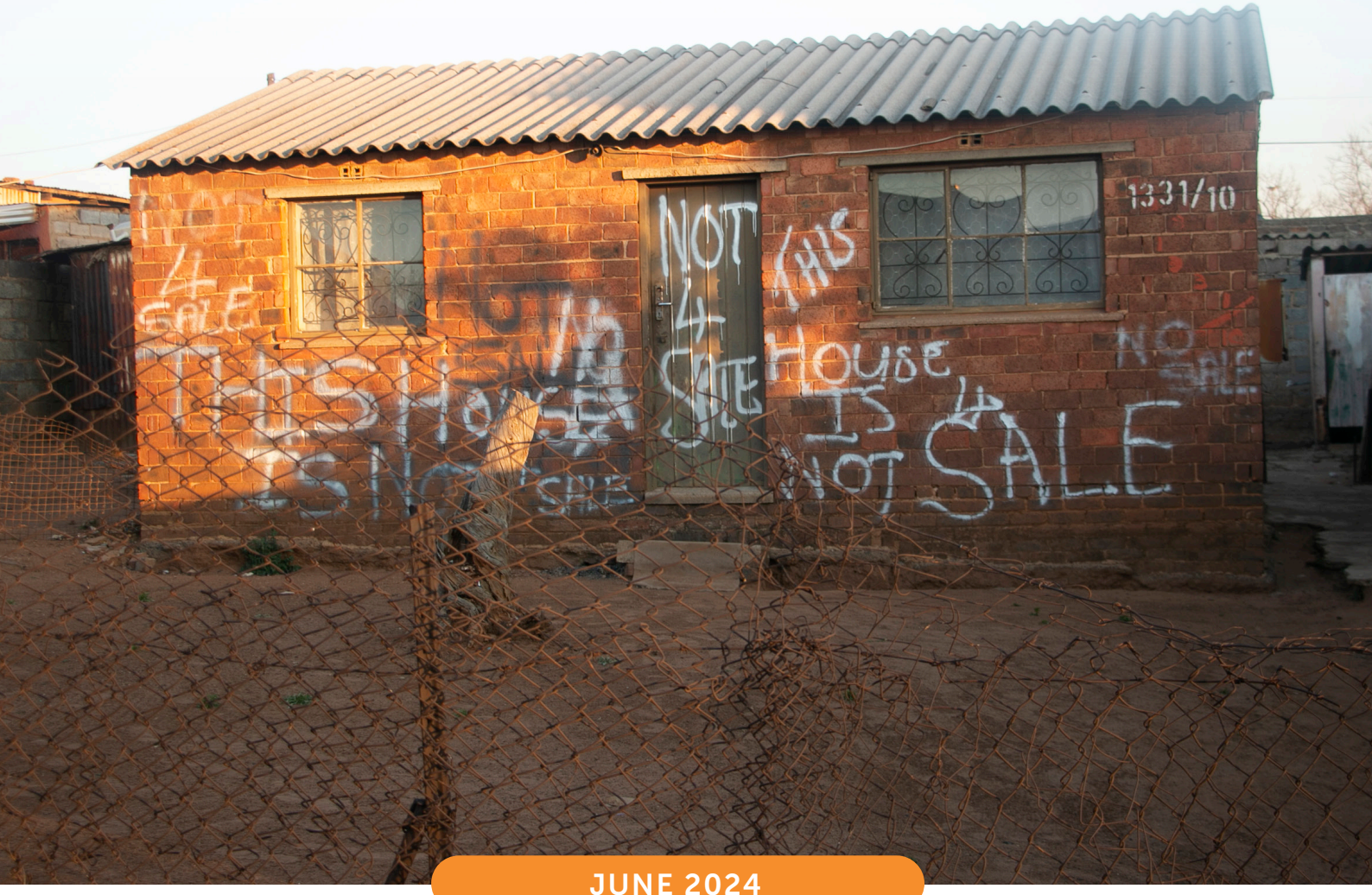
SERI

socio-economic rights institute of south africa

WOMEN'S EQUAL RIGHTS TO LAND AND HOUSING

RESEARCH REPORT 1

A GENDERED ANALYSIS OF FAMILY HOMES IN SOUTH AFRICA



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INTRODUCTION

In 2021, the photographer Thato Monare published a series of photographs entitled *Kukithi La: This House is Not for Sale*.[1] The photographs show modest family homes in the urban township of Soweto that have been spray-painted with a warning that the house is not for sale often along with the statement, 'This is a family house'. Monare's artist statement highlights the prevalence of homes that have been scrawled with similar messages:

> *'Kukithi La* is a project that came to me when I wasn't looking. The houses I later set out to document had been there all along; I just hadn't been paying attention. The one day I was riding my bicycle, I saw three of them in a single street in Diepkloof Zone 2. The houses angrily announce to the world at large: *This house is not for sale!*
>
> 'Once my eyes had been opened, I saw the defaced houses everywhere in my neighbourhood, Orlando East and elsewhere around Soweto... I found out that the trouble usually begins with the death of an elder who is the title deed holder and legal owner of the property. [Their death] precipitates a bitter family feud [about the ownership, occupation, use and control of the house] that can sometimes go on for years. Some family members try to sell the house before the dispute has been resolved. The graffiti scrawled on these properties is an outward manifestation of this conflict.'[2]

A family house in Soweto that has been spray-painted in an attempt to preserve the house against being sold (Thato Monare, 2021).

[1] See the collection of photographs published in T Monare, 'Kukithi La: This House is Not for Sale', in B Khona (ed), *Our Ghosts Were Once People: Stories on Death and Dying* (2021), pp. 111-118. See also T Monare, 'He is taking photographs of your house!', *Mail & Guardian* (6 November 2021), available at: https://mg.co.za/friday/2021-11-06-he-is-taking-photographs-of-your-house/.

[2] Monare, 'Kukithi La', p. 111.

Monare's photographs offer a unique and troubling snapshot into the desperation of family members who are at risk of losing their homes – who often go to extreme lengths including defacing their homes – to prevent it from being sold and lost to the market.

As the prevalence of these homes in the township of Soweto suggest, these photographs are just a snapshot of a much larger trend. In reality, thirty years after the end of apartheid, hundreds-of-thousands of black families living in South Africa's urban townships are facing the same tenure insecurity and the threat of homelessness as they fiercely contest the ownership, occupation, control and rights to access so-called 'family homes'.

When title holders pass away, many of these families have been shocked to find that, despite occupying these homes peacefully for generations, they have weak or non-existent legal rights to their homes due to 'gaps lefts in the system' regulating property law, intestate succession, matrimonial property and the administration of deceased estates.[3] But, more than this, the lack of succession surrounding family homes lays bare fundamental disjunctures between the formal legal system and how the vast majority of black families in the township live, challenging their fundamental assumptions about ownership, succession and potentially even the notion of family.

Central to the issues raised by family home disputes is a

> **'lack of clarity about what succession of a family house means – does it mean 'acquiring assets' [as those with individual title suppose] or does it mean 'stepping into the shoes of the family head as custodian of a multi-generational home and site of engagement with the ancestors' [as those who subscribe to the notion of the family home suppose]?**[4]

But these questions are also intimately tied up with questions about gender, discrimination and empowerment. Access to land and property is central to women's empowerment and security. As the Presidential Advisory Panel on Land Reform and Agriculture underscored,

> **'Rights to control and use land are central to the lives of … women, whose lives and livelihoods are derived from the land and its natural resources. The lack of land rights for women and girls threatens their living conditions, their economic empowerment, their physical well-being and their struggle for equality within a patriarchal society … Rules of access and inheritance in rural societies favour men over women and women with children over those without.'**[5]

As the primary occupants – and caretakers – of family homes, women and children are disproportionately at risk of losing their tenure security or being rendered homeless in evictions.

It is in this context that this report, which was commissioned by the Socio-Economic Rights Institute of South Africa (SERI), sought to conduct a gender analysis and research report on 'family property', 'family home' or 'family tenure' in the South African context.

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[3] M Bolt and T Masha, 'Recognising the Family House: A Problem of Urban Custom in South Africa', *South African Journal on Human Rights*, 35(2) (2019), p. 149.

[4] M Bolt, 'Homeownership, Legal Administration and the Uncertainties of Inheritance in South Africa's Townships: Apartheid's Legal Shadows', *African Affairs* 120 (479) (2021), p. 236.

[5] Presidential Advisory Panel on Land Reform and Agriculture, *Final Report of the Presidential Advisory Panel on Land Reform and Agriculture* (2019), pp. 36–37.

The research for this report consisted of an extensive desktop review of secondary sources dealing with family homes and and the limitations of title in the context where land is treated as family property, including books, chapters in books, journal articles, court judgements, research papers and media reports (such as op-eds, photographic essays, radio interviews and even reality television shows). These sources were complemented with three semi-structured interviews with legal experts who have assisted clients that are involved in family home disputes.[6] The report was also informed by various consultations that SERI staff has participated in that concerned how to give legal recognition to the concept of a family home, including consultations convened by ProBono.Org.

The report is structured as follows:

- **Section 2** examines the historical origin of family homes, by looking at how customary notions of collective entitlement to land and the historical ban on black people to own property contributed to the development of the family home concept;
- **Section 3** describes the nature of 'family property', a hybrid form of tenure that amalgamates notions of private title with customary law notions that recognise the relative rights of family members in land or residential property;
- **Section 4** describes a typical family home dispute;
- **Section 5** unpacks how the courts have approached claimants' invocation of the concept of the family home in arguments before them;
- **Section 6** contains a comprehensive analysis of the problems related to family home disputes;
- **Section 7** consists of gender analysis based on these resources; and
- **Section 8** suggests a variety of potential interventions that could address the problems posed by the lack of recognition of the family home concept.

It is hoped that this report and gender analysis will contribute to a deeper understanding of land tenure and gender inequality issues related to 'family property', and ultimately inform stronger gender-responsive policy and legislative reform proposals for SERI and its partners to advocate for.

[6] Interviews were conducted with SERI senior attorneys Nkosinathi Sithole, Khululiwe Bhengu, Thulani Nkosi and SERI candidate attorney Thando George over Zoom.

2

HISTORICAL ORIGIN OF FAMILY HOMES

'Family homes' (also sometimes referred to as 'family houses' or 'family tenure'), is a term used to describe a hybrid system of tenure that is based in freehold title but also contains a more African, familial notion of property.[7] According to Maxim Bolt, family houses are 'places of collective entitlement for the patrilineal descendants of an original householder'[8] that have parallels with the rural homestead.[9] These homes effectively 'belong collectively to multi-generational lineages' – including the ancestors and even future generations.[10] As Bolt writes, articulating a nurse in Soweto's understanding of the concept,

> **'The house was understood to belong to the lineage, a place of shelter and potential return. The ancestors were still here, to be found when called upon. And they, in turn, were connected *through the house* to the unborn.'**[11]

The notion of a family home developed informally over generations from 'an interplay' between enduring customary norms and the apartheid government's 'racialised history of administration and urban government, particularly [black people's] exclusion from urban property rights'.[12]

Under apartheid, the government systematically established and maintained a complex legal framework that prohibited black people from legally owning land[13] and ensured that the degree of tenure security that black people were entitled to was more precarious than the tenure security to which white people were entitled.[14] The system meant that the land rights available to black people were of a 'second class status'.[15] In fact, the only land rights available to black people were limited to customary land rights in the homelands or statutory land 'rights' which provided for a permit-based

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7 See R Kingwill, 'Custom-Building Freehold Title: The Impact of Family Values on Historical Ownership in the Eastern Cape', in A Claassens and B Cousins (eds), *Land, Power and Custom: Controversies generated by South Africa's Communal Land Rights Act* (2008), pp. 184-206; R Kingwill, 'Square Pegs in Round Holes: The Competing Faces of Land Title', in D Hornby, R Kingwill, L Royston and B Cousins (eds), *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017), pp. 235-282.

8 Bolt, 'Homeownership', p. 222. See also M Bolt, 'The family home in South African townships is contested – why occupation, inheritance and history are clashing with laws', *The Conversation* (26 September 2023).

9 M Bolt, 'Fluctuating Formality: Homeownership, Inheritance and the Official Economy in Urban South Africa', *Journal of Royal Anthropological Institute*, 27 (2021), p. 983; Bolt, 'The family home in South African townships'. See also the radio interview conducted with Bolt on Kaya 959 (Z Komisa, 'Understanding laws governing family homes', *Kaya 959* (15 May 2018)).

10 Bolt, 'The family home in South African townships'.

11 Bolt, 'Homeownership', p. 230 (emphasis added).

12 Bolt and Masha, 'Recognising the Family Home', p. 148. See also Bolt, 'Homeownership'; Komisa, 'Understanding laws governing family homes'.

13 See *Hlongwane v Moshoaliba*, High Court Gauteng Local Division, Johannesburg (2 February 2018), Case No A5009/2017 (*Hlongwane*), para. 7; *Shomang v Motsose N.O. and Others* 2022 5 SA 602 (GP) (*Shomang*), para. 13. See also Bolt and Masha, 'Recognising the Family Home', p. 150.

14 AJ van der Walt, 'Property Rights and Hierarchies of Power: A Critical Evaluation of Land Reform Policy in South Africa', *Koers*, 64 (1999), pp. 262-263.

15 Department of Land Affairs (DLA), *White Paper on South African Land Policy* (1997), pp. 57-67; WJ Du Plessis, 'African Indigenous Land Rights in a Private Ownership Paradigm', *Potchefstroom Electronic Law Journal*, 14(7) (2011), pp. 45-69.

system – in terms of which black people were offered limited rights of use and occupation in terms of leases or state-issued permits.[16] These rights were 'generally subservient' to ownership rights.[17]

This was also the case in the urban townships – particularly former black townships in Gauteng such as Soweto, Thembisa, Kagiso and Diepkloof – where the apartheid government initially issued long-term leases over township houses to black families.[18] Later these leases were replaced with 'a range of permits'[19] – site permits, residential permits, lodgers' permits or certificates of occupation – issued in terms of the Regulations Governing Control and Supervision of Urban Black Residential Areas and Relevant Matters.[20] These regulations primarily allowed black people to rent housing from local authorities, but in some cases it also allowed people to 'build or buy a house without owning the plot underneath, which was owned by the state'.[21] The most popular permits were site permits issues in terms of regulation 6 (which allowed people to erect a house with their own funds); residential permits issued in terms of regulation 7 (which allowed people to rent a house from the local authority); or certificates to occupy issued in terms of regulation 8 (which allowed people to purchase occupation rights to a house from the local authority).[22]

None of these permits offered black families anything more than a personal or contractual right against the local authority.[23] In other words, none of these rights amounted to ownership. These permits were, for instance, not transferrable or inheritable – which meant that unless other family members had also been expressly recognised as additional permit holders, families' homes could not pass to them when the primary permit holder passed away. In practice, this led to many families dealing with inheritance or transferability of their homes informally, without the involvement of the state.[24] It also meant that permit holders were unable to sell off or alienate family homes – a characteristic that has arguably informed contemporary understanding of family homes.

By the end of apartheid, customary conceptions of the homestead had become intermingled with the legal limitations of occupational permits (such as the limitations on the rights to alienate their homes and the fact that permits often listed approved familial occupants) to informally create 'a sense of collective [or group] entitlement' over family homes for many black families.[25]

In the 1980s, as influx-control laws began to crumble and the apartheid regime's grip on power began to slip, the government introduced various reforms aimed at converting these permit-based rights into private ownership.[26] This shift was initially motivated by the state's inability to maintain state-owned housing stock,[27] and pressure brought by community-based groupings such as the

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[16] Since the system was permit-based, the particular permit would determine the types of rights a person had in relation to land. Some of these permits included residential permits, lodgers' permits, hostel permits or certificates of occupation. See JM Pienaar, 'Tenure Reform in South Africa: Overview and Challenges', *Speculum Juris*, 1 (2011), p. 110; B Cousins and R Hall, 'Rights without Illusions: The Potentials and Limits of Rights-Based Approaches to Securing Land Tenure in Rural South Africa', Institute for Poverty, Land and Agrarian Studies (PLAAS) Working Paper No 18 (2011), p. 4.

[17] SM Kariuki, 'Failing to Learn from Failed Programmes? South African's Communal Land Rights Act', African Studies Centre (ASC) Working Paper (2004), p. 7.

[18] In the 1950s and 1960s, the government issued 30-year leases and, later, issued 99-year leases, which were subject to registration. Each of these forms of leasehold was later abolished in terms of the Regulations Governing Control and Supervision of Urban Black Residential Areas and Relevant Matters (promulgated in terms of the Black 'Urban Areas' Consolidation Act 25 of 1945) and the Black Community's Development Act 4 of 1984, respectively. See *Hlongwane*, paras. 7-11; and Bolt and Masha, 'Recognising the Family Home', p. 150. See also E Emdon, 'Privitisation of State Housing: With Special Focus on the Greater Soweto Area', *Urban Forum* 4 (1993), pp. 1-13.

[19] Bolt, 'The family home in South African townships'.

[20] GN R1036 of June 1968, issued in terms of section 38(8)(a) of the Blacks (Urban Areas) Consolidation Act 25 of 1945. See *Shomang*, para. 13.

[21] Bolt, 'The family home in South African townships'.

[22] See *Shomang*, para. 13.

[23] *Shomang*, para. 14.

[24] See Bolt, 'Homeownership', p. 225, who writes: '[w]hile permits could be passed down to kin by official means, a lack of administrative capacity meant they were often held within families without re-registration'.

[25] See Bolt, 'Fluctuating Formality', p. 983; and Bolt, 'The family home in South African townships'.

[26] See, generally, Emdon, 'Privitisation of State Housing', pp. 1-13. See also Bolt, 'Fluctuating Formality', p. 983.

[27] Emdon, 'Privitisation of State Housing, pp. 1-13; Bolt, 'Fluctuating Formality', p. 983.

Soweto People's Delegation, who advocated for policy and governance reforms during negotiations to end the rent boycott in 1989 including, among others, the transfer of homes to black residents.[28] However, by the early 1990s, these reforms were aimed at promoting and securing the tenure rights of black families.[29]

As part of these reforms, the government enacted two important pieces of legislation. The first was the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (the Conversion Act), which required provinces to transfer occupation rights granted in terms of regulations 6 or 8 into private ownership and empowered the MEC for Housing to conduct an inquiry into disputed transfers to determine who the lawful beneficiaries of the property in question were.[30] The second law was the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA), which automatically converted all registered leaseholds and various other rights over land into ownership.[31] These national laws should be read with section 24A and 24B of the Gauteng Housing Act 6 of 1998, which gives the provincial housing department the authority to adjudicate disputed cases that emerged from the transfer of residential properties.

In the late 1980s and early 1990s, the transfer of public housing stock in private ownership took place in earnest, with some commentators suggesting that around 750,000 houses were up for transfer, with approximately 120,000 homes up for transfer in Soweto alone.[32] The transfer process was 'murky' for a number of reasons, chief among them poor official record-keeping, the government's crumbling and overburdened land administration infrastructure, and the government's attempts to accelerate the process 'by [offering] monetary incentives to local authorities' to decide on rightful owners as soon as possible.[33]

The process usually took the form of lease- or permit-holders coming forward to have their rights 'converted' or 'upgraded' in terms of either the Conversion Act or ULTRA and being registered as individual owners. In the vast majority of instances, black families were told that they had to register family homes in the name of a single person.[34] This exclusive and individualised approach to family homes was in direct conflict with the social and communal perspective that many black families had of their family homes – setting the stage for bitter family disputes. The requirement of registering an individual on the title deed led to many families claiming that they were unaware of their house being allocated to a specific person or that the registration of ownership took place 'without their relatives' knowledge'.[35] Some have even reported fraud on the part of relatives who they claim secretly acquired title.[36] As senior attorney Nkosinathi Sithole remarked during an interview:

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[28] See I Chipkin, *Democracy, Cities and Space: South African Conceptions of Local Government* (1997), p. 25; and M Swilling, W Cobbett and R Hunter, 'Finance, Electricity Costs and the Rent Boycott', in M Swilling, R Humphries and K Shubane (eds) *Apartheid City in Transition* (1991), p. 188. See also Emdon, 'Privitisation of State Housing, pp. 1-13.

