

# THE FAMILY HOUSE A POSITION PAPER



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## **INTRODUCTION**

As apartheid crumbled, the South African state enacted a series of overlapping processes through which rented and quasi-owned family houses in black townships would become private property. This meant registering individual owners who came forward on the basis of permits listing multiple family members. Decades later, an increasing number of title holders are dying, and disputes over the legitimate ownership of these houses have become intense. The formalisation involved in reporting deaths catalyses disagreements. It reveals the huge gap between popular understandings of the family house and the legal frameworks of individualised ownership, land registration and intestate succession.

Popular notions of the family house themselves derive from a complex interplay of customary norms and the racialised history of administration and urban government. The family house is thus part of a broader legacy of racially discriminatory spatial planning in South African cities, which will take years to repair. And it is one example of the sheer complexity involved in addressing discrimination in relation to title and security of tenure.

The family house is therefore an important issue today. This is not only because it shapes countless economic lives, as property passes en masse to the next generation. It also relates to crucial wider questions in South Africa and internationally. In South Africa, while debates about access to land have often taken a rural focus, it is imperative to appreciate the ways people access and use urban land. South Africa is distinctive in global terms, because the transfer of township houses into individual title represented the unusually widespread and rapid creation of small-scale landowners in cities. The implications of this unprecedented devolution of housing stock require careful analysis for policy in South Africa and beyond. At the same time, in recent years, economists and policy makers have begun to recognise the huge global implications of inheritance for family opportunities and constraints. In South Africa, making sense of cross-generational wealth transfer is especially crucial because of the country's acute inequality. Houses remain, for many, the most significant items of property passed on at death. And, in metropolitan areas like Gauteng, this often means the family house – with its complex administrative legacies and its embeddedness in norms of urban custom.

The paper focuses on three densely populated townships in the Gauteng area. It is informed by case work seen at ProBono.Org, and by Dr Maxim Bolt's research since 2016 across the world of deceased estates in South Gauteng, including observation, shadowing, interviews and consultations with government departments, estates practitioners, civil society and communities.

## THE FAMILY HOUSE AS HISTORY<sup>1</sup>

Houses in historically black townships – overwhelmingly former rental properties – came to be known as family houses. This was partly because residents strove to live in them according to rural kinship-based residence norms. But it was also because apartheid law denied black people the right to own urban property, while regulating residence through permits that listed all family members as occupants. While these permits could officially be passed down within families, a lack of administrative capacity meant that they were often held across generations without re-registration.

The late 1970s and the 1980s saw steps towards transfer of township houses into long-lease agreements and then into private ownership. Shorter leases had been available from the 1950s (see timeline below), but not widespread. These new measures were encouraged by the Urban Foundation, a corporate alliance seeking to influence the direction of change. They represented a means to create a property-owning class and a housing market, resembling moves in other countries like the United Kingdom at the same time. But doing so meant contending with the unevenness of township property regimes, including the need for township registers for full ownership – still lacking in some areas. Once mass-transfer to private property became a priority in the 1990s, this meant registering individual owners who came forward on the basis of Native Affairs permits for co-habiting families, a process made especially difficult by uneven official record-keeping and the sheer complexity of residence patterns. In some cases, according to disputing parties today, members appear to have registered ownership without their relatives' knowledge. More generally, representatives were selected by their kin, but the implications of doing so were not clear to them at the time – the notions of 'custodian' of the family house and family representative ran straight into the sharply bounded legal concept of individual title. This, although houses could and were sometimes divided in equal shares, which then led to different difficulties around future use, credit and sale. All this, in a programme initially accelerated by monetary incentives to local authorities for each house converted to individual title. It must be emphasised that the importance of 'custodians' for families was known at the time. TORPS introduced family rights agreements by which families formally recognised custodians, while protecting broader entitlements to the property and against eviction or alienation (see timeline below). But the agreements were not legally enforceable, as they lacked recognition in formal property registration. Later attempts to incorporate the agreements into deeds registration proved equally thorny in legal terms. Today, then, the intensity of disputes over family houses is exacerbated by the contestability of past bureaucratic processes – from apartheid's legacies to thwarted efforts to address these.

