These issues, however, are interconnected. The infrastructure must be strengthened before the threshold may be raised. Increased use of the service points by attorneys and other professionals may lead to better performance, but this is more likely to happen only after the threshold is raised. Education and awareness campaigns — among professionals as well as the general population — are, therefore, an important first step.

Even after the system is strengthened, property grabbing will continue to occur, from within and outside of the formal institutions. Property grabbing from within the system will, most likely, continue to be perpetrated by means of fraudulent representations in estate applications. Officials who deal with such applications should be aware of this possibility and should be taught what to look out for. When would-be 'grabbers' are caught, they should be prosecuted.

Future research should follow up on institutional practices vis-à-vis letters of authority: Do financial institutions, the Deeds Office and other relevant organizations insist on the typed inclusion in letters of authority of estate assets before they will release such assets? What is the position of the banks regarding the release of subsistence funds to a widow prior to issuance of letters of authority? Is immovable property that has been inherited actually transferred in the Deeds Office to the rightful heirs? What would a review of files in the Deeds Office — corresponding to immovable property included in the estate files reviewed for this project — show?

The current study had a narrow focus, due to inadequate funds. It was not possible, for example, to test the effect of poverty and of HIV/AIDS on the phenomenon of property grabbing. In terms of poverty, this might be partially accomplished by comparing the estate file data gathered from a study of larger intestate estates to the data collected for this study.

Isolating the impact of HIV/AIDS on property grabbing is even more complicated. HIV/AIDS was not referred to at any point within any of the estate files we reviewed.⁵⁴ Nevertheless, given the known mortality rates in the areas reviewed and the prevalence of HIV/AIDS within the communities, the effect cannot be ignored.⁵⁵ In areas with a high incidence of

⁵⁴ In the estate files reviewed, 40 per cent of deaths of individuals between the ages of 18 and 59 were recorded as 'natural'. This is a surprisingly high natural death rate for a young population and it appears likely that this includes a high incidence of death associated with HIV/AIDS.

⁵⁵ The HIV/AIDS prevalence rate for South Africa is estimated at 16.7 per cent for 2005 by Statistics South Africa in 'Mid-Year Population Estimates, 2005' Release P0302. It must be noted that this figure is given for the whole of South Africa and the rate may be higher amongst the poorer sectors of society, due to factors such as lack of education.

HIV/AIDS, legitimate heirs may be weak and less able to fight for their rights. Further, the increased number of orphans may result in a greater number of children who are largely unaware of their inheritance rights and unable to enforce them on their own. There may, therefore, be a correlation between a high incidence of HIV/AIDS and of property grabbing. Further study in this regard is warranted.