[29] This is apparent when one looks at the objectives of the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA) and particularly the reference to 'upgrading' of tenure rights to ownership.

[30] See, in particular, sections 2 and 3 of the Conversion Act.

[31] For a full description of ULTRA, see W Beinhart, P Delius and M Hay, *Rights to Land: A Guide to Tenure Upgrading and Restitution in South Africa* (2017), pp. 33-51.

[32] See Emdon, 'Privitisation of State Housing', pp. 1-13. See also Bolt, 'Homeownership', p. 220; and Bolt, 'The family home in South African townships'.

[33] Bolt and Masha, 'Recognising the Family Home', p. 150.

[34] Bolt, 'The family home in South African townships'. This was also apparent from the interviews with attorneys. See interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023); interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023); and interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023). In some instances, families were informed of their ability to register the house in the name of two or more distinct co-owners, but many families seem to have rejected this option on the basis that this would also amount to a form of individual ownership by the listed individuals (to the exclusion of other family members).

[35] Bolt, 'Homeownership', p. 228; Bolt, 'Fluctuating Formality', p. 983; and Bolt, 'The family home in South African townships'. See also the interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023); and interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[36] Bolt and Masha, 'Recognising the Family Home', p. 150.

> 'In many cases, what ... happened was that people would go into the offices clandestinely, and get the property registered in their names...'[37]

This occurred despite the Conversion Act's requirement that transfer to ownership only occur after a participatory rights inquiry was held to determine who should be appointed as the registered owner.[38] The implementation of ULTRA, which did not require similar inquiries but instead upgraded titles automatically, was also saddled with similar complaints.[39]

In those instances where rights inquiries were conducted, they were often 'perfunctory' and hampered by outdated personal and municipal records.[40] In the majority of these cases families elected a family representative or 'custodian' to act in a supervisory and managerial capacity on behalf of the family as a whole 'unaware that the [custodian] would come home with exclusive individual title'.[41] Usually the representative or custodian that was appointed would be a male relative, often the eldest male sibling of the original house holder – an occurrence that seems to be informed my custom. During an interview, senior attorney Nkosinathi Sithole describes this process as follows:

> 'In cases where the [rights] inquiry ... happen[ed] ... families would be compelled by the people who were assisting them... or they themselves would take a decision to have the property registered in one of the male [relatives]'s name. So, if you have sisters, the property of your parents will then be registered in your name, to the exclusion of your sisters. Now we know that in law, once that happens, it is no longer a family home. It is the title holders' individual property. Because, in law, we do not have a family home, that concept doesn't exist in law.'[42]

Senior attorney Khululiwe Bhengu described a similar process and highlighted how many families remained unaware of the long-term consequences:

> 'The family sat as a family and decided the person who's going to have the title deed is their older brother, not understanding what title means and that, once it's given to that person, [the house] becomes their exclusive property and goes down their lineage. [The family agrees to this] with the belief that he's going to be the custodian of the title of the family home, not that he's taking all the rights away from everyone, which is essentially the legal effect.'[43]

Over the years, hundreds-of-thousands of permits have been upgraded to individual ownership.[44] However, despite the goal of 'upgrading' the tenure security of black families, Bolt argues that the

[37] Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[38] The sheer number of similar claims among families, makes the truthfulness of these claims more likely.

[39] See Bolt, 'Homeownership', p. 228; Bolt, 'Fluctuating Formality', p. 983; and Bolt, 'The family home in South African townships'. See also Emdon, 'Privitisation of State Housing', pp. 1-13; and, in the context of the implementation of ULTRA, Beinhart et al, *Rights to Land*, pp. 33-51.

[40] Bolt, 'Fluctuating Formality', p. 983.

[41] Bolt and Masha, 'Recognising the Family Home', p. 150. See also Bolt, 'Homeownership', p. 228; Bolt, 'Fluctuating Formality', p. 983; interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023); and interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[42] Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[43] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[44] Bolt, 'The family home in South African townships'.

> 'change did not necessarily give [black] families greater security. Some family members benefited while others were left vulnerable. That is because the transfers – and the legal definitions of property and inheritance – do not account for how many people understand their homes: collective and cross-generational, available to an extended lineage.'[45]

These transfers had two long-term negative consequences. The first negative consequence, as alluded to in the above quotes, was that the registration of homes in an individual's name had the legal effect of concentrating exclusive ownership in that individual – to the exclusion of their other family members (often without their family members' knowledge).

From early on, state officials were aware that the limitations of individual ownership did not serve the needs of black families and 'tried to make the system more responsive'.[46] The clearest example of this was the provincial housing department's accommodation, through its Transfer of Rental Property Scheme (TORPS), for families to conclude 'family rights agreements' in terms of which families recognised custodians to manage their homes while protecting their entitlements to property and attempting to prevent custodians from alienating properties without their consent.[47] In *Shomang v Motsose N.O. (Shomang),* Acting Judge Elmien du Plessis wrote about how housing officials urged black families to conclude such agreements and appoint 'a custodian of the title of the property on behalf of the family', who would 'have a supervisory role over the property on behalf of the family and will not have sole ownership' as a way to ensure that use and occupation rights remained in the direct family.[48] Similarly, in *Hlongwane v Moshoaliba (Hlongwane),* the applicants explained how they had understood the relationship of a custodian through their family rights agreement as follows:

> 'We ... when assenting to the abovementioned agreement, mutually agreed to appoint our brother as a "custodian". We assented to his appointment as custodian, because in our culture, a male child is usually given a responsibility to look after the family. His appointment as a "custodian" was to give him a *supervisory or safe-keeping role for and on behalf of the whole family*. This did *not mean he was being given ownership* of the property.'[49]

These types of agreements were relatively common as they have been mentioned multiple times in the course of the research in case law around family homes and during interviews conducted with attorneys.[50] The intention of these family rights agreements seemed to have been to limit the rights of the person registered as the owner of the property and ensure some form of legal recognition of the relative rights of other family members. However, despite state officials implicitly recognising family homes in this way, these family agreements had limited legal effect. Senior attorney Nkosinathi Sithole, for instance, highlighted the limited legal application of these agreements by stating:

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45 Bolt, 'The family home in South African townships'.

46 Bolt, 'The family home in South African townships'. See also, generally, Bolt, 'Fluctuating Formality'.

47 Bolt and Masha, 'Recognising the Family Home', p. 150. In terms of understanding the varied legal ramifications of family rights agreements, see *Hlongwane* and *Shomang*.

48 *Shomang*, para. 27.

49 *Hlongwane*, para. 23 (emphasis added).

50 See *Shomang* and *Hlongwane*. See also Bolt, 'The family home in South African townships'; Bolt, 'Fluctuating Formality'; and the interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

> 'There's a number of those that you'll find - family home agreements - they are not title deeds, they have no force or effect whatsoever on other parties, except that they amount to a contract between the contracting persons.'[51]

This limited application was also highlighted in the *Hlongwane* case, where the court described family agreements as largely 'informal' and 'personal agreements' that only bound the parties involved and would only have legal recognition if they were expressly registered as usufructs or conditions attached to the title deeds of the property.[52] Bolt also highlights the 'lack of legal weight' of these agreements, quoting an official from the provincial department of human settlements, who stated:

> 'We would list the [family members] and we used to call it a family title deed, ... then we were stopped by the Deeds Office saying ... the [Deeds Registration] Act does not provide for such title deeds, it's like it doesn't exist, so we're wasting our time.'[53]

While more recent case law – such as the *Shomang* case – offer a potential different interpretation of the legal effect of family law agreements by underscoring the importance of the intention of those concluding family home agreements, at present these agreements still carry limited legal weight.[54] Perhaps most concerning, the lack of legal recognition of this form of tenure has meant that many families were under a misapprehension about the potential effectiveness of this type of agreement to protect their collective entitlements over a family house.[55] The overall effect is that many are unaware that they have weak legal claims to their homes.

The second negative consequence of the transfer process was an entrenchment of the gendered landholdings that had been the norm during the colonial and apartheid eras. This is due to the fact that ULTRA automatically converted holders of tenure rights into owners without providing the occupants and affected parties with notice or an opportunity to make submissions to an appropriately established forum. The effect of this arrangement was that ULTRA essentially formalised access to land as it was held in terms of the Black Administration Act (originally the Native Administration Act 37 of 1927) – which subjected black families to a 'crude version of customary succession' in terms of which succession in black people was determined largely through 'a blanket rule of male primogeniture' (i.e. the eldest son would be a sole heir).[56] This, along with the fact that the Regulations Governing Control and Supervision of Urban Black Residential Areas and Relevant Matters only enabled men to be registered as 'family heads', meant that ULTRA edified and bolstered the rights of men over family homes, largely to the detriment of women.[57] Bolt summarised the consequences of this process as follows:

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[51] Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[52] *Hlongwane,* paras. 49 and 53.

[53] Bolt, 'Homeownership', p. 228.

[54] See a full discussion of the *Shomang* case and its potential implications for the legal understanding of family home agreements below in section 5 below.

[55] See Bolt, 'Homeownership', p. 235, who writes about the shock and surprise of many families (and even LLB students) when they are made aware of the legal status of these agreements and the transfer of ownership to custodians.

[56] Bolt and Masha, 'Recognising the Family Home', p. 151.

[57] In this respect, see the Constitutional Court judgment in *Rahube v Rahube* 2019 1 BCLR 125 (CC), where the court declared section 2(1) of ULTRA unconstitutional on the basis that it infringed women's right to equality. See also the discussion of this case in Bolt and Masha, 'Recognising the Family Home', pp. 159-160.

Another example of a home in Soweto being spray-painted with a warning to potential buyers that the home is not for sale (Thato Monare, 2021).

> **'Men were usually documented as householders under apartheid, and gender discrimination was extended by giving them exclusive property rights [through ULTRA].'**[58]

The overall effect was that women, who had often occupied, used and improved family homes, were stripped of their rights to these homes – in direct conflict with the intention of ULTRA to upgrade or strengthen people's tenure rights.[59]

Decades after these upgrading processes, as the first generations of title holders are dying, the reporting of deceased estates have highlighted a 'substantial gap between popular understandings of the collective family house and the legal frameworks of individual ownership, land administration and intestate succession'.[60] As more families become aware of the lack of legal recognition of the family home concept, and title deed holders are acting in ways that do not have regard to their other family members, bitter intra-family disputes have emerged – which are, increasingly, spilling over into the courts.

This section has examined the historical origins of the conceptions of family tenure, and shows clearly how the notion of family home as a distinct form of tenure developed through an intermingling of customary practice and formal law. It also shows that many government officials have been aware of, and sympathetic to, people's ideas of family homes and sought to find innovative solutions to recognising the concept despite the lack of recognition of the concept in the legal framework. The next section considers that we mean when we refer to a 'family home'.

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58 Bolt, 'The family home in South African townships'.

59 See *Rahube*, paras. 38-42; *Shomang*, paras. 37-41.

60 Bolt and Masha, 'Recognising the Family Home', p. 157.

3

UNDERSTANDING THE FAMILY HOME AND ITS PREVALENCE

3.1 What is a family home?

The term 'family house' or 'family home' is virtually common-place, being regularly evoked by black families in everyday life – the frequent usage of the term spray-painted on the walls of houses in an attempt to prevent house sales,[61] during debates on radio broadcasts,[62] and even on reality television shows[63] indicates that the term has become part of township dwellers' daily lived reality. However, despite the universality of the term, there is no single definition of what this term means. As Bolt and Masha argue, although 'a clear definition is lacking' the term is 'ubiquitous, taken for granted, and often seen as highly consequential'.[64]

Despite the lack of a common definition, there are certain common features mentioned by the various authors that have attempted to define the term. As noted above, family homes have been described as a 'hybrid' system of tenure that is based in freehold title but also contains a more African, familial notion of property.[65] Bolt has stated that the family home is a 'place of collective entitlement for the patrilineal descendants of an original householder'[66] and has equated it to customary notions of the rural homestead.[67] Importantly, these homes are viewed as 'belonging' to cross-generational lineages – including the ancestors and future generations.[68] Senior attorney Thulani Nkosi described it as follows:

> **'[Our clients] say [the family home] belongs to nobody, if it was to belong to somebody at all, it must belong to all of [them]. The bottom line is that is must stay in the family...'**[69]

Commentators argue that family homes are intimately connected to people's sense of familial identity, which is clear from their use of the home as a family refuge, for occupation by extended family members, and even for ancestral ceremonies.[70] For instance, Bolt and Masha, drawing of

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61 See the collected photographs of Thato Monare referenced above in the introduction (Monare, 'He is taking photographs of your house!').

62 The various callers during the radio interview on Kaya 959 all referred to the concept with a seemingly common understanding of the term (Komisa 'Understanding laws governing family homes').

63 The popular television shows *Kukithi La* and *Ekhaya* produced by Moja Love (DSTV Channel 157) are reality shows that chronicle family disputes over the ownership and occupation rights of family homes. See Moja Love, *Ekhaya*, Moja Love (2021), available at: https://mojalove.co.za/portfolio/ekhaya/.

64 Bolt and Masha, 'Recognising the Family Home', p. 155.

65 See Kingwill, 'Custom-Building Freehold Title', pp. 184-206; Kingwill, 'Square Pegs in Round Holes', pp. 235-282.

66 Bolt, 'Homeownership', p. 222. See also Bolt, 'The family home in South African townships'.

67 Bolt, 'Fluctuating Formality', p. 983; Bolt, 'The family home in South African townships'.

68 Bolt, 'The family home in South African townships'.

69 Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

70 Bolt and Masha, 'Recognising the Family Home', pp. 156-157.

years of ethnographic field research and the legal challenges brought to ProBono.Org's public interest law housing clinic, define a family home as:

> 'a social property form that is central to the social organisation of many urban African families. Its significance is in preserving and anchoring family relationships and the ties that family members have with the house. The use and control of the property, and access to it, are matters of collective mores... [A] family house is regarded as a place to which an extended group of kin members *should* have access. It is a refuge from the vagaries of economic uncertainty and shifting domestic arrangements.'[71]

This description is similar to those proposed by other commentators. Kingwill, in an extensive body of work on family property based on a study in two areas of rural and small-town Eastern Cape, describes family property as:

> 'property relations [that] are interpreted in terms of kinship relationships that have been adapted to work with title. Property is regarded as family property to which all family members have rights of access, held for the family in perpetuity. Individuals cannot inherit the land in their own capacity or dispose of the land unilaterally.'[72]

This definition corresponds to notions of family property documented in other parts of the country. Mbatha, for example, writes about similar conceptions of family property that emerged during a study into customary succession conducted in two rural communities in the North West Province by the Centre for Applied Legal Studies (CALS) in the mid- to late-1990s.[73] He summarised the findings as follows:

> 'The research findings confirmed that the primary value underlying customary succession is an egalitarian one aimed at ensuring the maintenance of the family ... Families have changed their practices to ensure that the family rather than an individual heir is cared for ... We came across several community practices designed to realise the responsibilities entrusted to the heir by customary succession rules. In all of these practices, the concern is with who will control the parents' property. Parents wanted to leave their properties as family properties to be accessed in accordance with need and in acknowledgement of children who contribute to the welfare of the family members, especially parents ... The common practice is to bring children up in the belief that the residential home is family property, the use of which should be based on need rather than entitlement.'[74]

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[71] Bolt and Masha, 'Recognising the Family Home', pp. 156-157 (emphasis added).

[72] Kingwill, 'Square Pegs in Round Holes', pp. 243-244. See also Kingwill, 'Custom-Building Freehold Title', p. 185.

[73] L Mbatha, 'Reforming the Customary Law of Succession', *South African Journal on Human Rights* 18 (2002), pp. 259-286.

[74] Mbatha, 'Reforming the Customary Law of Succession', p. 268-269. See also S Mnisi Weeks and A Claassens, 'Tensions between Vernacular Values that Prioritise Need and State Versions of Customary Law that Contradict Them', in S Liebenberg and G Quinot (eds), *Law and Poverty: Perspectives from South Africa and Beyond* (2012), p. 384

Mbatha's research showed that parents specifically sought to protect the rights of '*all* of their dependents' and 'curb the abuses of the typically male "heirs" recognised by codified customary law set out in section 23 of the Black Administration Act 38 of 1927'.[75]

All of these definitions underscore key features: The hybrid nature of family property – that even though family property takes the form of freehold title, it has been infused with many of the characteristics of 'customary' land tenure that prioritise the family over the individual (in particular, the notion that all family members have a collective entitlement or claim to the property). In a similar vein to customary land holdings, family property can therefore be seen as a 'layered' or 'nested' form of tenure, in terms of which different people hold 'complementary interests [in land or residential property] simultaneously'.[76] In other words, this form of tenure is based on an idea that different family members hold relative rights to the same residential land.[77]

In addition to these core features, the authors writing about family homes have also identified a number of important characteristics that are common to people's conceptions of a family home. These characteristics are discussed in more detail below.

3.2 Prevalence of family homes

Given that family homes are not a legally recognised form of tenure, it is difficult to determine the exact prevalence of people who subscribe to or live according to notions of a family home. However, the scale of homes that were transferred from lease- or permit-holders into ownership gives an idea of the prevalence of family homes. As noted above, the number of leases or permits that were transfered into ownership was 'substantial' – with some commentators suggesting figures in the hundreds-of-thousands.[78]

Anecdotal evidence also suggests that the concept of the family house is 'an enduring and recurring trope' that can be found in various different parts of the country and in many different contexts – from urban and rural contexts, and even in small-towns.[79] Moreover, some research hints at the fact that the notion of family homes might not be unique to South Africa as similar concepts have emerged throughout Africa, most notably in Namibia and Ghana.[80] The common usage of the term has increasing crept into legal arguments around title before the courts and in families' relaying their grievances while seeking legal assistance to preserve their entitlements to their family homes.[81]

The prevalence of disputes about family homes is also evident from the interviews with attorneys. Senior attorney Khululiwe Bhengu, when questioned about the prevalence of these disputes, remarked:

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[75] See Mbatha, 'Reforming the Customary Law of Succession', p. 269; and Mnisi Weeks and Claassen, 'Tensions between Vernacular Values that Prioritise Need', p. 384.

[76] 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), pp. 110-111.

[77] HWO Okoth-Ogendo, 'The Nature of Land Rights under Indigenous Law in Africa,' in A Claassens, and B Cousins (eds), *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008), p. 129. See also Mnisi Weeks and Claassens, 'Tensions between Vernacular Values that Prioritise Need', p. 385, who state that rights in property are 'often shared' and 'exist in overlapping ways'. See also Beinhart et al, *Rights to Land*, p. 49.

[78] Bolt, 'Homeownership', p. 220; Bolt, 'The family home in South African townships'.

[79] Bolt and Masha, 'Recognising the Family Home', p. 156.

[80] See, for example, C Nord, 'Family Houses – Building an Intergenerational Space in Post-Apartheid Namibia', *Canadian Journal of African Studies* (2021), pp. 1-26; and Z Abubakari, C Richter and J Zevenbergen, 'Plural Inheritance Laws, Practices and Emergent Types of Property – Implications for Updating the Land Register', *Sustainability*, 11 (2019), pp. 1-17.

[81] See, for example, *Shomang* and *Hlongwane*.