Matters were made yet more confusing for residents by changes in the law. The legal story since apartheid is one of attempting to integrate black and white people into one system. Creating private property in townships had been seen as inclusion into a private property market. In the law, too, inclusion was central – here, it was a matter largely of extending the reach of the civil code and the administrative systems that had

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<sup>1</sup> For a more detailed account, see Erica Emdon, 'Privatisation of State Housing: With Special Focus on the Greater Soweto Area', *Urban Forum* 4, 2 (1993), pp. 1-13.

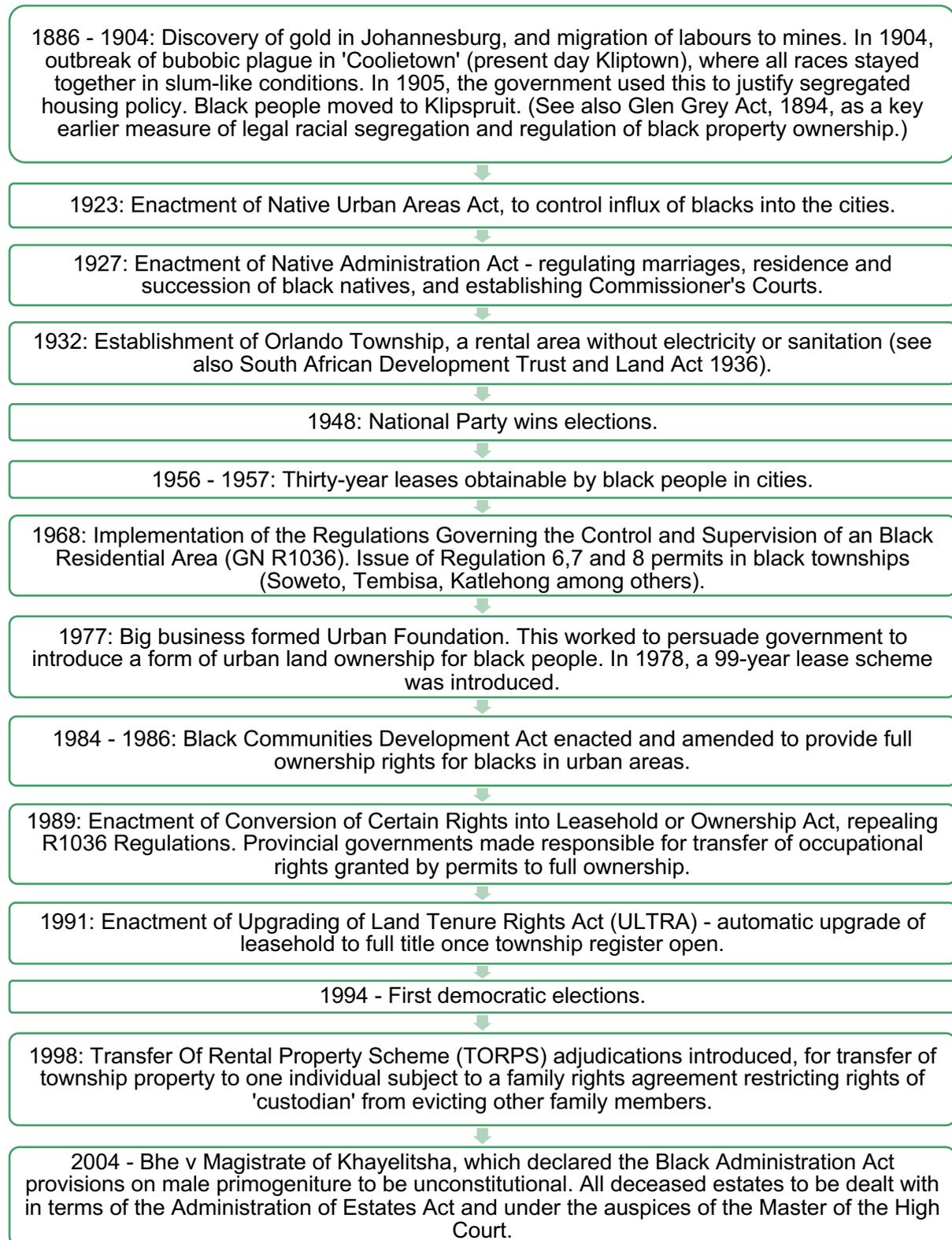
previously been restricted to whites. The unintended result has been to position South Africans very differently in relation to the law.