> 'They were coming up *daily*. In our housing law clinic [at ProBono.Org], we had 80 cases a day and *at least 70* of those matters were these types of family home disputes...'[82]

Other legal experts that were interviewed suggested that these disputes have existed for a long time, but are increasingly becoming 'visible' due to the fact that these cases are increasingly finding their way into litigation.[83] Senior attorney Nkosinathi Sithole noted that disputes over family homes become visible when they 'appear to [attorneys] at the litigation stage', often as eviction proceedings – but that the vast majority of disputes never get to court.[84] This claim is strengthened by the fact that almost two-thirds of deceased estates are never reported, which implies that many of these types of disputes remain 'invisible' to the formal system governing the administration of deceased estates.[85]

However, all of the legal experts interviewed believed that the number of disputes over family homes that are making it to the court system are increasing.[86] As senior attorney Thulani Nkosi stated:

> 'I think these cases have always been there, especially in Soweto. But more of them are finding their way through the court system nowadays ... people are challenging it more often. *The problem is endemic.*'[87]

3.3 Characteristics of the family home

As noted above, there are certain important characteristics that are common to many people's conceptions of a family home. These characteristics have been compiled from secondary sources in which a variety of authors have written about family homes in different contexts – including the documentation of years of ethnographic field research and legal research. Two particular sets of sources deserve mentioning. The first set of sources is the body of work produced by Maxim Bolt, which is based on extensive ethnographic research in Gauteng including various interviews, court appearances, consultations with officials and even two consultative workshops with residents in Soweto, Thembisa and Kagiso to determine how these residents define and interact with the concept of family home.[88] The second set of sources is a body of work written by Rosalie Kingwill, a land and tenure rights expert, who investigated landholdings in two locations in the Eastern

[82] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[83] Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023); and interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[84] Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[85] These figures are based on official statistics presented by the Chief Master to deceased estate practitioners in 2016 – although the majority of these cases are assumed to be in rural areas. See Bolt, 'Homeownership', p. 232, who refers to the Chief Master of the High Court of South Africa, 'Presentation at the Fiduciary Institute of South Africa' (2016). See also Bolt, 'Fluctuating Formality', p. 983.

[86] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023) (who stated that '[t]here is definitely an increase in the number of cases, not only an increase in the visibility of these cases'); interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023); and interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[87] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023) (emphasis added).

[88] See, in relation to the ethnographic research and consultative workshops, Bolt and Masha, 'Recognising the Family Home', p. 155. See also Bolt, 'Homeownership'; Bolt, 'Fluctuating Formality'; Bolt, 'The family home in South African townships'; and M Bolt, '"Creature of Statute": Legal Bureaucracy and the Performance of Professionalism in Johannesburg', *Critique of Anthropology* 42(4) (2022), pp. 419-438.

Cape – one rural and one based in a small-town – that informed a series of articles, policy papers and books.[89] Kingwill's research is also based on in-depth interviews with residents of family homes and a keen awareness of the legal and regulatory environment governing landholdings in South Africa.

Bolt, Kingwill and other authors have identified key characteristics of the family home concept, which are described in detail below.

3.3.1 Family homes are a preference for extended family over nuclear family

The concept of a family home is directly influenced by the idea of 'family'. In the case of family homes, this implies a preference for extending relative rights to the property to people that are part of the *extended family*, rather than only extending rights to an *individual or nuclear family.*

As mentioned above, Bolt argues that family homes are considered 'place[s] of collective entitlement for the patrilineal descendants of an original householder'[90] – which ordinarily takes the form of a group of siblings who are the children of an earlier, usually male, household head (and their descendants).[91] This description aligns with the different isiXhosa terms that people used to express what they meant by family to Kingwill during her research interviews. For Kingwill, the majority of words that were used to describe what people meant by family – *unmombo* (family tree), *imilbo* (forebears), *abantu bakowethu* (our people) or *abantu bakulotata* (our father's people)[92] – refer to kinship that follows the patrilineal lineage, i.e. relatives are calculated through the male line and include those who are related by blood or consanguinity, known as agnates.[93]

This does not mean that women cannot be recognised as descendants with entitlements to a family house – they can in certain circumstances. This is because even though succession follows the male line, it would include both daughters and sons as members of the patrilineage. Daughters and sisters would fall within the parameters of patrilineal descent and, consequently be able to lay claim to entitlements to family property, as long at their ties to the patrilineage is not 'severed' by marriage.[94] This means that unmarried sisters or daughters would ordinarily still be considered agnatic, while the children of married daughters are not considered agnatic as they are considered members of their husbands' families.[95] Senior attorney Nkosinathi Sithole referred to similar customary understandings that were shared by clients when discussing entitlements over family homes:

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[89] See, among others, Kingwill, 'Square Pegs in Round Holes'; Kingwill, 'Custom-Building Freehold Title'; R Kingwill, *The Map is Not the Territory: Law and Custom in 'African Freehold' - A South African Case Study,* PhD thesis, University of the Western Cape (2014); R Kingwill, 'Designing Durable Land Administration Institutions for Recording Current Land Rights in Tenure Contexts that Fall Outside of the Existing Formal Cadastre and Off the Deeds Registration System', REDI 3 x 3 Working Paper No 51 (2018); R Kingwill, 'Papering over the Cracks: An Ethnography of Land Title in the Eastern Cape', *Kronos*, 40 (2014); and R Kingwill, 'Land and Property Rights: "Title Deeds as Usual" Won't Work', *Econ 3 x 3* (2017), pp. 1-7.

[90] Bolt, 'Homeownership', p. 222. See also Bolt, 'The family home in South African townships'.

[91] See Bolt, 'Fluctuating Formality', p. 983; and Bolt, 'The family home in South African townships'.

[92] Kingwill, 'Square Pegs in Round Holes', p. 245.

[93] Kingwill, 'Square Pegs in Round Holes', p. 244.

[94] Kingwill, 'Square Pegs in Round Holes', p. 251.

[95] Kingwill, 'Square Pegs in Round Holes', p. 251.

> 'The big downside of the notion [of family homes] and understanding it from the customary law background is that it does not favour women. Most of the time, when I've consulted women who are being evicted from their family homes either because they aren't able to buy their own houses or they had a bad divorce and they came back [to the family home], they almost always raise some kind of disclaimer, like "I know I was married. I know I'm a girl child, but this is also my home". And even with the men, you hear it in consultations, that, "No, she was married, she's no longer there anymore, she belongs to her husband's family surname, why is she fighting now to have rights to this family house...?".'[97]

Thus, although it is possible for women to use direct descent to claim their rights to family property, this is generally limited. However, despite the customary law focus on the patrilineage, in practice even formerly married women are claiming their entitlements to family homes.[98] As senior attorney Thulani Nkosi remarked during an interview:

> 'On the one hand, we've got a lot of unmarried women [as clients] who find themselves in this situation. But on the other hand, we have women who were previously married but ... things went wrong in those marriages, they're wanting to come back [to the family] home. And now they find that things have changed at home and they literally have to fight for their rights to come back home.'[99]

Kingwill has found that, at least in her research sites in the Eastern Cape, that some women have been able to bolster or 'reinforce' their claims or entitlements over the family home by retaining their paternal family name, remaining resident at the family home, or investing socially or financially in the family and the family property (for example though maintenance and upkeep).[100]

[96] Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[97] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[98] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023); and interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[99] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[100] Kingwill, 'Square Pegs in Round Holes', p. 250.

More evidence of a family signalling to the outside world that a family home is not available to be sold (Thato Monare, 2021).

Importantly, the preference for extended family is predicated on the fact that there is no limitation on the agnates that would have relative rights to the family property, as these customary notions of family reach over multiple generations to include all agnates that can trance their relationship back to the common ancestor.[101] As Kingwill states,

> **'the vernacular approach ... categorises eligible claimants, rather than listing individuals as "owners". Descendants were – and continue to be – traced according to social relationships identified by genealogy. Individuals are not named, and claimants not usually quantified...'[102]**

The desire to leave claims open to the extended family may partially be why many township families are reluctant to update the title deeds of family homes when ancestors pass away. The lack of compliance with the legal requirements of registering transfers are a regular occurrence in South Africa – resulting in title deeds that seldom reflect the current ownership.[103] This despite numerous large-scale attempts by the state to update outdated titles through the appointment of commissioners over the decades (in terms of the Black Administration Act 38 of 1927 and later the Land Titles Adjustment Act 111 of 1993).[104] Commentators believe that many families strategically choose to leave family homes registered in a deceased ancestor's name, in an attempt to retain broad family entitlement to the house.[105] As Kingwill observes, the 'legal provisions of the deeds

[101] Kingwill, 'Square Pegs in Round Holes', pp. 250-251. See also Bolt, 'Fluctuating Formality', p. 983; and Bolt, 'The family home in South African townships'.

[102] Kingwill, 'Square Pegs in Round Holes', pp. 250-251.

[103] Kingwill, 'Square Pegs in Round Holes', p. 236. See also Beinhart et al, *Rights to Land*, p. 49.

[104] See Kingwill, 'Square Pegs in Round Holes', p. 249, and Beinhart et al, *Rights to Land*, p. 49.

[105] See Bolt and Masha, 'Recognising the Family Home', p. 160; Kingwill, 'Custom-Building Freehold Title', p. 185.

registration system are … ignored, or only sporadically observed, in order to keep safeguards felt to be lacking in the formal documented system'.[106]

The preference for extended family stands in stark contrast with the notions of family that is found in the common law, which rely heavily on the reconstitution of the family as a nuclear family in each successive generation when a marriage is concluded. This is clear from Bolt's observation that many families were 'indignant' when they became aware that the legal consequences of intestate succession would that the family home would be left to a nuclear branch of the family.[107] Instead, the concept of the family home requires a more expansive approach which extends beyond the nuclear family to the extended family. As Siphiwo Baninzi, one of Kingswill's research participants, says:

> **'[I]n terms of our life, we have what is called the *extended family*. You may have somebody that we do not know who is related to this home. Maybe he went to the mines and worked there for years, or for ages, then *when he comes back if we sell this place he will … have nowhere to stay…* So that thing is of assistance… If my father, for example, by chance has another child that we do not know, and as the time goes, we pick up that he does have this child, then it means, *if he or she has nowhere to go, this is also his home or her home where he can be accommodated here*. If he's got to be buried, then this property, we would use it for making the preparations…'[108]**

Linda Sindiso Mnyemeni, another of Kingwill's research participants from Fingo Village, had a similar interpretation:

> **'Family property *helps keep the family together*. I will leave this property to my children because this is their home, bought by their fathers who passed away. They were born here and grew up here…'[109]**

3.3.2 Custom-built tenure: Freehold title, infused with customary values

Another common characteristic of people's understanding of family homes is the 'hybrid' nature of family homes – which contains elements of common law and customary law. For many commentators, family homes indicate that there has been a gradual adaptation of private title by black families, to accommodate the need for a form of tenure that 'reflect[s] [the] familial relationships reminiscent of customary concepts of the family'.[110] Kingwill argues there is a fundamental 'misfit' between formal rules and the registration of title in the Deeds Registry – which grants exclusive rights to use, occupy, manage and alienate land or residential property and requires that it be registered in the name of an individual, juristic person or legally constituted group[111] – and 'customary concepts of land holding' that recognise the relative rights of family members.[112] She believes that rather than

[106] Kingwill, 'Custom-Building Freehold Title', p. 185.

[107] Bolt, 'Fluctuating Formality', p. 984.

[108] Siphiwo Baninzi as quoted by Kingwill, 'Square Pegs in Round Holes', p. 246 (emphasis added).

[109] Linda Sindiso Mnyemeni as quoted by Kingwill, 'Square Pegs in Round Holes', pp. 245-246 (emphasis added).

[110] Kingwill, 'Square Pegs in Round Holes', p. 257.

[111] While property could also be registered in the name of co-owners, this would stand in conflict with familial notions of property as such registrations would only recognise the rights of the co-owners rather than the full range of recognised family members.

[112] Kingwill, 'Square Pegs in Round Holes', p. 241, where she argues that there is a 'misfit between registration of title (whether of groups or individuals) and customary concepts of land holding'.

being constrained by the legal limitations of the Westernised form of title that is legally recognised in terms of common law, black families '[overlaid] African customary norms and values on the management of title' to better suit their needs.[113]

In a similar vein, Bolt argues that family houses share many 'parallels with the rural homestead'[114] and 'came loosely to approximate ideals of the collective rural home, contrary to rural dwellers' stereotypes of urbanites as rootless occupants of government buildings'.[115] For Bolt and Masha, the urbanised nature of family houses has been partially to blame for the lack of recognition of this form of tenure as a distinct urban customary norm.[116] They also note that the recurring character of this form of tenure means that it 'has the obligatory character of customary rules rather than simply being a matter of individual preference or general customary usage'.[117]

The effect of the importation of these African customary norms into the formalised tenure system that is documented through private title is that 'two previously different concepts of property [one Western and one customary] have been collapsed into a distinctly hybrid form of ownership'[118] – a form of private title that operates as a unique, customised form of tenure for these families (often in a way that is at odds with the formal conception of private title).

3.3.3 Family homes are a preference for inclusion over exclusion

Another key feature of family homes, which is closely related to the family home's emphasis on collective entitlement by an extended family, is its emphasis on the principle of *inclusion* as opposed to *exclusion*.

This shift from exclusion to inclusion is tied up with notions of customary norms. As Bolt states,

> **'Assertions of custom ... become attempts to keep kin-based claims open, in the face of exclusive official rules, where formalized tenure raises the stakes of recognition'.**[119]

But this is not only about the customary approach to family, rather it is the home itself that is seen as a space that creates and strengthens family relationships. Kingwill's findings, for example, stress that family property plays an important role in 'keeping familial networks alive, durable and resilient'.[120] She states that family homes act as a mechanism to 'maintain family bonds, promote interaction and protect the family'.[121] This common belief was echoed by a Soweto resident during an interview with Bolt:

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[113] Kingwill, 'Square Pegs in Round Holes', p. 241. See also Kingwill, 'Custom-Building Freehold Title', p. 185, where she notes that private title has been adapted 'based on customary principles of property management'.

[114] Bolt, 'The family home in South African townships'; and Bolt, 'Fluctuating Formality', p. 983.

[115] Bolt, 'Homeownership', p. 225.

[116] See, generally, Bolt and Masha, 'Recognising the Family Home'. See also, generally, M Bolt and T Masha, 'The Family House: A Position Paper', Economic and Social Research Council (ESRC), ProBono.Org, University of Birmingham and WISER Policy Paper (July 2018).

[117] Bolt and Masha, 'Recognising the Family Home', p. 156.

[118] Kingwill, 'Custom-Building Freehold Title', p. 197.

[119] Bolt, 'Homeownership', p. 222.

[120] Kingwill, 'Square Pegs in Round Holes', p. 246.

[121] Kingwill, 'Custom-Building Freehold Title', p. 196.

> 'The house was understood to belong to the lineage, a place of shelter and potential return. The ancestors were still here, to be found when called upon. And they, in turn, were *connected through the house* to the unborn.'[122]

Kingwill makes a similar observation about family identity and belonging:

> '[Family] members thus belong to the property, rather than property belonging to individuals – though, as Peters argues, there is a shift afoot "from someone belonging to a place to a property belonging to someone, in short a shift from inclusion to exclusion".'[123]

SERI has highlighted how the centrality of nuanced notions of belonging is also present in the context of informal settlements, where residents often invoke notions of belonging to justify their presence and bolster their claims to space.[124]

Applying the concept of belonging to the concept of family property, the rationale for the retention, maintenance and protection of family property becomes clear: It is a *family* asset that should be preserved to benefit the family and be available to family members in need.

3.3.4 Family homes are a refuge for family members in need

Family homes are also commonly described as a refuge, shelter or 'safe haven' for family members – particularly those who are in need or who have fallen on hard times.[125]

This finding was borne out in both the literature and the interviews with legal experts. In almost all of the sources the family home was described as a place where family members could return to when they needed to escape economic, social or physical hardship. As Bolt argues, family members 'might come and go, but the home is a place to return to'.[126] Elsewhere Bolt and Masha state that in their consultative workshops with residents in Soweto, Thembisa and Kagiso, there is a 'clear insistence' that family homes should offer 'shelter for family members in need for housing, rather than simply [be construed as] property owned by an individual or an asset on the market'.[127] Later they note that,

> 'The family house is thus a social form of property which, after the death of an elder, instead of following testate or intestate succession law and registration of title, continues a more collective family relationship to the property. There is also a strong sense of allowing a sibling or relative unable to acquire their own home to be afforded dignity in taking on the deceased's property.'[128]

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[122] Bolt, 'Homeownership', p. 230 (emphasis added).

[123] Kingwill, 'Square Pegs in Round Holes', p. 261, quoting P Peters, 'Inequality and Social Conflict over Land in Africa', *Journal of Agrarian Change* 4(3) (2004), p. 305. See also Kingwill, 'Custom-Building Freehold Title', p. 196, where she states that: 'The family concept of ownership is most aptly represented by the word "belonging". People *belong* to the extended family; property *belongs* to the whole family; and family members *belong* to the family land'.

[124] See Socio-Economic Rights Institute of South Africa (SERI), *Here to Stay: A Synthesis of Findings and Implications from Ratanang, Marikana and Siyanda* (May 2019), Informal Settlements in South Africa: Norms, Practices and Agency Report 4, pp. 69, 71 and 79.

[125] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[126] Bolt, 'The family home in South African townships'.

[127] Bolt and Masha, 'Recognising the Family Home', p. 156.

[128] Bolt and Masha, 'Recognising the Family Home', p. 156.

A similar sentiment was expressed during the interview with senior attorney Thulani Nkosi:

> **'[A family home] must stay in the family. It must be used by members of the family as and when each one of them requires a place to stay... The bottom line is that it must stay in the family... Somebody can live here, they can up and leave to go work somewhere, but if they are met with hardships, they can come back because that is the family home'.**[129]

and the interview with senior attorney Khululiwe Bhengu:

> **'[Family members] see [the family house] as a place where if I'm unable to buy a house for myself, I can stay here for as long as I need, and my children can stay here, and their children can stay here. And even if I am able to buy a house for myself, but life goes wrong, it's a place where I'm always able to come back.'**[130]

For Kingwill, the notion that family members that are in need should be able to be accommodated at the family home highlights how important the family home is for 'taking care of potentially indigent or disabled family members – in other words, they apply the criterion of "need"'.[131] She quotes Linda Sindiso Mnyemeni, one of her research participants from Fingo Village, who explains it as follows:

> **'We call it family property because sometimes someone is disabled or unemployed. They can come back to that house. If a son or daughter [falls on hard times] you will take them in, even my grandchildren...'**[132]

Mbatha' research also emphasises the importance of the family home as a space for family members that are in need.[133] According to him, prioritisation on the basis of need is a central consideration in any determination about who would inherit occupation, use and administration of the family home. For this reason, he states that widows, orphans, unmarried, separated or divorced sisters or disabled people are often the primary occupiers of family homes (even though they may not have legal title over the home).[134] In addition to these groups, Mnisi Weeks and Claassens point out that daughters are increasingly granted occupation of family homes in rural settings as 'they were the ones who had also most contributed to the family's well-being and cared for their parents'.[135]

In an article that highlights the prioritisation of need in vernacular land-holding systems, Mnisi Weeks and Claassens agree with these claims. According to them, in land-holding systems based on vernacular values 'rights do not function primarily as boundaries of exclusion', instead they prioritise those that are most in needs.[136] This might mean that one person's need for a residential plot may, in certain circumstances, override another person's right to arable land or grazing land.

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[129] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).
[130] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).
[131] Kingwill, 'Square Pegs in Round Holes', pp. 246 and 259.
[132] Linda Sindiso Mnyemeni as quoted by Kingwill, 'Square Pegs in Round Holes', pp. 245-246.
[133] Mbatha, 'Reforming the Customary Law of Succession', p. 269 n. 41.
[134] Mbatha, 'Reforming the Customary Law of Succession', p. 269 n. 41.
[135] Mnisi Weeks and Claassen, 'Tensions between Vernacular Values that Prioritise Need', p. 384.
[136] Mnisi Weeks and Claassens, 'Tensions between Vernacular Valuses that Prioritise Need', pp. 385-486.

They argue that when competing claims arise in vernacular systems, there is a process of mediation and prioritisation of needs, in which all stakeholders are involved. As they write:

> **'Of overriding value is that the outcome should protect the survival and security of the group and its members... those with the greatest need are prioritised, and those who occupy and use the asset, as well as those who have made the largest human contribution by giving the most care to others.'**[137]

3.3.5 Custodians

A key feature of this hybrid form of family tenure is the family's appointment of a custodian, caretaker or 'responsible person' – that is, a person who acts as a 'representative selected to manage the property on behalf of [the family] members'.[138]

While references to custodians appeared in all of the literature on family homes, there seemed to be two distinct ways of understanding the concept. The first way of understanding the concept is the *custodian of the title* – where the family agrees that a representative be the title holder on behalf of the family who will have a supervisory role over the property on behalf of the family as a way to ensure that use and occupation rights remained in the direct family. This understanding was apparent in the work of Bolt, Masha and the interviews with legal experts, and seems to be the reigning understanding of the concept throughout townships in Gauteng.[139] Bolt and Masha found that references to custodians were mentioned as an important feature of family homes by all of the 39 workshop participants from Soweto, Kagiso and Thembisa. As they state, 'in all responses there was clear reference to a custodian who takes care of and preserves the property for future use'.[140]

The second way of understanding the concept is the *custodian as caretaker or housekeeper* – where the family appoints a representative to manage and take care of the family home. Kingwill states that terms such as the 'keeper', 'caretaker' or even 'housekeeper' or umgcinikhaya (keeper of the home) are used to described this concept.[141] Kingwill also writes that the person appointed by the family in terms of this understanding of custodianship is closely entwined with ideas of responsibility – as they are required to manage the property for the benefit of the family and, in doing so, ensure the 'social reproduction of the family through material, emotional and spiritual support'.[142] Importantly, while this person usually has to be occupant in the family home, *they do not have to be the title deed holder*. This understanding of custodianship is apparent from the work of Kingwill, and seems to be the predominant understanding of the concept in the Eastern Cape. While these two understandings of custodianship sometimes overlap, they don't always.

In the vast majority of instances, the role of both *custodian of the title* and *custodian as caretaker* has been subsumed into customary notions of the male heir or were played by elder male relatives from the patrilineal line. However, at least in relation to *custodian of the title,* many of these (predominantly) male relatives have proven themselves to be unreliable by, for example, selling family homes to pay off debts. Mbatha, for example, found many accounts of 'customary heirs'

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137 Mnisi Weeks and Claassens, pp. 385-386; Mbatha, 'Reforming the Customary Law of Succession', pp. 268-269.

138 See Kingwill, 'Square Pegs in Round Holes', p. 245; and Kingwill, 'Custom-Building Freehold Title', p. 194.

139 See, for example, Bolt, 'Homeownership'; and Bolt and Masha, 'Recognising the Family Home'. See also *Shomang*.

140 Bolt and Masha, 'Recognising the Family Home', p. 156.

141 Kingwill, 'Square Pegs in Round Holes', pp. 258-259.

142 Kingwill, 'Square Pegs in Round Holes', p. 258; Kingwill, 'Custom-Building Freehold Title', pp. 194-195.

(i.e. male primogenitors) abusing their legal rights to the family property and dispossessing other dependents – often disadvantaging women and children.[143]

Kingwill believes that this has meant that families are gradually moving away from the practice of appointing a *custodian as caretaker* based on descent (usually a male relative or heir), towards appointing people who have shown that they are capable of acting responsibly and are able to manage the family property effectively (usually the women who occupy the property). This is due to the fact that the position of custodian as caretaker requires them to be able to pay the taxes, bills, or services associated with the property, and otherwise manage the property. Accordingly, families are beginning to appoint people (increasingly women) who have the 'personal qualities' that are associated with a good custodian, 'such as competence, sobriety and trustworthiness'.[144] As Kingwill states,

> **'women are seen as more reliable... men are regarded as more likely to engage in spontaneous or impulsive sales, or to get indebted to microlenders who may take over the property.'**[145]

This shift seems to be directly linked to the notions of maintaining and preserving the family property. Kingwill argues that the 'custodian is expected to protect the family property from the very powers of alienation created in law' so that it remains available to the family.[146]

While families may be shifting towards appointing women as *custodian caretakers*, it is still rare to see women appointed as *caretakers of the title* (i.e. to find women in whose name family property has been registered to hold on behalf of the family).[147] However, this does not mean that women aren't being appointed to this role. Bolt, for instance, writes that

> **'The role of female householder challenges the ideal-type patrilineal home, but is far from unknown.'**

Similarly, Kingwill has found instances of families registering the family property in the name of female *custodian caretaker* in order to bolster the custodian's legal powers in relation to the property.[148]

For Kingwill, the emphasis on the relative rights of family members and the practice of appointing a custodian to manage family property on behalf of the family suggests that '[l]ineage land holding can be equated to a form of trusteeship'.[149] The notion of African freehold described above certainly sits more comfortably with a version of trusteeship than with more exclusionary notions of ownership and shares many of the same attributes: Family property is viewed as a *communal resource*, to which all recognised *family members* (who could be viewed as trust beneficiaries) have *relative rights*, that is managed by a *responsible custodian* (who could be viewed as a trustee) who

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143 Mbatha, 'Reforming the Customary Law of Succession', p. 259.

144 Kingwill, 'Square Pegs in Round Holes', p. 258; Kingwill, 'Custom-Building Freehold Title', pp. 194-195.

145 Kingwill, 'Custom-Building Freehold Title', p. 195.

146 Kingwill, 'Square Pegs in Round Holes', p. 258.

147 In her interview, attorney Khululiwe Bhengu stated: 'In Soweto, I haven't come across a case where it has been a female person that has been placed to be the custodian, and of course, ultimately gets title.' Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

148 Kingwill, 'Square Pegs in Round Holes', p. 255.

149 Kingwill, 'Square Pegs in Round Holes', p. 261.

is expected to *preserve and manage* the communal resource *on behalf of* the family members, in a manner that *benefits the family as a whole*. Senior attorney Khululiwe Bhengu raised a similar point during her interview:

> **'I think [the notion of a family home] is actually closer to a form of trusteeship... That's what is in all of the other family members' minds – that this person has the role of a type of trusteeship, not understanding that title is actually going away.'**[150]

However, as tempting as it might be to liken family tenure with trusteeship, it is important to resist the equation of family tenure (which is developed from and informed by vernacular or customary values and norms) to yet another Western common law legal construct. It is, after all, assumptions about the adequacy of private title to address the (unique) needs of black families that has led to the families' non-compliance with, and development of, title into family tenure.

3.3.6 Limitation on ability to alienate family homes

Another key feature that is often repeated in relation to the concept of a family home, is the custodian or title holder's ability to alienate the family home should be limited. This flows directly from the duties of the title holder as 'custodian' of the family property. As Bolt and Masha write:

> **'The family house exists as a social form governing a family's relation to a particular immovable property, founded on the premise that those who control the property have a collective kin-based *obligation to preserve it*. This implies that the kin members' *ability to alienate the property from the rest of the family should be limited*. It is a duty to maintain the relationship of the family to the particular property, based on the connection between the property and the ancestors. Individuals are mere custodians.'**[151]

This interpretation is further bolstered by the common description of family homes as a 'refuge' or 'shelter' that everyone in the family 'should have access to' – as alienating a property would mean that it is no longer available to those in need.[152] Senior attorney Thulani Nkosi made this point clearly by stating:

> **'Family home means that the house should never be sold, it must stay in the family. It must be used by members of the family as and when each one of them requires a place to stay... [Our clients] say it belongs to nobody, if it was to belong to somebody at all, it must belong to all of [them]. The bottom line is that *it must stay in the family and it must never be sold*. Somebody can live there, they can leave to go work somewhere else, but it they are met with hardships, they can always come back, because it is the family home.'**[153]

[150] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).
[151] Bolt and Masha, 'Recognising the Family Home', p. 166.
[152] Bolt and Masha, 'Recognising the Family Home', p. 158.
[153] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

Bolt and Masha believe that the limitation of alienability of family homes – and norms implying that they should not be sellable – flow directly from apartheid state planning. As they state, when the family home is understood in historical context it becomes clear that families do not consider them sellable in part because historically 'the houses were not assets, because the residents were denied ownership rights'.[154]

The issue of the limited alienability of family homes also arose in the interviews with legal experts. SERI senior attorney Khululiwe Bhengu referred to homes in Soweto being spray-painted with the words 'Not for sale, family home' on the exterior wall of their house. These actions invoke clear communal understandings of what a family home is, and serve to offer informal protection by making potential purchasers aware that ownership of the home may be disputed by family members occupying the house. Elsewhere during the interview, Bhengu noted that the ability to dispose of family homes were the root of the issue. As she said,

> **'the problem with ownership comes from the fact that ownership means you're able to dispose of [the family home]. Sometimes when one person decides to dispose of it, then the rest are left outside in the cold.'**[155]

Notions of custodians being constrained from alienating or selling family homes are also raised by black families in many of the High Court cases that have featured arguments about family homes, including *Shomang* and *Hlongwane*.

It is, however, important to note that even though inalienability is a commonly invoked feature of family homes, it is by no means an absolute principle. Kingwill, for example, refers to families that have said that selling a family home may be possible, but that it would only be possible if there was wide-ranging agreement among family members. This raises complicated questions about whose consent would be required for such a decision. As Khululiwe Bhengu noted during her interview:

> **'What would be difficult would be [to determine] where the need for consent ends? For example, if a particular erf belongs to your father, you and your siblings would view that as a family home. But does the need to obtain consent extend to your spouse? Does it extend to cousins? Second, third cousins? You would need, in some way, to have clear parameters on who could grant consent to alienate a family home.'**[156]

3.3.7 Family home is dynamic and adaptable

Another key characteristic is that the concept of the family home is a dynamic and adaptable concept that can shift based on the circumstances – as different parties seek to emphasise different features of the concept to address their everyday needs. Bolt hints at this when he writes that the 'family house is not a static idea'.[157]

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[154] Bolt and Masha, 'Recognising the Family Home', p. 158.

[155] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[156] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[157] Bolt 'The family home in South African townships'.

A further example of graffiti scrawled over a family home in Soweto to ward off potential buyers (Thato Monare, 2021).

The flexible nature of the family home concept is closely related to the idea of 'living customary law', in terms of which people adapt and change the customary rules to apply to their everyday lives. Like living customary law, many black families rely on overarching values or principles that lay at the heart of the family home concept to advocate for how the concept should be applied in their family situation. Values such as 'inclusion' or the 'prioritisation of family members in need' offer important guidance to how the family home concept should be applied, without enforcing rigid rules. For example, while family homes are, in most instances, conceived of as inalienable, there are circumstances where families believe that the home should be able to be alienated or sold.

The adaptable nature of the family home concept is particularly important for women and their dependents as it offers them the opportunity to advocate for understandings of the concept that benefit them – thereby advocating for their own needs and demands.

4

TYPICAL FAMILY HOME DISPUTE

The majority of family home disputes share many similarities. Most disputes arise when (predominantly) male relatives that are part of the patrilineal line of the deceased title holders either approach the Office of the Master of the High Court (or the Master's Office) to have family homes transferred into their name in terms of section 18(3) of the Administration of Estates Act 66 of 1965, or approach the provincial housing bureau to have family homes transferred into their name in terms of the Conversion Act or ULTRA.

This often occurs without the male relatives informing officials that they are not the only family member who may have entitlements to the family home. It seems evident that one of the reasons male relatives seem to feel entitled to sole ownership of the family homes is the legacy of male primogeniture (i.e. first-born inheritance) and occasionally male ultimogeniture (i.e. last-born inheritance), which continue to be widely practiced in the social organisation of succession despite the principle being struck down by the Constitutional Court in the case of *Bhe v Magistrate Khayelitsha*.[158] Some families also tend to complain of deliberate fraud by their male family members. However, in the majority of instances, these transfers take place without the other family members having any knowledge of the process of the transfer of ownership.

Once transfer has taken place, these male relatives often sell off the family homes to willing buyers – often while these homes are still occupied by family members, who are, invariably, women and children.

These new owners, having acquired the family homes, attempt to evict the family members that are still occupying the family home – who are often shocked by their male relative's abuse of the legal system to sell the family house out from under them and equally shocked by the realisation that their notions of a 'family home' is not recognised by the formal legal system.[159]

This commonly signals the beginning of years-long eviction disputes between the new owners and occupying family members, both before the courts and outside of the legal system. For instance, Bolt and Masha write that there have been many instances of families being evicted from their family homes, only to be assisted by neighbours and community members to informally regain physical occupation of the home.[160] Similar findings were voiced by senior attorney Khululiwe Bhengu during her interview:

[158] See Bolt and Masha, 'Recognising the Family Home', p. 157. See also *Bhe v Magistrate Khayelitsha* 2005 10 SA 580 (CC).

[159] Bolt and Masha, 'Recognising the Family Home', p. 164.

[160] Bolt and Masha, 'Recognising the Family Home', p. 163.

> **'The eviction order will be granted on the unopposed court roll but the problem will arise when the Sheriff comes and evicts the occupants from their house. And in some instance after the Sheriff evicted them, the community puts them back [into their home] because it's common knowledge in terms of which everyone knows that that is the X-family house and they have been living there since they were children.'**[161]

Nonetheless, many family members find that they suddenly have no legal rights to their only homes and face the threat of eviction and homelessness.

A key issue that has contributed to this phenomenon has been the lack of rights inquiries on the part of officials during the processes of the administration of deceased estates. The majority of these types of cases are administered in terms of section 18(3)'s simplified administrative process for estates that are valued at less that R250,000. In terms of this process, the Master's Office issues a family member with a 'Letter of Authority' to act as the 'Master's Representative' by distributing assets in the estate without court supervision.[162] Many family disputes involved disagreements about who is granted a letter of authority as the holders of the letter of authority often utilise the power conferred by the letter to claim ownership of the family house.[163] The Master's Office has limited investigative powers and cannot subpoena people to appear before them, which often means that these offices perform only very limited oversight and often take the first family representative that approaches them at their word.[164]

This process stands in stark contrast to the inquiry processes that are provided for before the Housing Transfer Tribunal in terms of the Conversion Act. Sections 2 and 3 of the Act provides for an inquiry to be conducted to confirm that those who claim the rights over the property 'satisfy the conversion requirements', as well as providing for aggrieved parties to appeal the decision of the inquiry.[165] The lack of an inquiry in the Masters' process of administration of deceased estates therefore leaves considerable room for abuse by legal-savvy family members who want to claim ownership of family homes.

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[161] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).
[162] Bolt and Masha, 'Recognising the Family Home', p. 165.
[163] Bolt and Masha, 'Recognising the Family Home', p. 165.
[164] Bolt and Masha, 'Recognising the Family Home', p. 165.
[165] See section 2 and 3 of the Conversion Act. See also *Hlongwane*, paras. 11-15.

5

FAMILY HOMES BEFORE THE COURTS

There have been a multitude of cases to come before the court that have dealt with the concept of a family home in various ways. Most of these cases stem from the conversion or upgrading processes, where families apply to reverse the award of title to the first claimant or review the decision to award a property to an individual.[166] However, more often, these cases related to a family home that has already been sold on to a *bona fide* purchaser, who seeks to evict family members still living in the family home. In some of these cases, applicants have made explicit reference to the concept of the family home. This section briefly discusses some of these cases.

Two earlier cases that were both matters to come before Acting Judge Francis in the South Gauteng High Court are *Khwashaba v Ratshitanga*[167] and *Maimela v Maimela*.[168] These cases were remarkably similar. In both, there were claims to own 'property claimed to be a family house' by virtue of in-community-of-property marriages.[169] In both cases, ex-wives claimed rights of ownership over the homes through their divorces. In *Maimela*, a sibling challenged how one brother had earlier acquired title. The mother of the siblings had been a regulation 7 permit holder and had died after claiming the property in terms of the Conversion Act, but before her claim was finalised. Her daughter-in-law claimed that she and her ex-husband had been given the house verbally – which her ex-husband denied. In *Khwashaba*, the ex-husband denied the validity of his own title, which had been obtained after leasehold had been obtained through the Conversion Act and title in terms of ULTRA in place of his mother who could not be given tenure rights at the time. His ex-wife had claimed the house as a joint-owner, had sold the house and was attempting to evict her ex-husband's brother. The arguments in *Khwashaba* refer to a notion of family homes that are clearly outlined in this report. As the judge noted:

> **'The applicants [the ex-husband and his brother] already mentioned that the property is a *family house* and [was] never intended to be the exclusive property of the first applicant. The first applicant was *only the de jure holder of the leasehold on behalf of his mother and her family.* On the housing permit the applicant replaced his father as the head of the family and his mother was reflected as an occupant under him. This marks the property as a family house and not as his private personal property entitling the second respondent [the ex-wife] to a half share of their joint estate.'**[170]

[166] Bolt and Masha, 'Recognising the Family Home', p. 161.

[167] *Khwashaba v Ratshitanga,* High Court Gauteng Local Division, Johannesburg (19 February 2016), Case No 27632/14 (*Khwashaba*).

[168] *Maimela v Maimela*, High Court Guateng Local Division, Johannesburg (24 August 2017), Case No 13282/16 (*Maimela*).

[169] *Maimela*, para. 1.

[170] *Khwashaba*, para. 9 (emphasis added).

Judge Francis therefore expressly referred to family homes in their historical context. She also recognised that 'many of the family houses were transferred in the name of single individuals' and that family rights agreements were meant to restrict the rights of ownership.[171] Importantly, the judge noted the 'gap between overt legal recognition, on the one hand, and popular practice and administrative histories on the ground, on the other'.[172]

However, despite these acknowledgements, the judgments in both of these cases were limited by the lack of legal recognition of the concept of a family home. This was borne out particularly in the remedy in these cases. In both matters, the court ordered for the property to revert back to the Gauteng Provincial Department of Housing and that the department undertake an inquiry in terms of section 2 of the Conversion Act to consider the competing claims and determine who was entitled to ownership of the property. This focus on reverting back to a process of inquiry has been emphasised in a Supreme Court of Appeal case, *Kuzwayo v the Executor in the Estate of the Late Masilela*, as the most appropriate remedy for these types of cases.[173] In this case, the court had declared that a section 2 inquiry was the legal remedy that should be provided in instances where a property had been transferred to an individual without having taken into account the entitlements of other occupiers to the property in question. This relatively weak procedural remedy stems from the fact that there is no legal acknowledgement by the courts of the family house 'in terms that recognise [it as a distinct] category [and] customary law concept'.[174]

Two other High Court cases have emphasised the importance of family rights agreements to infer intention to limit a titleholders' ability to alienate a family home.

In *Hlongwane*, four siblings had mutually agreed to appoint their eldest brother, Dennis Hlongwane, as a 'custodian' of their 'family house' after their father passed away to 'give him a supervisory or safe-keeping role for and on behalf of the whole family'.[175] They had also concluded a family rights agreement, which was presented before an adjudicator of the Housing Transfer Tribunal, who recognised the agreement, but who did not register the agreement against the title deed. Dennis later had a falling out with his siblings and unilaterally sold the family house to a third party, Ms Moshaoliba, who, in turn, launched eviction proceedings to have the siblings removed from the family home.

Much of the case turned on the legal consequences of the family rights agreement. Judge Molahlehi emphasised that the purpose of registration of immovable property in the Deeds Office is to keep public records of immovable properties and 'any encumbrances that may be registered over such properties' to 'inform the public whether such a person may transact in the alienation of such property'.[176] This publicity function is important so that prospective buyers could be made aware of any limitations of the title or the title holder. Any encumbrance that is noted on the title deed, would be deemed a 'real agreement', which could be enforced against everyone due to its publicity on the title deed, but any encumbrance that was not expressly acknowledged on the title deed could only be considered an 'informal' or 'personal agreement' that bound Dennis and his siblings – but not prospective buyers. The judge said that this approach flowed from South Africa's 'abstract

[171] *Khwashaba*, para. 6. See also Bolt and Masha, 'Recognising the Family Home', p. 162.
[172] Bolt and Masha, 'Recognising the Family Home', p. 162.
[173] *Kuzwayo v the Executor in the Estate of the Late Masilela* 2011 2 All SA 599 (SCA) (*Kuzwayo*).
[174] Bolt and Masha, 'Recognising the Family Home', p. 162.
[175] *Hlongwane*, para. 23.
[176] *Hlongwane*, para. 37.

system of ownership transfer', in terms of which ownership transfer is not dependent on a valid underlying contract or sale to transfer ownership. This approach is aimed at protecting *bona fide* purchasers, who act in good faith when purchasing property without being aware of some default in a previous sale or contract. The court relied on the fact that the family rights agreement had not been entered as an endorsement on the title deed to find that the agreement only constituted a 'personal agreement'. As the court noted,

> **'[the siblings] knew from the advice of officials that the property could be jointly registered into their names. They consciously elected, being fully aware of their rights, to have the property registered in the name of Dennis. They did not insist on an appropriate endorsement of the title deed. Their agreement effectively replaced their right to ownership with the personal right. This means that in selling the house he effectively breached his personal obligation to his sisters.'**[177]

The court therefore said that the 'transfer to the *bona fide* purchaser [Ms Moshaoliba] was valid and enforceable'. The only rights that Dennis' sisters had was a claim for damages against Dennis for the breach of the family rights agreement.