The most significant constitutional court judgment came in 2004. *Bhe vs Magistrate of Khayelitsha* declared male primogeniture (inheritance by the first male child, or in this case the closest surviving male relative) in the Black Administration Act unconstitutional along gender lines. The effect was to do away with this apartheid-era interpretation of customary norms, but also to remove customary succession itself as an option for people without wills. All South Africans became subject to the same intestate succession law: inheritance by the spouse first, with the property shared with children if in excess of a threshold currently of R250,000; in the absence of spouses or children, the line of succession continues to the deceased's parents and then siblings and their descendants. While the changes removed apartheid-era stratification, they entrenched a kinship model of the nuclear family, with its European pedigree – even though the civil code was amended to recognise custom when it came to marriage, childbearing roles and adoption. It stood in contrast to a model of the family in which sons inherited houses from fathers, and then brothers (and sometimes sisters) took over the house as core members of the father's line. This is generally the family implied in the family house.

Today, then, custom is invoked for the notion of the unsaleable family house, with its emphasis on collective ownership like the rural homestead. But it is also the result of earlier state planning. The houses were off the market because their residents were denied ownership rights. And the very idea of the family house has become inseparable from the family permit. Previously listing those with permission to reside, this document is now popularly seen to prove the family house's legitimacy. Today, permits are brought to mediation meetings at the Master's Office, representing the truth of history and intended to call title deeds into question. Legal status here confronts an earlier era of formality woven into experiences of custom and culture.

The family house thus needs to be understood historically, because it is the result of an apartheid legacy, and because it represents a claim about the importance of family history over individual property or the market. There is a still broader historical context, summarised in the timeline below.

## TIMELINE OF LEGISLATIVE POLICY AND KEY HISTORICAL EVENTS<sup>2</sup>



<sup>2</sup> This draws on Van Gend Botha, 'Leasehold Explained 2010', a presentation at our previous Family House event, 19 September 2017. For a useful and accessible historical summary, see also Denis Creighton, 'Housing in Soweto', Soweto – Research Project Doc 1 (2003), available at [http://www.soweto.co.za/html/i\\_research\\_doc1.htm](http://www.soweto.co.za/html/i_research_doc1.htm).

## THE FAMILY HOUSE AS AN IDEA TODAY

What, then, of the family house today? The concept has clear popular influence. What follows investigates why, by examining what the idea means to people, its dynamics in practice, and the ways it plays into popular claim-making.

In attempting to gain further understanding, two sessions were held wherein stakeholders such as academics, legal professionals, state department representatives and township community members were asked how they define and interact with the concept. Both sessions – the first with professional experts and practitioners, the second with community members – highlighted that clear definition is currently lacking, despite the term's ubiquity. Indeed, even the responses from academics and legal professionals varied substantially depending on what roles particular institutions play in housing, property and inheritance.

Here, though, we focus on the session with community members. During this engagement, a questionnaire asked four simple questions:

1. Do you have a family house?
2. Where is the house situated?
3. How many people reside in it?
4. What makes this house a family house?