The *Hlongwane* case is important for two reasons. First, it implicitly highlighted that there is scope for family rights agreements, and by implication, family houses, to be recognised through a process of registering endorsements on the title deed. Second, the case highlighted that the courts will step in to protect *bona fide* purchasers where the property has already been transferred into such purchaser's name. In doing so, the court did not specify how it had satisfied itself that Ms Moshaoliba has been a *bona fide* purchaser. This, arguable, leaves some room for litigants to raise undisputed facts surrounding a sale for the court to consider when determining whether a purchaser is, in fact, *bona fide* in the circumstances. For instance, in many of these cases, purchasers buy properties without physically viewing the property, while being aware that the property is occupied, or, as is illustrated by Thato Monare's photos, without heeding the informal warnings spray-painted on family homes by desperate occupants. If a purchaser could be shown to have been aware of such factors, it is conceivable these could be used to challenge whether a purchaser could genuinely be considered '*bona fide*'.

The more recent case of *Shomang* offers more hope for the recognition of the family house. This case had similar facts to *Hlongwane*, but with two key differences. First, the property had not yet passed to a third party through a sale, which meant that there was no *bona fide* purchaser that the court felt compelled to protect.[178] Second, the provincial housing department had, itself, acknowledged that they had erred in not noting the family rights agreement over the property when registering the title deed (the department specifically said it should have given family rights protection in the form of a 'usufruct' registered over the property).[179] These two differences dramatically affected the outcome of the case.

[177] *Hlongwane*, para. 49.
[178] *Shomang*, paras. 65-66.
[179] *Shomang*, paras. 32-34.

In a nuanced and well-researched judgment, Acting Judge Du Plessis grounded her ruling in the purpose of the Conversion Act and ULTRA by stating that these laws were 'meant to improve the precarious tenure position of black persons caused by apartheid'.[180] The judge said that this is 'at odds with the registered property rights of a single individual occupier, with all these rights viewed through the lens of the common law'.[181]

The court highlighted how 'common' family homes were despite being 'invisible to the "formal laws" of South Africa'.[182] Judge Du Plessis characterised family homes as follows:

> **'Family homes govern a family's relation to immovable property. It is based on the principle that the person in control of the property ("custodian" or "caretaker") has a collective kin-based obligation to preserve the property. By implication, then, kin members' ability to alienate the property is limited by their obligations. Moreover, it is not always possible for people on the outside to determine who the custodian of the property is. It is undoubtedly more complicated than fixating on the individual titleholder whose name is written on the title deed.'[183]**

She asserted that 'the right to occupy a family house is a right in property that deserves protection'.[184] And acknowledged that family homes are 'more than a commodity that can be traded and inherited' but constituted a 'collective good whose value as a place connecting kinship across generations is bigger than the value it can fetch in the market by a person whose name happens to be on the title deed'.[185] She also acknowledged the challenge of alienation by stating:

> **'That does not mean that it can never be alienated, but it cannot be alienated by the sole decision of the person listed on the title deed.'[186]**

Crucially, the judge distinguished the case from the *Hlongwane* case and held that the family rights agreement indicated an intention to have the property be a family home and to limit the powers of the title holder to alienate the property. For the judge this, along with the fact that no innocent third party had been affected but that it was rather someone who had been aware of the family rights agreement that was involved, meant that the parties should be bound by the family rights agreement.

Perhaps the most transformative element of *Shomang* is that the judge seemed to lay the groundwork for the recognition of the family house as a unique form of customary law tenure. As she noted:

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180 *Shomang*, para. 41.
181 *Shomang*, para. 41.
182 *Shomang*, para. 46.
183 *Shomang*, para. 47.
184 *Shomang*, para. 61.
185 *Shomang*, para. 61.
186 *Shomang*, para. 61.

> 'The ownership model is an inflexible system that does not allow for alternative models of holding land, especially not the social tenures that operate outside this formal system. For property law to transform, what is needed is a fragmentation of land rights, not by abolishing ownership but by developing a more comprehensive range of rights, such as a property right in a family home, that can sometimes trump ownership... This needs to be flexible and context-sensitive and allow for the creation of new rights and the adaptability of existing rights to new situations. If these structural inequalities in the property system are not addressed, transformation will be impossible, and our constitutional ideals [of the right to tenure security] not be attained.'[187]

She also hinted at a potential constitutional basis for a challenge of the failure to recognise the relative rights of family members to a family home:

> 'To give effect to the Constitution and its transformative imperatives, it requires that property law develops. The situation of family members living in a family house without their tenure rights being secured goes against the aims of the Constitution in section 25(5) and arguably also section 25(6). It needs urgent addressing. The main duty rests on the legislature in terms of section 25(6). However, the Constitution binds all of us: judges, citizens, officials and family members living in a family house.' [188]

The words 'Not 4 Sale! No Sale' mark the outside of a home in Soweto (Thato Monare, 2021).

[187] *Shomang*, para. 73.
[188] *Shomang*, para. 78.

6

SYSTEMIC PROBLEMS POSED BY THE LACK OF RECOGNITION OF FAMILY HOMES

6.1 Problems with the processes for deceased estates, the registration of title, and the lack of rigorous rights inquiries

The most commonly cited systemic problems that result in the vulnerability of family members in family home disputes are related to procedural problems – in both the formal processes of the administration of deceased estates (the process before the Master's Office) and the registration of title (the process of transfer of permit-based occupation into ownership before housing bureaus established by the provincial housing departments in the 1990s).

In relation to the Master's Office – the statutory body that is responsible for the administration of deceased estates (among other things)[189] – these challenges are related to the processes within, and constraints of, the Master's Office, including the failure of officials to conduct appropriate oversight over the execution of deceased estates valued at less than R250,000 (the threshold into which most township family homes fall), and the lack of rigorous rights inquiries by officials before granting Letters of Authority.[190] These, as well as other systemic problems in relation to the administration of deceased estates, will be discussed in section 6.1.1 below.

In relation to the processes before the housing bureaus, the main challenges are a lack of suitably rigorous rights inquiries before awarding ownership, the limited legal power of so-called 'family rights agreements', and the failure of officials to advocate for appropriate legislative changes. These will be discussed in section 6.1.2 below.

6.1.1 Problems with the process for deceased estates

As noted above, the Master's Office is a branch of the High Court, created and regulated in terms of legislation, that is responsible for the administration of deceased estates through the 'orderly winding up of the financial affairs of the deceased, and the protection of the financial interests of the heirs'.[191] It is staffed by officials that have law degrees.[192] All decisions taken by these officials are

[189] See Bolt, 'Homeownership', p. 234.

[190] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023); interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023); and interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[191] Department of Justice and Constitutional Development, 'The Master of the High Court', *Department of Justice and Constitutional Development* (2023), available at: https://www.justice.gov.za/master/.

[192] Bolt, 'Homeownership', p. 235.

deemed to be decisions taken by the Master's Office and have the same legal relevance. Officials' decisions are generally final and can only be challenged through judicial review in the High Court.[193] The Master's Office's capacity is highly strained, especially in the Johannesburg and Pretoria High Courts where there is often significant overcrowding and long queues of people waiting to be attended to.[194] These capacity constraints are exacerbated by many people lacking awareness of the process for the administration of deceased estates, which mean that Master's officials often have to engage in lengthy consultations to explain the law and often require people to come back if they do not have the necessary paperwork.[195]

The process for the administration of deceased estates in the Master's Office, which is governed by the Administration of Estates Act 66 of 1965, is cumbersome.[196] There are two important components of the process – appointing an executor; and supervising the estate's liquidation and distribution. The ordinary process entails a 'tightly regulated back-and-forth engagement with the Master' in terms of which adverts are placed in two newspapers inviting anyone with a claim against the estate or objections to the appointment of an executor to raise their objections within a prescribed period.[197] These adverts do not have to be in the language that interested parties might understand, and even if they were, almost no one reads them except for professional debt collectors.[198] Senior attorney Khululiwe Bhengu remarked on the limited effectiveness of an advert in a newspaper to alert family members or interested party to the appointment of an executor during her interview:

> **'People don't read [newspapers]. I don't know the last time I read the newspaper, especially in the digital age where we read things online. So, there's a likelihood that people will ... miss it...'**[199]

Objecting to the appointment of an executor or claiming against an estate is a complicated process that requires an attorney and the payment of fees, which many township families cannot afford. Unsurprisingly, this means that many township families try to 'avoid [the formal] legal process, despite its potential protections'.[200] Importantly, the appointment of an executor requires the consent of all living heirs – which, in terms of intestate succession and depending on the circumstances, ordinarily includes spouses, siblings and children.[201] If this requirement were strictly followed it would, in many instances, circumvent much of the trouble brought about by family home disputes as vulnerable family members would refuse to consent to the appointment of an unsuitable executor.

However, the vast majority of township family homes are part of estates that are valued at less that R250,000 and which, given their size, are subject to an 'abridged' process of administration.[202] In terms of this abrogated process, the master simply appoints a family representative as an executor to take control of the estate and deal with the claims or distribute the estate's assets – without

[193] Bolt, 'Homeownership', p. 235. Although, in the context of appointing executors for deceased estates, there seem to be documented cases of Master's Office officials revoking their previous appointments and re-issuing Letters of Authority to new appointees. See, for example, the interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[194] Bolt, 'Homeownership', p. 234.

[195] Bolt, 'Homeownership', p. 235.

[196] The process is described in detail in the Act, as well as in Bolt, 'Homeownership', pp. 237-238.

[197] See the Administration of Estates Act. See also Bolt, 'Homeownership', p. 237.

[198] Bolt, 'Homeownership', p. 237.

[199] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[200] Bolt, 'Homeownership', p. 238.

[201] See also Bolt, 'Homeownership', p. 237.

[202] Bolt, 'Homeownership', p. 238.

any further oversight from the Master.[203] This is done by issuing a 'Letter of Authority', which is essentially a document that notes the appointment of the executor as the 'Master's Representative' and empowers them to administer the estate on the Master's behalf.[204] Whom obtains the Letter of Authority is highly consequential in family home disputes and, as a result, this is often fiercely contested. The reason is that being appointed as the executor offers the appointee significant power over the deceased person's estate. As senior attorney Thulani Nkosi explains:

> **'[T]his Letter of Authority has tremendous powers, because whomever has it can do with the house whatever they want to and, more often than not, that is to sell it to somebody else.'[205]**

In fact, Bolt notes that the Letter of Authority is particularly important to family home disputes because of the 'popular notion that a Letter of Authority amounts to a certificate of ownership'.[206] As he explains:

> **'Practically speaking, unsupervised distribution enables many letter holders simply to keep the property, where disputants are particularly unlikely to take them to court. Many never even transfer assets into their names, settling for paperwork confirming their recognition.'[207]**

Given the power that an appointed executor could wield, and the permanent consequences that this could have for family members including potentially vulnerable women and children, it is imperative that the Master ensure that they only appoint an executor after fully considering the circumstances surrounding the deceased's estate. In this context, one would expect the Master to conduct a sensitive and rigorous rights inquiry before issuing a Letter of Authority. However, in reality, this is not the case as most executors get appointed without any oversight or scrutiny from the Master's Office. This was highlighted by senior attorney Thulani Nkosi:

> **'At the Master's Office, there needs to be a [better] way for these claims to be verified because, as things stand now, the Master's Office takes your word at face value. If you say that you're the only child [that stands to inherit from an estate], that's what the officials go with, and they'll issue you with a Letter of Authority, which you can then use to dispossess a whole range of people...'[208]**

Bolt further emphasises how little oversight is conducted by the Master's Office with the following comment:

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[203] Bolt, 'Homeownership', p. 238.

[204] Bolt, 'Homeownership', p. 238. See also interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023); and interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[205] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023). See also Bolt, 'Homeownership', p. 238; and Bolt, 'Fluctuating Formality', p. 986.

[206] Bolt, 'Homeownership', p. 238. See also Bolt, 'Fluctuating Formality', p. 986.

[207] Bolt, 'Homeownership', p. 238. See also Bolt, 'Fluctuating Formality', p. 986.

[208] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

> 'But, with no built-in follow-up process, relatives – or even chancers with similar names – get away with omitting kin when reporting [deceased estates]. After having themselves appointed Master's Representative, they sell the property.'[209]

While it may be tempting to assume that these kinds of flippant appointments are due to disinterest or fraud, the research suggests another, more nuanced picture – one of an overwhelmed and under-capacitated bureaucracy that, in a way that is outside of its mandate, attempts to settle succession disputes through a combination of mediation, advice and assertion of the law.[210] One aspect which contributes to the Master's approach to appointments is its limited capacity, resources and authority. For example, until recently, the Master's Office had no access to Home Affairs births and deaths registries which significantly inhibited their ability to confirm whether someone who claims to be a sole descendant has siblings or other kin who may have joint claims to the estate.[211] Moreover, the Master's Office has no investigative or coercive powers. As Bolt notes,

> 'Master's officials are fully aware that their control is fragile, and that they have virtually no coercive power beyond the confines of their own building. If they issue summonses, these rely on a respect for authority that cannot be counted on.'[212]

In spite of these constraints, Bolt highlights that sympathetic officials in the Master's Office have, in various ways, made 'efforts to mediate between formal and informal / civil and customary sets of rules' regulating the inheritance of family homes.[213] Elsewhere he notes that Master's officials have attempted to 'suture together the system' through mediation.[214] He speaks of officials working through their lunchbreaks to try to help families come to agreement or settle a dispute:

> 'Many [officials] see succession law as needing an upgrade. They sympathize with clients; lose their lunch breaks to offer open-ended discussion rather than narrow process; dwell on uncertainty; and draw out the intricacies of people's circumstances'.[215]

Attorney Khululiwe Bhengu said that given many of these constraints she has sympathy for the Master's Office and acknowledges that,

> '[t]he Master's Office do try to rectify it when disputes arise. [If someone had been issued a Letter of Authority without notifying their siblings] the Master's Office would issue a letter and say, "Come into the office, let's discuss". Of course, if the person knew that they had bad intentions they would never attend that meeting, then the Master's Office may re-issue a new Letter of Authority...'[216]

[209] Bolt, 'Homeownership', p. 238. See also Bolt, 'Fluctuating Formality', p. 986.

[210] Bolt, 'Homeownership', pp. 222 and 238. See also Bolt, 'Fluctuating Formality', pp. 984 and 986.

[211] See interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023); and Bolt, 'Fluctuating Formality', p. 986, who says that the Master's Office only gained access to Home Affairs' records in 2013.

[212] Bolt, 'Fluctuating Formality', p. 984.

[213] Bolt, 'Homeownership', p. 221.

[214] Bolt, 'Fluctuating Formality', p. 984.

[215] Bolt, 'Fluctuating Formality', p. 985.

[216] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

The result is that officials in the Master's Office has carved out an ambiguous role for themselves. According to Bolt,

> **'[o]fficials' own positions are ambiguous: sympathetic to the outrage, but also committed to the legal emphasis on protecting women. Stuck in between, they have crafted their professional roles into something between mediator, adviser, and judge...'**[217]

And through this negotiated role, Master's officials have, in various way given expression to the notion of the family home. For example, Bolt writes that

> **'The idea of the "family house", despite its lack of any legal weight, has become central to how they negotiate everyday administration. They acknowledge its everyday reality, and understand why families want to find ways to protect it through the system.'**[218]

In spite of officials' informal attempts at mediating disputes and finding creative ways to solve intra-family disputes, these solutions are hardly long-term systemic solutions. Moreover, the prevalence of legal disputes around family homes shows that the system urgently requires amendment. In particular, the legal experts interviewed had some useful suggestions about how the procedures around deceased estates could be amended. Senior attorney Thulani Nkosi seemed to suggest that some of the components of the ordinary process for the appointment of an executor (as opposed to the abridge process that applied to estates valued at less than R250,000) could be useful in overcoming some of the most unjust appointments. As he noted during his interview:

> **'More must be required from the Master's Office. For example, maybe before an appointment is made or a Letter of Authority is issued, there can be some sort of announcement and advert to report the deceased estate and the house as part of the estate, because currently [the administration process] is not transparent at all. You could still be living in the house and you don't know that it is subject to a Letter of Authority, which has been issued to somebody and that somebody is in the process of selling the house from under you.'**[219]

However, while these interventions may 'assist a great deal', this process suffers from many constraints that could lead to similarly unjust outcomes. For instance, family members may still fail to see adverts in newspapers or lack the financial means to challenge the appointment of an executor.[220]

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[217] Bolt, 'Fluctuating Formality', p. 984. See also Bolt, 'Homeownership', p. 238.

[218] Bolt, 'Fluctuating Formality', p. 985.

[219] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[220] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

Another, potentially more effective, intervention suggested by two of the legal experts is for the Master's Office to have a type of messenger to conduct investigations or serve notices in person.[221] Senior attorney Thulani Nkosi explains how he sees this working in practice:

> **'If the Master's Office could have somebody like a messenger. For example, if a deceased estate that is within the threshold gets reported, the messenger has a duty to actually go to the house itself and see who lives there, ask a few questions, and come back to report to the Master's Office before the Master's Office makes an appointment. I think that could be most effective.'[222]**

In a related vein, senior attorney Khululiwe Bhengu suggests that,

> **'[a] better approach would be to give notice, in the same way a person gives notice in eviction proceedings or other court proceedings, i.e. they send the Sheriff to give notice. That's an example where you can safely say that you have tried to make people aware of what it is happening by explaining that the owner of the estate is deceased and outline the process available to people in the circumstances.'[223]**

These types of procedural amendments would enable interested parties to come forward, thereby enabling the Master to conduct more rigorous rights inquiries before issuing a Letter of Authority.

6.1.2 Problems with the process for the registration of title

Similar complaints of a lack of an appropriately rigorous rights inquiry have been made in the context of housing bureaus transferring ownership of family homes to claimants in terms of the Conversion Act and ULTRA in the 1990s. As noted above, the Conversion Act provided for the provincial housing department to transfer homes that were held in terms of occupational permits into ownership after conducting a rights inquiry. To achieve this objective, the government established housing bureaus to conduct rights inquiries and make determinations about who should be awarded ownership.

However, many family home disputes have shown that, in practice, this did not occur. Senior attorney Khululiwe Bhengu, for example, notes that many of her clients have reported that,

> **'[t]here was no inquiry done by the Housing Bureau. They take the word of whomever comes, they don't to any investigation, even as simply as looking at a permit that has five names on it and asking "Where are the other four people? Why are you here alone?"'[224]**

[221] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023); and interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[222] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[223] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[224] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

Senior attorney Nkosinathi Sithole underscored how the lack of a comprehensive rights inquiry negatively affected women:

> **'This is another example of, you know, how women would be side-lined in terms of the process... and I think where the process is lacking is with the Housing Bureau, because the question is put to the applicant as to "Are there any persons living in that household that you are aware of?" and if my answer is "No", then there is no further investigation and even an inspection of the property by the Housing Bureau to say "We need to make sure on our side". That's where the gap is created – even though the inquiry is a good process, but there's a gap.'[225]**

Once an allocation of ownership had been made, it was difficult to challenge it. In fact, the only way to reverse the award of title is through a High Court application, which few people struggling to maintain access to a family home can afford.[226]

Officials in the housing bureau became aware of the misfit between how people conceived of family homes and the ownership they were granted and sought to creatively navigate the legal rules – in a way that is similar to officials in the Master's Office. The clearest example of this was the development of family rights agreements (discussed in section 2 and 5 above). As Bolt writes,

> **'The divergence between the law and people's expectations quickly became apparent to administrators. In the 1990s, housing officials sought to find ways to give recognition to this alternative conception of the family home and "create a workaround" by having families sign "[family] agreements" formalizing the custodian's obligations, limiting ownership rights, and ensuring collective weight.'[227]**

However, as outlined above, these agreements have been found to lack legal weight (unless they are registered as usufructs or conditions that attach to a title deed). As a result, many officials stopped suggesting this course of action.

6.2 Problems with private ownership

Exclusive ownership of land, that is secured through a title deed registered in the name of an individual, juristic person or legally constituted group, is generally considered to be one of the strongest forms of tenure security in most countries following Western systems of law.

The post-apartheid South African government has largely bought into notions of private ownership and its perceived ability to create economic growth, which has led to it prioritising title over other forms of tenure security through its state-subsidised housing, land restitution and tenure upgrading programmes. The strengthening and protection of the tenure security of black people was a critical objective of the post-apartheid government. In large part, this entailed the adoption of a slew of legislation that prevented eviction and upgraded various 'permit-based' rights over land into

[225] Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).
[226] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).
[227] Bolt, 'Homeownership', p. 228.

private ownership through legislation like the Conversion Act and ULTRA. This process has already been described in detail above.[228]

The post-apartheid government placed considerable currency in the theory that the formalisation of property rights – particularly, the notion that 'informal' or 'permit-based' land rights should be 'formalised' into exclusive ownership that is recorded and confirmed by a title deed – as a mechanism that encouraged economic development and poverty reduction. Although this theory is not wholly novel, it gained popularity in the works of Hernando De Soto.[229] At its core, this theory posits that formally securing 'informal' property rights in a manner that is '"legible" to outsiders' enables the right holder to invest their property to reap economic benefits.[230] The greater the powers and entitlements of the right holder to the property, the less constrained they are in using their land to better their lives. Central to this theory is the notion that property rights that are readily alienable or transferable as a commodity improve the right holder's access to credit, thereby allowing the right holder to offer their land to a lender as security for a loan.[231] For proponents of De Soto's theory, formalising property therefore transforms 'informal' land into capital 'with a life of its own' through mortgaging of land to secure credit. Other classical economists, including Smith and Mill, also believed that property rights underlay economic growth.[232] For this reason notions of private ownership and its perceived ability to create economic growth have played an important role in how land tenure systems are structured in Western market economies, including South Africa.

However, there are various elements of private ownership that stand in stark contrast to black families' notions of family homes. These are discussed below.

REGISTRATION OF PRIVATE OWNERSHIP

In South Africa, private ownership of land is recorded and registered through a title deed in the Deeds Registry in terms of the Deeds Registries Act 47 of 1937. In order for land to be registered, it has to be surveyed by surveyors appointed through the Office of the Surveyor General, after which its area, boundaries and ownership are recorded.[233] The date and purchase price of the last transaction are also recorded on the title deed. The system is largely digitised and any member of the public can get access to this information at the relevant Deeds Office subject to the payment of an administration fee. Overall, the system is effectively administered.[234]

[228] For more on ULTRA, see Beinhart et al, *Rights to Land*, pp. 33-51.

[229] See H De Soto, *The Other Path* (1989); and H De Soto, *The Mystery of Capital: Why Capitalism Trumps in the West and Fails Everywhere Else* (2000).

[230] JW Bruce, 'Simple Solutions to Complex Problems: Land Formalization as a "Silver Bullet"', in JM Otto and A Hoekema (eds), *Fair Land Governance: How to Legalize Land Rights for Rural Development* (2012), pp. 31-56; C Nyamu Musembi, 'De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories about Property Rights', *Third World Quarterly*, 28(8) (2007), pp. 1457-1478.

[231] Bruce, 'Simple Solutions to Complex Problems', pp. 31-56.

[232] Bruce, 'Simple Solutions to Complex Problems', pp. 31-56.

[233] P Delius and W Beinart, 'Securing the Land: From Customary Land Tenure to Registered Titled Land?' in K Mabasa and B Mabasa (eds), *Land in South Africa: Contested Meanings and Nation Formation* (2021), p. 86.

[234] Delius and Beinart, 'Securing the Land', p. 86.

6.2.1 Ownership is exclusionary and vests in a single individual or individuals

As outlined in the section above on the historical origin of family homes, the notion of individualist and exclusive ownership does not align with most black families' conceptions of a home – which consists of a more nuanced social form of property in terms of which family members have relative entitlements to the family home. As Bolt states, most families 'complain that the form of individualization represented by the property system is an alien imposition that threatens the extended family.'[235] Similarly, Kingwill argues that 'ownership of land [in a family house context] does not imply the conferral of exclusive proprietary powers on any one person or set of persons within the family'.[236]

The limitations of the exclusive ownership paradigm have also been highlighted by members of the Deed's Registries Office during a panel discussion in 2018, where an official stated:

> **'It's not only about the living, it's also about even their ancestors... We advise people to say, "Register the property in the name of all siblings", but it's still the individualistic approach to ownership. This is not what people want. People want the property to be registered in the name of the family and then it will move from generation to generation, not from an individual to another individual.'[237]**

The emergence of family tenure in spatially distinct parts of South Africa therefore raises questions about whether black families believe that title deeds are, in fact, promoting tenure security.[238] The prevalence of the family home concept certainly suggests that many believe that individual ownership does not address their land-holding needs. However, in spite of being described as an 'obligatory' or non-optional custom, there are some that have articulated a preference for individual title over the notions of the family home.[239] Some women, in particular, strive for individual title as a means to escape or sever familial ties that are often extremely gendered.[240]

As Bolt says,

> **'[i]ndividualised title holds out possibilities [for women], which take on special significance in highly gendered [familial] relationships.'[241]**

At the same time, economists and academics have increasingly begun to challenge the assumptions that private title is the most appropriate way to secure tenure. The primary argument levelled against the formalisation of land rights into title relate to government's narrow conceptions of 'informality', which is often understood to mean any claims or arrangements that exist outside the constraints of formal state law.[242] This approach has been criticised on the basis that it fails to recognise that

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[235] Bolt, 'Fluctuating Formality', p. 987.

[236] Kingwill, 'Custom-Building Freehold Title', p. 185.

[237] Bolt, 'Homeownership', p. 228.

[238] Kingwill, 'Custom-Building Freehold Title', p. 185.

[239] Bolt and Masha, 'Recognising the Family House', p. 156.

[240] Bolt, 'Homeownership', p. 231. Similar views were expressed by callers during a radio discussion on family homes on Kaya 959. See Komisa, 'Understanding laws governing family homes'.

[241] Bolt, 'Homeownership', p. 231.

[242] Nyamu Musembi, 'De Soto and Land Relations in Rural Africa', pp. 1460-1462.

> 'a range of sub-state actors from tribal kingdoms down to villages and squatter communities manage their land through their own normative systems of varying complexity and rigor. The fact that those systems are not validated by national law does not deprive them of objective reality.'[243]

Formalisation approaches are therefore often at odds with customary conceptions of land tenure as customary law land-holdings are not actually an 'informal' system but 'an alternative formality, a sub-national alternative to the formality of the national state'.[244] In fact, some authors have noted that land tenure reform programmes funded by development agencies that sought to replace customary law systems wholesale with formalised property rights have 'had very mixed results, including weaker than anticipated positive impacts and unanticipated negative impacts'.[245] Instead, customary tenure systems have proved to be remarkably resilient – with these systems being reasserted by communities when formal systems fail to adequately address their needs or hybrid systems developing which incorporate elements of both the formal tenure system and the customary tenure systems.[246] This seems to be what has developed in relation to family homes in the South African context.

Another key criticism levelled against private titling is that the vesting of the exclusive right to alienate property rights in a particular person or persons carries potentially negative distributional consequences, which may leave poor households worse off than before.[247] This is due to the fact that the formalisation of property rights not only brings opportunities but also risks by exposing the poor to market forces from which their 'informality' has, to some extent, shielded them.[248] Formal title may have potentially detrimental impact on poorer rights holders who are 'more prone to distress sales', forcing them into deeper poverty and widening inequality.[249] As Nyamu Musembi asserts, '[a]ny redefinition of property rights produces winners and losers'[250] – it seems particularly ironic that the losers in private title may be the very families in whose name formalisation of property rights take place.

Academics and specialists have particularly cautioned that traditional notions of private title potentially contradict customary notions of land rights. The prioritisation of a single property owner for each piece of land, to the exclusion of others, that lies at the heart of the private title is unsuited to accommodating the layered and nested nature of customary land rights. As Kingwill states, 'freehold title in South Africa is poorly aligned with the realities of African ideas about land ownership' and this lack of alignment is compounded by a 'lack of alignment of family and succession law with the local transmission practices'.[251]

[243] Bruce, 'Simple Solutions to Complex Problems', pp. 31-56.

[244] Bruce, 'Simple Solutions to Complex Problems', pp. 31-56.

[245] Bruce, 'Simple Solutions to Complex Problems', pp. 31-56.

[246] Bruce, 'Simple Solutions to Complex Problems', pp. 31-56. See also Nyamu Musembi, 'De Soto and Land Relations in Rural Africa', pp. 1461-1462.

[247] Nyamu Musembi, 'De Soto and Land Relations in Rural Africa', pp. 1469-1470; Bruce, 'Simple Solutions to Complex Problems', pp. 31-56.

[248] B Cousins, T Cousins, D Hornby, R Kingwill, L Royston and W Smit, 'Will Formalising Property Rights Reduce Poverty in South Africa's "Second Economy"? Questioning the Mythologies of Hernando de Soto', PLAAS Policy Brief No 18 (2005).

[249] Nyamu Musembi, 'De Soto and Land Relations in Rural Africa', pp. 1469-1470.

[250] Nyamu Musembi, 'De Soto and Land Relations in Rural Africa', p. 1469.

[251] Kingwill, 'Square Pegs in Round Holes', p. 270.

6.2.2 Ownership prioritises notions of the nuclear family

Another problem that many families complain about in the context of disputes over family homes, is that the formal system of private title – when applied in conjunction with intestate succession – prioritises the nuclear family over the extended family. As Bolt explains, when black people were brought under the purview of the civil rules of intestate succession, they along with

> **'[a]ll South Africans became subject to a legally enshrined kinship model of the nuclear family with its European pedigree: inheritance by the spouse first, shared with children over a minimum property threshold.'**[252]

This narrow approach to family ties is at odds with many people's more expanded notions of family (as outlined earlier in this report). Bolt, for instance, states that 'families are often indignant about the house being left to a nuclear branch of the family'.[253]

There seem to be various ways in which the problem of prioritising the nuclear family manifests. First, it's alien to how most black families in the townships live. In this sense, many seem to feel that the rules of intestate succession are foreign, were not designed to accommodate their needs, and have been 'imposed' on them without their consent. Bolt, for example, notes that the law and administration systems that remain in place in South Africa were designed for and intended to cater for the white minority.[254] He goes further to note that

> **'Relevant statutory law remains fundamentally grounded in principles that were long cast as European and deliberately excluded the black majority, affecting how it is perceived.'**[255]

This is assuming that families are aware of the legal implications of the civil rules of intestate succession, which is not always the case. This is where disputes often arise:

> **'The problem with title is that it goes to a person and their descendants and it is lost to the rest of the family, which is where these disputes come in because down the line the children or spouses want to evict [the family members living in the family home].'**[256]

Second, issues around the nuclear family primarily arise in the context of a widow who has inherited her husband's family house. In these instances, family house disputes often present as a highly gendered dynamic – with the widow and her children, on the one side of the dispute; and the extended family of the deceased (who are often represented by elder male relatives), on the other side.

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[252] Bolt, 'Homeownership', p. 234.
[253] Bolt, 'Fluctuating Formality', p. 984.
[254] Bolt, 'Homeownership', p. 232.
[255] Bolt, 'Homeownership', p. 232.
[256] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

Another example of residents attempting to resist the sale of a family home by spray-painting a warning on the exterior of the house (Thato Monare, 2021).

6.2.3 Ownership includes rights of alienation

One of the elements of ownership is the right to alienate or dispose of property. To some, this is the primary disjuncture between private ownership and notions of the family home. As mentioned above in sections 3.3.4 and 3.3.7 of this report, the family home is a refuge to which family members in need should have access. For this reason, a key characteristic of family homes, as described in the literature and through interviews, is that family homes should not ordinarily be sold.

For senior attorney Khululiwe Bhengu, the power to alienate is the central issue in these disputes:

> **'I think [the problem] is alienation. I don't think the problem is necessarily [the other aspects of] ownership – although it is exclusionary and prioritises the nuclear family – but at the very heart of this is alienation, whether it happens from the first generation or whatever generation because with alienation comes eviction... The ability to alienate these family homes then becomes the problem for those who need it and who reside in them.'**[257]

Elsewhere she states:

> **'The problem comes in when, with ownership, you're able to dispose of [the family home]. Sometimes when one person decides to dispose of it, the rest are left outside in the cold.'**[258]

[257] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).
[258] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

Bhengu's identification of the right to alienate at the central problem related to ownership presents potentially interesting legal remedies. For instance, could an effective remedy for family home disputes be registering special conditions to the title deeds of family homes that limit the title holder's ability to alienate the house? This could take the form of a permanent limitation (something that would retain the property for all descendants) or a limitation that only allows the title holder to alienate the property if a certain percentage of the family consents to the alienation.[259]

6.3 Overlapping legal systems

As mentioned above, a variety of commentators have argued that there has been a gradual adaptation of private title by many black families, to accommodate the need for a form of tenure that 'reflect[s] [the] familial relationships reminiscent of customary concepts of the family'.[260] While title remains an important form of security for these families, it is used as a means to protect a variety of relative rights over family property in a way that operates in the 'shadows of the law'[261] and 'contradict[s] the Westernised legal construction of title'.[262]

These findings speak to the creation of a hybrid form of tenure – which marries Western notions of private ownership recorded through title, on the one hand, and customary law norms and practices that recognise the layered nature of family tenure, on the other hand. This hybrid form of tenure is subject to its own 'alternative normative framework'.[263]

The amalgamation of various elements of formal Western (state) law and customary law norms and practices can be viewed as a form of 'living customary law' (as recognised by the jurisprudence of the Constitutional Court).[264] As senior attorney Thulani Nkosi put it:

> **'People are straddling two systems, two legal systems, at the same time.'**[265]

Family tenure has often been described as a form of urban custom that exists, has a clear and recognisable content, and which is practiced by a significant number of people.[266] It may have evolved in localised settings, but the literature shows that the concept of the family home is subject to patterned and durable norms throughout South Africa.[267] At the same time, the research shows that these norms are also not fixed, but remain adaptive.[268] As Bolt and Masha note, 'customary norms are flexibly mobilised', with various norms or practices being 'used strategically, selectively and sometimes temporarily'.[269] Elsewhere in the same article, they emphasise how 'people … choose strategically between normative frameworks in a legal pluralist environment'.[270] In all these ways, family tenure is a clear expression of living customary law.

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[259] The latter example could be similar to the requirement for rights holders to consent to being deprived of their informal land rights in terms of the Interim Protection of Land Rights Act 31 of 1996 (IPILRA).

[260] Kingwill, 'Square Pegs in Round Holes', p. 257.

[261] Bolt and Masha, 'Recognising the Family Home'.

[262] Kingwill, 'Square Pegs in Round Holes', p. 271. See also Bolt and Masha, 'Recognising the Family Home'.

[263] Kingwill, 'Square Pegs in Round Holes', p. 257.

[264] Bolt and Masha, 'Recognising the Family Home', pp. 151-152; Kingwill, 'Square Pegs in Round Holes', p. 265.

[265] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[266] See, for example, Bolt and Masha, 'Recognising the Family Home'; and Bolt, 'Homeownership'.

[267] Kingwill, 'Square Pegs in Round Holes', p. 257.

[268] Bolt and Masha, 'Recognising the Family Home', p. 154; Kingwill, 'Square Pegs in Round Holes', p. 257.

[269] Bolt and Masha, 'Recognising the Family Home', p. 154.

[270] Bolt and Masha, 'Recognising the Family Home', p. 154.

In locating notions of a family home in discussions about living customary law, it is important to distinguish living customary law from official customary law – i.e. the codified version of customary law that was promoted by colonial and apartheid regimes, often in a distorted or reductive form that ultimately was 'specifically crafted to fit in with notions of separation and exclusion of Africans from the people of "European" descent'.[271] Living customary law, on the other hand, reflects popular norms and their changes over time. In *Shilubana v Nwamitwa*,[272] the Constitutional Court described living customary law as follows:

> **'As has been repeatedly emphasised by this and other courts, customary law is by its nature a *constantly evolving system*. Under pre-democratic colonial and apartheid regimes, this development was frustrated and customary law stagnated. This stagnation should not continue, and the free development *by communities of their own laws* to meet the needs of a rapidly changing society *must be respected and facilitated.*'**[273]

Likewise, in *Alexkor Ltd v the Richtersveld Community*,[274] the Constitutional Court interpreted customary law to be 'living law' which 'evolves as the people who live by its norms change their patterns of life'.[275]

Consequently, in light of the Constitutional Court precedent, there is a compelling argument to be made for the fact that the adaptation of customary law by ordinary people to accommodate the ever-changing demands of their circumstances should be recognised and granted legal recognition under the Constitution (provided that it is not in conflict with the Constitution).[276] In fact, there are various constitutional provisions that could be employed to show that family tenure is justifiable and recognised in terms of the Constitution, including the section 30 right to culture, the section 31 right to cultural community, and the section 211(3) duty of the courts to 'apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'. In a similar vein, section 39(3) of the Constitution recognises customary law that is not codified:

> **'The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.'**

Although the notions of family home as they have evolved in practice currently fall outside of the formal system of the common law, this brief (albeit incomplete) discussion of living customary law suggests that there is a compelling case to be made for family tenure to be recognised as a development of living customary law.

Nonetheless, and despite the constitutional assertion that customary law has equal weight and validity to civil law, many black families have found that state institutions only recognise the civil system (of, for example, individual title), and relegate customary law principles (of, for example, the

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[271] *Bhe*, para. 61. See also Bolt and Masha, 'Recognising the Family Home', pp. 151-152.
[272] *Shilubana v Nwamitwa* 2009 2 SA 66 (CC) (*Shilubana*).
[273] *Shilubana*, para. 45 (emphasis added).
[274] *Alexkor Ltd v the Richtersveld Community* 2004 5 SA 460 (CC) (*Alexkor*).
[275] *Alexkor*, para. 52.
[276] Mnisi Weeks and Claassen, 'Tensions Between Vernacular Values that Prioritise Need', p. 398.

family home) to the 'informal'. The end result is that many black families may feel that they have to choose one of the systems or strategically navigate both systems.

At the same time, the South African courts have been reluctant to provide legal recognition of, or to develop, customary law norms that are not before it. This is understandable as courts do not always have the technical and institutional capacity to set down legal principles that may apply in various differing ways in practice. However, this reluctance has also meant that in many instances where courts were asked to interpret and offer legal recognition to living customary law, it has held its decision to strike down unconstitutional elements of the law in abeyance while it offered Parliament the opportunity to remedy the legal vacuum through the adoption or amendment of legislation. Consequently, questions of customary values in property relations or customary law succession and matrimonial property have been gradually developed by the court through a series of court cases that span a period of decades, rather than a single wide-ranging decision. For example, the Constitutional Court jurisprudence that have challenged the inequitable gender impact of the codified versions of the customary law of intestate succession and matrimonial property relations can, in many ways, be viewed as the slow extension of the similar legal principles over different legal circumstances – each of which had to be presented before the court before it felt emboldened to recognise these principles. In this way, the Constitutional Court's decisions in cases like *Rahube v Rahube* and *Ramuhovhi v President of the Republic of South Africa* could be viewed as a continuation of the work it began in *Bhe v Magistrate Khayelitsha* more than a decade earlier.

Ultimately, this seems to suggest that courts would need clear and compelling evidence of how family tenure has been applied by differing groups in differing circumstances before it would recognise this hybrid form of tenure as living customary law that applies throughout the country. It also suggests that legal recognition through the courts may not be the most suitable way to ensure legal recognition of family tenure. Instead advocating for legal reforms through legislation or policy reform may be more appropriate (albeit subject to its own limitations).

6.4 Lack of awareness of the formal laws and rules governing deceased estates

Throughout many of the sources and interviews, it became apparent that most families that subscribe to the notion of a family home lack full knowledge or awareness of the formal laws governing deceased estates. Bolt, for example, writes about relatives' shock when they are made aware of the formal rules of intestate succession and informed that the concept of a family home is not legally recognised.[277] As he states:

> **'Once confronted with the details, intestate succession rules provoke surprise and disagreement among many relatives of the deceased.'[278]**

[277] Bolt, 'Homeownership', p. 235.
[278] Bolt, 'Homeownership', p. 235.