Thirty-seven responses were received from residents of Soweto, Tembisa and Kagiso. These revealed a substantial range of views. This range itself differed by township (although such conclusions are necessarily tentative with such a small sample size). Respondents from Tembisa referred to a property that initially had a permit, is currently occupied by family members, and is also used for ancestral ceremonies. Here, entitlement to occupy the property is mainly based on either having been listed on the permit or being a descendent of a person who was on the permit. Similarly, in Soweto, the property is used to maintain familial identity. That is not always defined by physical occupation by family members, but often by election of a custodian who manages the property after the death of the elder or title deed holder. This was the majority view, but not the only one. The alternative was in greater evidence in 'newer' townships like Kagiso. Here, a number of respondents defined the family house simply as a property that is inherited from direct ascendants – that is, divorced from more historically embedded interpretations. Nevertheless, in all responses there was clear reference to a custodian who takes care of and preserves the property for future use. There was also a noticeable reference to shelter for family members in need of housing, rather than simply property owned by an individual or an asset on the market.

The family house is thus a social form of property which, after the death of an elder, instead of following common law succession and registration of title, continues the family relationship to the property. There is also a strong sense of allowing a sibling or relative unable to acquire their own property to be afforded dignity by taking on the deceased's property. It is important to note that the family house concept is not equally salient for all African families in the urban areas. Factors such as education, socio-economic standing and general familiarity with the current legislative framework for administration of deceased estates play important roles in determining how immovable property is seen after the death of the title deed holder.

The family house can be defined 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, access and control of the said property will be largely dependent on the family's own mores, and these are influenced by the family as a collective, not simply by one individual.

### **THE FAMILY HOUSE IN THE PRACTICE OF INHERITANCE<sup>3</sup>**

In practice, the family house usually collides with state law and administration after a death. In the course of disputes over inheritance, immovable property often takes centre-stage. Opposed parties turn to the official administration of deceased estates in support of their own interests, and a key faultline of disagreement is whether the house will remain a family house. We see this at the point when an elder or a custodian has passed away, and there is no collective agreement on how the immovable property is to be dealt with. Most commonly, it is to be inherited in terms of intestate succession, by a spouse or children of the deceased. Disgruntled or victimised family members then turn to normal common law administration processes which, however, disregard the family house concept completely. Meanwhile, the property may cease to be identified as a family home if a male relative has not been 'appointed' as a custodian. Despite the fact that it was declared unconstitutional in *Bhe vs Magistrate of Khayelitsha*, male primogeniture (first-born inheritance) continues to be the dominant principle in the social organisation of family house succession (an important alternative is male ultimogeniture, or last-born inheritance, as shown below). Although not applied in strict terms, and usually taking into account the surviving family members who require housing, there is still a tendency to refer to a male child or descendant as the preferred custodian. We will show how this interacts with administration and legal process in the sections below.

It is important to emphasise the sheer variation among cases of family house inheritance in practice. A few examples illustrate this. The first takes us to a corridor of the Johannesburg High Court, where a group of siblings celebrated, reflecting on the settlement that had just been formalised with their deceased brother's wife. Their father had died in 1985, with a house in Soweto. By that point, the house was under a 99-year lease, and it went straight to his eldest son, and that eldest son's wife then inherited it upon the latter's recent death. In this respect, here was a classic family house dispute. The siblings of the deceased were ranged against the surviving spouse: the 'family' with collective entitlement, versus the heir under intestate succession law. One of sisters underlined to me the siblings' position: their sister-in-law cannot just keep the house because she is married in community of property. It had belonged to their late parents, and the deceased was merely a custodian who took advantage of his position to register the house in his own name by shady means. To complicate matters, the deceased and his wife had not actually been living in the

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<sup>3</sup> These examples from interviews, the observational material and analysis on deceased estates later in the paper, and part of the historical analysis above are drawn from draft articles by Bolt. One, on the family house, inheritance and class formation in Johannesburg, was presented at the University of the Witwatersrand and University of Edinburgh; the other, on formality in economic life, was given as the 2018 Malinowski Memorial Lecture at the London School of Economics.

house. Rather, it was one of the sisters who resided there (the other siblings resided in Bloemfontein). After initially 'being nice', their brother's wife tried to evict her and sell it. It was then that they thought 'we also have rights', and approached an attorney recommended by neighbours.