A similar sentiment was expressed during the interviews with legal experts, in particular senior attorney Thulani Nkosi:

> **'[Our clients] don't know the legal processes and we think that's where part of the problem is – that this idea of reporting the deceased estate to the Master's Office is oftentimes very foreign to our clients. They think that if somebody has passed on, they grieve and then life continues. Nobody even considers that they have to look into things pertaining to ownership, this, that and the rest of it.'**[279]

Later, during the same interview, he also underscored family members' surprise:

> **'All of our clients have said, "I didn't know, I didn't know that when the deceased dies that this is what needed to happen. I was just so surprised. My mind is blown that this is what needed to happen". That's what our clients are telling us.'**[280]

The end result of this lack of awareness is that most black families never report the deceased estates of their kin. The extent of this practice is hinted at when one looks at official statistics on the number of deceased estates that are administered. According to official statistics presented by the Chief Master to deceased estate practitioners in 2016, two-thirds of deceased estates are never reported (although the majority of these are assumed to be in rural settings).[281] While there may be reasons other than lack of familiarity with the formal rules governing deceased estates and intestate succession that have contributed to these statistics,[282] the lack of knowledge seems to be, at the very least, a significant contributing factor.

The lack of awareness of formal rules should not be surprising given the fact that black people were historically excluded from these systems of administration and inheritance.[283] As Bolt notes,

> **'Unfamiliarity with [the legal] stipulations and categories [is] born of previous exclusion.'**[284]

Under apartheid, black families were not able to inherit or transfer immovable property to their kin, and in the case of movable property, where inheritance was possible, black people were subject to a codified and reductive form of customary succession law prescribed through the Black Administration Act – which essentially subjected black people to the 'rigid stipulation of male primogeniture' even though 'living customary law norms were far more flexible, pragmatic and diverse … and less prejudicial'.[285] Given that black people were only brought under the purview of formal intestate succession law in relation to immovable property in 2004 when the Constitutional Court struck down the principle of male primogeniture in the *Bhe* case, it should not come as a

[279] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[280] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[281] See Bolt, 'Homeownership', p. 232 and n. 46. See also Bolt, 'Fluctuating Formality', p. 983.

[282] Many of the commentators suggest that suspicion of officialdom, state bureaucracy and formal law could offer another reason for the low rates of deceased estates being reported. See the discussion on the suspicion of officialdom in section 6.5 below.

[283] Bolt, 'Homeownership', pp. 224 and 231-232; Bolt, 'Fluctuating Formality', p. 983.

[284] Bolt, 'Homeownership', p. 224.

[285] S Mnisi Weeks, 'Customary Succession and the Development of Customary Law: The *Bhe* Legacy', *Acta Juridica* (2015), pp. 215-255. See also Bolt, 'Homeownership', p. 234.

shock that many black families remain unaware of the intimacies of the administration of deceased estates. As Bolt observes:

> 'Faced with alien rules and a confusing and disjointed system to which their commitment is shallow, many people avoid formal process. Instead they subscribe to some version of a "system of administration of estates by the family".'[286]

The lack of awareness of the formal rules by many black family members, means that they could also be taken advantage of by family members that do have an awareness of these rules and are able to manipulate the situation by getting themselves appointed as executors of the deceased estate. Senior attorney Thulani Nkosi implicitly referred to these kinds of situations, when he stated:

> '[Our clients] don't know the legal processes... And then you always get this sly person who knows what they've got to go and report this thing at the Masters' Office [to obtain a Letter of Authority], and then they take advantage of the situation.'[287]

and so did Khululiwe Bhengu:

> '[Some] people have knowledge, they've got some level of education and they get to understand certain things about the law – and they use that to their advantage... [T]here are definitely opportunistic people who do that.'[288]

6.5 Suspicion of officialdom

The historical legacy of colonialism and apartheid has also contributed to a general mistrust by black families of the formal system of the administration of deceased estates and landholdings.

Bolt, for instance, writes that there is a 'lingering suspicion of officialdom' among many black families.[289] He relies on the work of Jonny Steinberg to show that this mistrust is directly related to South Africa's apartheid history.[290] According to him, South Africans have only 'provisionally' and 'partial[ly]' consented to participating in formal state systems and, consequently, to being governed by the state, because the 'state bureaucracy remains associated with its reviled past'.[291] While Steinberg's work focuses on South Africans' relationship with the police, Bolt believes that a similar skepticism about state bureaucracy exists in relation to the formal system of the administration of deceased estates.

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[286] See Bolt, 'Homeownership', pp. 231-232, where the author quotes C Himonga and E Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015), p. 252.

[287] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[288] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[289] Bolt, 'Homeownership', p. 224. See also, Bolt, 'Fluctuating Formality', p. 979.

[290] J Steinberg, *Thin Blue: The Unwritten Rules of Policing South Africa* (2009).

[291] Steinberg, *Thin Blue*, as quoted in Bolt, 'Homeownership', p. 231. See also Bolt, 'Fluctuating Formality', p. 979.

Black families' historical wariness of officialdom goes hand-in-hand with a history of finding alternative, often informal, solutions to common problems – including issues of accessing land or housing. As Hornby et al remark, marginalisation meant that

> 'people [historically] secured their access to land and housing in very different ways from those required by the formal property system'.[292]

In this context, black families often 'keep their distance from official processes' where-ever this is possible.[293]

Another reason why black families are apprehensive of engaging in the formal systems for the administration of deceased estates and landholdings is the fear that they may lose control over the situation by participating in the formal process. As Bolt notes,

> 'Many township residents are left starkly uncertain about their footholds in the property system, unsure of what will happen if they seek the protection from the state or keep their distance.'[294]

Bolt believes that this is because people cede their power and interpretations over a dispute when they allow a dispute to be 'reframed' to be acceptable to 'state logics'.[295] He uses the work of Sally Engle Merry in the United State to illustrate how allowing a dispute to be ventilated in formal processes entails a trade-off: on the one hand, 'the personal dispute [could be] reframed by state logics' offering the possibility of a successful outcome; but, on the other hand, 'disputing parties risk ceding control over which interpretations matter'.[296] This raises a possible reason for why the state has failed to recognise the concept of the family home despite its' decades-long existence and prevalence – namely, that when family home disputes do reach the formal legal system, officials or legal experts reformulate them into arguments that 'fit' within the formal system of succession, inheritance and property law in well-intentioned attempts to assist claimants that ultimately strip claimants' arguments of reliance on the concept of the family home. If this is the case, black families' suspicion of the formal system seems to be at least partially justified.

6.6 Fraud and corruption in the system

The research is replete with family members claiming that one of their relatives was able to get the title of their family home registered in their name through fraudulent means. Many family members, for example, claim that they were never even aware that their family house had been transferred into their relative's name or highlight that their relative, as one of multiple descendants of the common ancestor, should not have been appointed as the executor of their deceased ancestor's

[292] D Hornby, R Kingwill, L Royston and B Cousins, 'Introduction', in D Hornby, R Kingwill, L Royston and B Cousins (eds), *Untitled: Securing Land Tenure in Urban and Rural South Africa* (2017), p. 3.

[293] Bolt, 'Fluctuating Formality', p. 987.

[294] Bolt, 'Homeownership', pp. 221-222.

[295] Bolt, 'Homeownership', p. 232.

[296] See Bolt, 'Homeownership', p. 232, where the author refers to SE Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (1990). For similar arguments about the potentially disempowering effect of the legal constraints on social movements, see generally J Brown, *South Africa's Insurgent Citizens: On Dissent and the Possibility of Politics* (2015).

estate by the Master's Office.[297] These claims often involve assumed collusion on the part of officials from the Master's Office or allusions to falsified documentation (for example, a forged Letter of Authority or even forged death certificates).

While it is unclear to what extent fraud and forgery contribute to disputes about the ownership of family homes, it is clear that some level of fraud is undeniably present. Bolt, for example, conducted interviews with 'specialist detectives' and concluded that 'fraud is rampant' in the system of the administration of deceased estates.[298] This assertion was reiterated during the interviews with legal experts.[299] As senior attorney Khululiwe Bhengu states:

> **'There is definitely fraud and opportunistic people... When people have knowledge and some level of education, and they have an understanding of the law, they can use that to their advantage.'[300]**

Family members' beliefs of fraud in the system contribute to their suspicion of the system as a whole and potentially threaten the legitimacy of the Master's Office.[301] Bolt notes that officials in the Master's Office are keenly aware of their fragile authority and highlights that some officials go to great lengths to try to combat fraud – to limited or no effect. As he states:

> **'The paperwork [at the Master's Office] is approved with date-stamps that can be forged at a stationary shop down the road. Officials guard their own stamps jealously, finesse distinctive styles of stamping, and cultivate elaborate signatures. But only by luck do such expressions of individuality prevent fraud...'[302]**

The reality is that fraud is a systemic part of the problem and that combatting it is an important contributing element of ensuring greater security for people living in family homes.

6.7 Limited legal remedies

Another systemic problem is the lack of legal remedies available to family members occupying a family home, when they face the threat of eviction at the hands of the title holder or, in cases where the house has already been sold on to a third party, the purchaser.

As mentioned above, most family home disputes enter the legal arena in the form of eviction proceedings, which threaten the tenure security of occupying family members (who are usually women and children). The first hindrance in these kinds of cases is the lack of financial resources to challenge the eviction. As Bolt asserts:

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[297] See Bolt, 'Fluctuating Formality', p. 984; and Bolt, 'Homeownership', 238. See also the interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023); interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023); and interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[298] Bolt, 'Homeownership', 238.

[299] Senior attorney Nkosinathi Sithole referred to fraud and corruption at various points during his interview. See the interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[300] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

[301] See, in general, Bolt, 'Fluctuating Formality'; and the discussion of people's suspicion of formal system in section 6.5 of this report.

[302] Bolt, 'Fluctuating Formality', p. 984.

> 'The system's fairness relies on recourse to the High Court, which costs most people too much money, time and energy.'[303]

While the ability to obtain *pro bono* legal representation enables some families to challenge their eviction,[304] this is likely a very small number of cases that exist.

If people are able to challenge the eviction in court, the first, and likely primary, port of call is to resist the eviction using the procedural defences in the Prevention of Illegal Evictions and Unlawful Occupation of Land At 19 of 1998 (PIE) and eviction protections, including raising the argument that occupants could be rendered homeless as a result of the eviction. As senior attorney Nkosinathi Sithole stated:

> 'And, so obviously, I have to deal with the eviction case and, you know, in terms of the eviction case, as I said, that agreement has no force or effect in law, what matters is the title deed. And that is *prima facie* proof that the holder of the title deed is the owner of the property. Now, as far as an eviction is concerned, our clients are unlawful occupiers and they're defence is basically the fact that they will be rendered homeless [as a result of the eviction], and not that they have title to the home.'[305]

In some cases, these may be the only defences available to the occupiers of the family house.

One of the only benefits of these cases entering the legal arena as eviction cases is that this enables the defendants to highlight the personal circumstances of the occupiers, including how many women, children, elderly people and people living with disabilities reside at the house.[306] In this way, the eviction proceedings offer the defendants an opportunity to bring the gender dynamics of the dispute into sharp relief through their pleadings.

In the majority of cases, the attorneys for the occupants will attempt to challenge the validity of the title deed – either by challenging the sales transaction (on the basis that the seller did not have the authority to sell the property because they fraudulently had the house registered in their name) or by reviewing the original transfer of the property into the title holders' name (in terms of inheritance, the Conversion Act or ULTRA). Senior attorney Thulani Nkosi described this strategy as follows:

> 'We try to "go behind" the transaction. So, we will unravel the transaction itself. [We will] ask the court to suspend the consideration of the eviction until we've unscrambled the whole thing. So more often than not, we go to the core of the transaction and we try to show that the person who sold the house did not have the right authority or was not authorised at all [to sell it]. [If] we've set aside [the transaction] ... that kills the eviction itself.'[307]

[303] Bolt, 'Homeownership', p. 238.

[304] See, in particular, the comments of Thando George, who highlighted the importance of the non-profit sector in ensuring that marginalised groups that would 'not ordinarily have access to legal services' could be assisted. Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

[305] Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[306] See sections 4(6) and 4(7) of PIE.

[307] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

However, there are limitations to these strategies. The first relies on showing clearly that there was fraud in the process, which entails proving that the title holder was aware that the title was defective; while the second could be hampered by the strict time-limits within which a review application should be brought in terms of section 8 of the Promotion of Administrative Justice Act 2000 (PAJA) (ordinarily within 180 days of the decision that is being reviewed or a 'reasonable' time – a subjective decision to be determined by a court).[308]

The effectiveness of these remedies could be hampered even more if the family home has been sold to a *bona fide* purchaser, i.e. somebody who purchases the property without knowledge that the person from whom they were buying the property had defective title. Courts are likely to be sympathetic to *bona fide* purchasers as they are 'innocent' parties that should not have to be 'punished' for earlier legal defects. As Thulani Nkosi states:

> **'I'm particularly worried about the [argument that the purchaser was] a *bona fide* purchaser... If the court considers a person a *bona fide* purchaser, then going behind the transaction would fail because if somebody is transacting with you in good faith, they don't know that you're not authorised or committing fraud, and so they gain ownership of [the house] lawfully... I think that's going to be a serious limitation ... [and] it's only a matter of time before somebody raises [that argument].'**[309]

Another family home with a graffiti warning that the home is not for sale. In this instance, the warning seems to be directed at an individual (Thato Monare, 2021).

[308] Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).

[309] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

7

FAMILY HOME: A GENDERED ANALYSIS

The review of secondary literature has highlighted a number of gender dynamics and gendered impacts that are at play in the context of family home disputes or that have been shored up by the limitations of private title in a context where a home is held as family property. These are discussed in detail below.

7.1 Women are disproportionately affected

The formalisation of informal and permit-based land rights of many black families into private title has had a wide-ranging and deeply gendered impact – which has threatened the tenure security of women. This has been acknowledged by all of the authors that have written about family-based notions of property. Kingwill specifically states that notions of family property have led to 'highly gendered family structures', and that, in some respects, these gendered notions may 'possibly even [have been] exaggerated with title'.[310] As she writes:

> **'Registration in the name of one owner formalises the exclusion of some family members by skewing decision-making powers in favour of male owners, and rendering the property vulnerable to the sale and its occupants to eviction [which] tend to affect women and children disproportionately'.**[311]

This situation has been exacerbated by prevailing notions of male 'dominance' or 'superiority' that exist in codified versions of customary law.

But it's not only in terms of their rights being formally recognised that the tenure security of women in threatened in family home disputes. In the vast majority of cases, women and children are the primary occupants of family homes and, consequently, those likely to be evicted if the title holder sells or otherwise disposes of the family home. Many of these women are single (either unmarried or formerly married), the heads of households or in some other way responsible for the care of dependents[312] – and are therefore particularly vulnerable. As senior attorney Thulani Nkosi sates:

[310] Kingwill, 'Square Pegs in Round Holes', p.262.

[311] Kingwill, 'Custom-Building Freehold Title', p. 186.

[312] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023); and interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

> 'Many are unmarried women who find themselves living in the family home. But, on the other hand, there are women who were previously married but something went wrong in their marriages and they're wanting to come back home.'[313]

Elsewhere during the same interview Thulani Nkosi and candidate attorney Thando George expand by saying:

> 'All but one of our clients so far have been women... of the seven or so cases, there has only been one man but his wife is also involved... and most of the women have been the heads of the household and have children.'[314]

7.2 Men are working the system(s)

Much of the literature underscores how men are manipulating both the common law notions of ownership and customary law values and norms to cement their power over residential family property – to the disadvantage of women and dependents. In other words, men are strategically utilising each of the different legal systems that applies to family homes or 'playing both sides'. As Kingwill states,

> 'the penchant of some men for manipulating law and custom, ha[s] heightened awareness among occupier-owners of their vulnerability'.[315]

Elsewhere, she writes that

> '[M]ale kinsmen have come to realise their power to alienate family property by claiming rights of "ownership" using common-law rules. Although common law is in theory gender blind, some men imagine that they have superior powers fueled by particular interpretations of customary notions of masculinity in relation to the control of property.'[316]

She believes that men's position is strengthened by the outdated codified versions of the customary law system that were documented and edified during the colonial and apartheid era in a manner that was 'designed to strengthen male power over land as head of households responsible for paying taxes'.[317] While many of the customary law attitudes that men rely on to bolster their powers over family property are 'outdated and [have been] discredited' since the coming into effect of the Constitution, they remain 'prevalent' in local settings.[318] The overall effect is that 'Western

[313] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).
[314] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).
[315] Kingwill, 'Square Pegs in Round Holes', p. 255.
[316] Kingwill, 'Square Pegs in Round Holes', p. 253.
[317] Kingwill, 'Square Pegs in Round Holes', p. 263. See also Interview with Nkosinathi Sithole (SERI senior attorney), over Zoom (26 July 2023).
[318] Kingwill, 'Square Pegs in Round Holes', p. 253.

practices and customary law (in its official codified variant) intersect to create an aggregated set of circumstances that favour male ownership'.[319]

Mbatha documented a similar abuse of power by male relatives in the North West Province, where he found many accounts of 'customary heirs' (i.e. male primogenitors) exploiting their legal rights over family property in ways that led to the dispossession of other dependents – disadvantaging women and children specifically.[320] Mnisi Weeks and Claassens argue that this is done through a 'corruption of underlying indigenous values'.[321]

This dynamic is illustrated by Kingwill with reference to a family that lamented the loss of their family home through a male family member who sold the property without their knowledge or consent because he needed the money to pay off his debts with a moneylender. Kingwill argues that the family

> **'interpreted his actions in terms of masculinity and power, rather than his legal right to alienate the property. They maintained that his view was that he could do as he liked with the property as he was the *mdoda* (man). "He felt he has the authority to sell the property because of his manhood powers..."'.[322]**

As a result of these dynamics, some families are finding strategies to prevent their brothers from being registered or appointed as the managers of family property or otherwise tightening up mechanisms to protect their property against alienation by male relatives by appointing women as the custodians of family property.[323] This is particularly the case in the Eastern Cape, where Kingwill argues that some residents have begun to recognise that 'women are ... more reliable... [as] men are regarded as more likely to engage in spontaneous or impulsive sales, or to get indebted to microlenders who may take over the property'.[324] The unusual approach of appointing women as custodians of family land is therefore seen as 'a form of insurance to protect family property'.[325]

This 'feminisation' of the role of custodian that Kingwill documents in the Eastern Cape, which was historically largely a role allocated to men, is also linked to women's role as caretakers and extends to the notions of 'caring for the potentially vulnerable, disabled or indigent members of the family' that are commonly associated with family property.[326] Mbatha's findings also point to similar developments. In terms of his findings, parents tried to protect their dependents by curbing the abuses of typically male 'heirs' recognised by the codified customary law set out in section 23 of the Black Administration Act 38 of 1927.[327] However, these findings stand in stark contrast to the situation in urban townships in Gauteng, where the vast majority of custodians and title holders remain men.

[319] Kingwill, 'Custom-Building Freehold Title', p. 186.
[320] Mbatha, 'Reforming the Customary Law of Succession', p. 259.
[321] Mnisi Weeks and Claassens, 'Tensions Between Vernacular Values that Prioritise Basic Needs', p. 384.
[322] Kingwill, 'Square Pegs in Round Holes', p. 255.
[323] Kingwill, 'Square Pegs in Round Holes', pp. 255-256; Kingwill, 'Custom-Building Freehold Title', p. 195.
[324] Kingwill, 'Custom-Building Freehold Title', p. 195.
[325] Kingwill, 'Square Pegs in Round Holes', p. 256.
[326] Kingwill, 'Square Pegs in Round Holes', p. 259.
[327] Mbatha, 'Reforming the Customary Law of Succession', p. 269.

7.3 Pitting women against each other

Another gendered impact of the conflicts that arise as a result of the limitations of freehold tenure in a context where a home is held as family property is that different groups of women claiming rights to the family property find themselves pitted against each other.

This is because the common law and customary law notions seem to protect different groups of women: The common law, as developed by the right to equality contained in the Constitution, emphasises notions of the nuclear family and is regularly invoked to protect wives or widows' rights to matrimonial property; while customary law notions of family property emphasise notions of an extended family linked to the male lineage and is regularly invoked to protect the relative rights of sisters and daughters that are associated with the male line of descent over family property. This is not to suggest that men are not often on both sides of these arguments – as noted above, men often utilise both legal systems to bolster their powers of family homes (whether as owners / title holders, elderly male relatives, or first- or last-borne sons).

Kingwill describes how the notions of family home with patrilineal lineage is linked to attempts to ensure that 'wives have circumscribed rights' in the following terms:

> **'[T]oday there is a tension between this older customary view and a more Westernised outlook that stresses the equal status of a wife in the family. Under these circumstances, the patrilineage tries to maintain its control over property by restricting transmission to and by wives.'**[328]

This means that women who are wives often turn to the common law rules of succession, matrimonial property or land-holding as the basis for their claims over family property, often also using the principles and right of equality to bolster their claims.

On the other hand, sisters or daughters who are agnatically related through the patrilineal lineage often invoke the notions of the family home to justify their occupation and use of the family home. The literature stresses that sisters or daughters who are agnatically related through the patrilineal lineage are able to claim rights and access to family property using a combination of descent, retention of the family name, occupation and by taking care of the property and the family.[329] Their rights over the family property is, however, often dependent on their 'adherence to the repertoire of family norms'.[330] As these rights are based in customary values and norms, women who are sisters and daughters often turn to customary law or notions of family tenure as the basis of their claims over family property. With recent shifts in family norms, such as the tendency of many women not to get formally married any more, the relative rights sisters and daughters to family land have become increasingly important.[331]

[328] Kingwill, 'Square Pegs in Round Holes', pp. 262 and 266.
[329] Kingwill, 'Square Pegs in Round Holes', pp. 262 and 265.
[330] Kingwill, 'Square Pegs in Round Holes', pp. 262 and 265.
[331] Kingwill, 'Square Pegs in Round Holes', pp. 265-266.

This tension is particularly apparent in the Constitutional Court case of *Ramuhovhi v President of the Republic of South Africa*, which related to the proprietary consequences of marriage and their relationship to land-holding in terms of customary law. Mnisi Weeks summarises the facts that led to the case as follows:

> **'The reason that the children of Mr Netshituka's first and second customary wives had brought the complaint was that his fourth wife, Ms Munyadziwa Joyce Netshituka, with whom he had purported to conclude a civil marriage (which was later declared null and void by the Supreme Court of Appeal in 2011), claimed half ownership of the real property that was his primary asset and had been named in Mr Netshituka's will (which the 2011 SCA decision declared valid) as the executrix of the estate. His children contested the validity of both s 7(1) of the Recognition of Customary Marriages Act and Ms Munyadziwa's registered ownership of an undivided half share of the "immovable property upon which a business called the Why Not Shopping Centre is located".'**[332]

As this challenge shows, women often find themselves on conflicting sides of debates about whether common law or customary law should be applied to a family home dispute. While this tension may, at first glance, seem to be irreconcilable, the prioritisation of need that lies at the basis of family tenure approaches may ease these tensions in practice.

7.4 Gendered power dynamics

The literature shows that the intra-family power dynamics are often critically important in disputes about family homes. This is particularly the case given the family home's ability to generate deep and lasting tension among families. Given how important a home is as a shelter and economic resource to most black families that live in urban townships, this should be unsurprising. Bolt has likened the contestation over family homes to Moore and Seekings' findings on the family tensions that are introduced in relation to instances where one family member accesses a welfare grant.[333] They argue that

> **'inequalities in public provision combine with familial norms to transform families and generate new tensions within them.'**[334]

The power dynamics are often deeply-entrenched and propped up by history, law and custom. But both men and women make use of history, law and custom to further their own interests – creating a situation that has the potential to either uphold existing power dynamics or subvert them. Bolt hints at how certain parties could emphasise specific components of a family home with reference to the male-dominated heritage of the family home by stating

[332] See, generally, S Mnisi Weeks, 'Constitutionally Transforming South Africa by Amalgamating Customary and Common Law: *Ramhuhovhi*, the Proprietary Consequences of Marriage and Land and Property', *Constitutional Court Review*, 11 (2021), pp. 165-205.

[333] Bolt, 'Homeownership', p. 229.

[334] E Moore and J Seekings, 'Consequences of Social Protection on Intergenerational Relationships in South Africa: Introduction', *Critical Social Policy*, 39(4) (2019), p. 521.

> 'the notion of the collective family house held back from the market is not subscribed to equally by everyone. It reinforces a version of kinship promoted by a state system that saw male family heads as intermediaries on behalf of households... disputes reveal the divergent interests at stake. Family houses are protected by siblings in the partilineage especially brothers; individual ownership is defended by surviving spouses, usually wives.'[335]

In a similar manner, women may seek to emphasise individual ownership, but they could similarly rely on customary arguments about family in need of refuge to make their claims to the family home. The argument employed by contesting parties often 'take shape through unpredictable application, effect and manipulation of [the] legal-bureaucratic system...'.[336]

It is therefore crucial to also be aware of how these complicated power dynamics play out in the home and in bureaucratic environments, such as the Master's Office, a lawyer's consultation room or the courts. Women or children may, for example, feel inhibited to contradict or speak back to elder male relatives in these spaces, or elder male relatives may bully widows and children. Some women may be afraid to approach government officials alone for fear that these officials will extort them sexually by forcing women to perform sexual favours in exchange for assistance.[337] Officials should be keenly aware of these dynamics and be careful to manage them sensitively. Bolt suggests that some Assistant Masters are able to navigate these dynamics well, but this may not always be the case.[338] However, finding ways to ensure that women and children are protected in these spaces is critical.

7.5 Women are fighting back

In spite of women often being pitted against each other in conflicts over family property, the literature suggests that women are using a variety of arguments to fight against their dispossession of family property, at least in so far as it relates to male relatives. As Bolt notes,

> 'Given the concentration of power among men, women more generally have greater reason to resist.'[339]

Mnisi Weeks and Claassens, for instance, writing in the context of women's claims to rural customary land, argue that women 'combine rights-based arguments with those based on vernacular values and entitlements' while making claims for access to land or property.[340] They have joined an expanding body of literature that suggests that limited, patriarchal notions of black women are slowly being rebutted by local communities that have been emboldened and reassured by the transition to democracy. One of the first clear signs of these developments was a survey of 3,000 women across three provinces conducted by the Community Agency for Social Enquiry (CASE),

[335] Bolt, 'Homeownership', p. 229.
[336] Bolt, 'Homeownership', p. 225.
[337] Socio-Economic Rights Institute of South Africa (SERI), *Draft Community Advice Officer Needs Assessment* (September 2023), p. 4 (unpublished paper on file with the author).
[338] Bolt, 'Homeownership', p. 236.
[339] Bolt, 'Homeownership', p. 229.
[340] Mnisi Weeks and Claassens, 'Tensions Between Vernacular Values that Prioritise Basic Needs', pp. 388-389.

which showed an increase in the number of women getting residential sites (predominantly in rural areas) in their own name in the years after 1994.[341] Although the rate of the increase varies across the three sites, the common explanation given for why women and communities felt that this was now possible is South Africa's transition to democracy and the rights and values contained in the Constitution.[342] There is great potential inherent in the spaces that communities and women are continuing to carve out for themselves, even more so now that these spaces are buoyed by the constitutional principles like equality, freedom and human dignity.[343]

Women are, however, also often relying on customary values to claim their rights to family property. For instance, Mnisi Weeks and Claassens state that women are often arguing in customary fora that they are fulfilling the role of providing for the family, often without men, and that this entitles them to be allocated land on the same basis as men with families to support. They often make these arguments in conjunction with the principles of equality, 'democracy' and 'the Constitution' – claiming that times have changed and discrimination is no longer legal.[344]

While not much is written about how women are fighting back against their dispossession in urban areas, there is anecdotal evidence that women are using whatever means they have at their disposal to keep their rights to family homes. Some clear examples of this is the common practice of spray-painting word such as 'Not for Sale!' or 'This is a family home!' on the walls of their homes to discourage potential purchasers from buying homes that are subject to family home disputes.[345] These may be less formal means of challenging dispossession that through litigation, but they nonetheless highlight that women are fighting back using the limited means that they have at their disposal.

[341] D Budlender, S Mgweba, K Motsepe and L Williams, *Women, Land and Customary Law*, Community Agency for Social Enquiry (CASE) Report (2011).

[342] See, generally, Budlender et al, *Women, Land and Customary Law*; and N Luwaya, 'Women's Strategies in Accessing Land in Rural South Africa' (2014), a paper presented at the New York Law School Law Review's Conference on 'Twenty Years of South African Constitutionalism' held in New York on 14-16 November 2014.

[343] Budlender et al, *Women, Land and Customary Law*; and Luwaya, 'Women's Strategies in Accessing Land'.

[344] Mnisi Weeks and Claassens, 'Tensions Between Vernacular Values that Prioritise Basic Needs', p. 400.

[345] See the collected photographs of Thato Monare referenced above in the introduction (Monare, 'He is taking photographs of your house!').

8

POTENTIAL AVENUES FOR INTERVENTION

8.1 Recognising the family home as a novel customary law form of tenure

There is considerable consensus among the authors that have written about family houses, that the concept deserves legal recognition and protection.[346] This sentiment was reiterated by all of the legal experts interviewed. As Bolt argues, the concept of the family home is 'too influential to ignore',[347]

> **'these understandings of home and kinship warrant legal recognition – indeed, constitutional recognition – as urban custom.'[348]**

Senior attorney Thulani Nkosi opines:

> **'We think that the legal system should find ways to recognise the concept of a family home. To us, it is clear that [the concept of] family home is something that is real, it exists out there. It is just unfortunate that the law does not recognise it. We think that the best way to deal with this is to find a mechanism within the title deed system in terms of which people can come forward and say, "This is a family home and can it be recognised as such". Because attaching ownership rights to one or two individuals is actually at the heart of this problem.'[349]**

Commentators are scant on the details of what this legal recognition should look like, but maintain that legal recognition will constitute a powerful step toward protecting vulnerable family members in family law disputes and secure the tenure rights of women and children. Senior attorney Thulani Nkosi remarked:

[346] Bolt and Masha, 'Recognising the Family House'; Bolt and Masha, 'A Family House: Position Paper'.
[347] Bolt, 'Homeownership', p. 231.
[348] Bolt, 'The family home in South Africa's townships'.
[349] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

> 'I haven't thought quite as far as what [the legal recognition of family homes] would look like because I think we're still at the recognition stage. I think if we get to a point where everybody accepts that a family home exists as a concept, then we can regulate it and we can think about the best way to do that. But, at the moment, I think many of our clients just want people to recognise that a family home is a concept that exists and that its intention is to serve everybody without necessarily belonging to one or two individuals.'[350]

One avenue for granting legal recognition to the family home concept is by advocating for such recognition through an Act of Parliament. This could take a variety of different forms. The most important for purposes of this discussion is recognising the family home as a form of customary tenure and amending key pieces of legislation to make accommodation for this form of tenure in the formal system, which could be enacted through a new piece of legislation or through the amendment of existing legislation such as the Deeds Registries Act and the Administration of Deceased Estates Act. Given South Africa's embrace of legal pluralisms and the Constitution's recognition that the common and customary law have equal status, there is a strong legal basis for recognising family tenure as a novel customary practice.[351]

However, some of the legal experts were hesitant of codifying customary law in legislation. As Thulani Nkosi says:

> 'I'm not sure that legislation is the best answer to this scenario. I would argue for some sort of high-level recognition [of the family home concept] without making it too rigid, because, for me, the problem is that once you put it down on paper, you solidify it, you codify it. Then five years down the line, another problem develops, which is not necessarily addressed by that qualification... But if you have some sort of high-level recognition that the concept exists and lives amongst people and everyone accepts that, from time to time, it may change depending on the circumstances and the situations at play, that is probably going to be a better solution.'[352]

For Nkosi the specifics of this novel form of tenure should be worked out through disputes and questions of interpretation in the courts. However, it's unclear how this recognition will lead to the inclusion of the concept into the formal system. Perhaps there is room for courts to use the remedy of reading in to amend existing legislation such as the Deeds Registries Act, the Administration of Deceased Estates and the Rules of Court?

[350] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).
[351] Bolt, 'Homeownership'.
[352] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

8.2 Different forms of registration

Another proposed intervention is amending the system of land administration, including the registration of title through the Deeds Registries Office, to enable families to obtain strong rights over family homes. Once again, this intervention could take different forms.

Some commentators, including the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (High-Level Panel) and Kingwill and Manona, have called for an ambitious new piece of legislation, what they refer to as the 'Land Records Act,' which would allow for a form of family-based tenure.[353] This Act envisions the statutory recording of all off-register rights in land through a system that would include a variety of tenure forms, including titles, quit rent and family tenure (among others), and would allow landholders to shift between different forms of tenure. The proposed land records system would run parallel to the Deeds Registry, and be administered by the same government department, so that

> **'there can be movement in both ways. People should be able to upgrade to title if families agree. But some landholders are moving to a less formal system by default – as indicated by the informal sale of RDP houses without registering this with the Deeds Office.'**[354]

The first step in the process would be clarifying the rights that people have. Where the rights people have to land would be contested, a land rights inquiry or adjudication process should be undertaken before trained officials. The proposal also includes provision of a new institution, the National Land Ombud, which would oversee land rights and provide assistance to landholders and have investigative powers and the ability to request information from individuals and state departments. While Beinart et al laud the innovative spirit of the proposal for the Land Records Act, they believe that the proposed law may replicate many of the same challenges that the current Deed Registries Act faces, including government capacity constraints and formalised approach in the Deed's Registry.[355]

When asked about whether they believed that this proposal offered potential solutions to the problems brought about by family home disputes, the legal experts were skeptical. Candidate attorney Thando George said:

> **'There should be easier access to the Deeds Registries Office, but we should be cautious of relaxing scrutiny because as it is we're already finding issues and people exploiting the system despite the due diligence obligations required... I don't feel any of those [proposals] assist with registering a family home, I think they are still quite Western in their ideology.'**[356]

[353] See High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, *Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change* (2017); and Beinart et al, *Rights to Land*, p. 53.

[354] Beinart et al, *Rights to Land*, p. 53.

[355] Beinart et al, *Rights to Land*, p. 53.

[356] Interview with Thulani Nkosi (SERI senior attorney) and Thando George (SERI candidate attorney), over Zoom (31 July 2023).

If this intervention does not take the form of a new piece of legislation, it could consist of the amendment of existing legislation to include the concept of the family home. For example, the Deeds Registries Act could be amended to provide for a family-based title, the Deeds Registries Act could be tweaked to make it easier for people to be listed as co-owners, or it could be made easier to endorse title deeds with limitations (such as the limitations contained in family rights agreements).

Another option is to advocate for a specific law that recognises the family houses with the key feature being that alienation powers of custodians are limited by, for example, requiring consent-based alienation from all or a majority of family members. There are similar models for this type of approach, such as the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), which may offer guidance to how this approach could be implemented in practice.

8.3 Amending procedures for the administration of deceased estates and transfer of ownership

There are a variety of ways that the processes for the administration of deceased estates in terms of section 18(3) of the Administration of Deceased Estates Act could be improved. This could take different forms. For example, it could incorporate some of the stricter measures that apply to estates valued at over R250,000; it could require a compulsory rights-inquiry process; could offer the Masters' Office some investigative powers; or could provide for a process of service of notices before a Letter of Authority is issued (similar to how the Sheriff would send notices in eviction cases).

8.4 Utilising other, similar, common law legal concepts to give effect to the concept of the family home

During discussions with legal experts about the nature of family homes, some of the interviewees made reference to various existing common law legal concepts that are closer to the concept of the family home that the concept of individualised ownership. These concepts offer legally recognised alternatives to the family home concept or potential mechanisms to give effect to the family home concept, albeit imperfectly. Three particular concepts arose in the literature and discussions, namely trusteeship, co-ownership and the registration of usufructs in favour of family members on the title deed.

The emphasis on the relative rights of family members and the practice of appointing a custodian to manage family property on behalf of the family suggests that '[l]ineage land holding can be equated to a form of trusteeship'.[357] As mentioned above, the notion of African freehold described above certainly sits more comfortably with a version of trusteeship than with more exclusionary notions of ownership and shares many of the same attributes: Family property is viewed as a *communal resource*, to which all recognised *family members* (who could be viewed as trust beneficiaries) have *relative rights*, that is managed by a *responsible custodian* (who could be viewed as a trustee) who is expected to *preserve and manage* the communal resource *on behalf of* the family members, in a manner that *benefits the family as a whole.*

[357] Kingwill, 'Square Pegs in Round Holes', p. 261.

Senior attorney Khululiwe Bhengu said that trusteeship was a potential solution to some of the challenges posed by family home disputes during her interview:

> **'I think [the notion of a family home] is actually closer to a form of trusteeship... That's what's in all of the other family members' minds – that this person has the role of a type of trustee, not understanding that title is actually going away... I think a trust is a good solution, but it's expensive and it is still run by trustees, who will have to change from one generation to another.'**[358]

Bhengu similarly referred to usufructs that could be registered against the title deed as a way to give formal recognition to the family home concept:

> **'The characteristics of a family home is similar to that of a usufruct. A usufruct doesn't give you ownership, but it gives you the right to use and enjoy the property and even to enjoy the fruits of the property. But you don't have the right to alienate [the property]'.**

But this too, has limitations:

> **'Of course, [registering a usufruct] is an expensive process. You can't go to the Deeds Registries Office and add a usufruct in every case, it will be difficult.'**

The similarities between co-ownership and family homes were raised by senior attorney Nkosinathi Sithole during his interview. However, he was quick to point out that co-ownership is still a form of individualised ownership, in terms of which people jointly own a home as individuals and highlighted that this could cause complications for the descendants that were registered as co-owners 'down the line'.

As tempting as it might be to liken family tenure with these common law concepts, it is important to resist the equation of family tenure (which is developed from and informed by vernacular or customary values and norms) to yet another Western common law legal construct. It is, after all, assumptions about the adequacy of private title to address the (unique) needs of black families that has led to the families' non-compliance with, and development of, title into family tenure in the first place.

[358] Interview with Khululiwe Bhengu (SERI senior attorney), over Zoom (3 August 2023).

8.5 Recognition of land rights in terms of section 25 of the Constitution

There is also room to utilise the right to tenure security and land redistribution contained in section 25 of the Constitution as the basis for either advocacy or as the basis for a constitutional challenge to existing legislation such as the Deeds Registries Act, the Conversion Act or ULTRA. The basis for such advocacy or legal challenge is firmly laid down in the *Shomang* case.

8.6 Awareness raising and knowledge building

Another potentially key intervention is broadening knowledge and awareness of the formal system governing the administration of deceased estates and registration of title among the population. This recommendation is based on the notions that lack of knowledge of the system is one of the primary issues leading the family home disputes. This intervention could include raising awareness of potential reforms of the formal system that would give legal recognition to the family home concept.

8.7 Other potential interventions

There are various other interventions that may be useful:

- Using strategic litigation in the form of a constitutional challenge to the Deed Registries Act, Conversion Act or ULTRA to compel Parliament to adopt legislation recognising family tenure. This could be viewed as a 'stick' rather than 'carrot' approach. There is also a legal foundation in terms of section 25(5) and (6), as highlighted in the *Shomang* case. This could be an alternative after more persuasive arguments have failed to convince the legislature.
- Embarking on a process of registering limitations of title deeds for family houses, either through registering usufructs (use rights) or other forms of limitations, such as limitation to the alienation of family homes.
- Arguing for recognition of family houses as a tenure form through the courts and case law – this could be through a series of cases in which the courts slowly develop the concept. This is a very complicated suggestion as courts are ordinarily not empowered to make laws, and the lack of foundation for family tenure has clearly already limited the courts' ability to build on this. One avenue that does show significant promise is to argue that family homes are a form of living customary law – however this is likely to require extensive expert evidence from specialists such as the experts quoted in this report.

9

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