These siblings, it is worth noting, were relatively unusual in having the means and the confidence in the system to take the matter to court. A case had been assembled to justify a reversal of the deceased brother's title deed. The latter had inherited the house as eldest son under the Black Administration Act. The argument was that the Act's application even during apartheid might be contested retrospectively: the result has been gender discrimination not only confined to the past, but rather with powerful effects that have persisted into the present. The judge postponed the matter so that a case law bundle could be prepared, but the wife withdrew. The court order that followed split the house equally among the surviving siblings and their brother's spouse, effectively reversing transfer of title from father to son and distributing across all children.

Although a judgment was not given here, the application itself was by no means far-fetched. It raised similar issues to the Rahube matter, which is currently awaiting judgment before the Constitutional Court.<sup>4</sup> The court of first instance held that Section 2(1) of ULTRA<sup>5</sup> is constitutionally invalid. For it automatically converted holders of land tenure rights into owners of property, without providing the occupants and affected parties lacking ownership rights with notice or opportunity to make submissions to an appropriately established forum, prior to the conversion of the land tenure rights into ownership. Furthermore, the constitutional invalidity was deemed retrospective to 27 April 1994. However, the application of this judgment was suspended for a period of 18 months to allow Parliament the opportunity to introduce a constitutionally permissible procedure to address the constitutional invalidity.

The second example concerns a man whom we shall call Mr Mthembu, a teacher in Mzimhlophe, Soweto. When he was interviewed, inheritance was on his mind because his father had recently died. A man with rural origins but an urban life, Mr Mthembu's father had done well. His substantial property was also matched by his substantial progeny: eight children, although only three within marriage. The result was a plural approach to inheritance, intertwining patrilineal norms and recognition of state laws and procedures. By law, half his estate went to his community-of-property wife. He had reinterpreted that principle, using its force to support his own reasoning: all major assets should be split between his three in-marriage sons – without going anywhere near formal administration. The eldest received his cattle, tractor, and everything on a farm he had bought. Mr Mthembu, as middle son, inherited the township family house. The younger brother got the goats. The other five children were kept out, persuaded that they would lose a costly legal battle if they approached the authorities. They were disinherited and selectively incorporated into legal process, and recourse was unlikely. Mr Mthembu's father also had cash savings, and for these only 'the will was there'. All eight children inherited here, marking cash from 'his property'. Each boy would receive 15%, and each girl 10%, bypassing the intestate rule of gender equality. Here, due

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<sup>4</sup> *Rahube v Rahube and Others* (101250/2015) [2017] ZAGPPHC 651; 2018 (1) SA 638 (GP) (26 September 2017) – Lawyers for Human Rights.

<sup>5</sup> Upgrading of Land Tenure Rights Act of 1991.

process was followed, reporting the will and this part of the estate to the Master's Office.

What happened to the family house? Mr Mthembu's own plans equally relied on and evaded formal institutional practices. He was just beginning to contemplate a will through his insurance company, because he had recently become a father, because he would soon embark on marriage plans with his partner, and because he had taken a bond for a new house. But this plan was focused specifically on making provision for his nuclear family in the new abode. In other words, his own bond house was to be treated differently from the family house. The family house was actually relegated to earning him rent, rather than its 'proper' use as a hub for living and ancestral members of the extended family. Nevertheless, he underscored, it will remain outside the will and state administration, passing as a 'family thing' through the patriline – 'it must rotate among members of the family', Mr Mthembu concluded.

Mr Mthembu's example has been presented in detail because its complexity is illuminating, and because it actually offers two instances to reflect upon – his own and that of his father. Two older and less affluent households contribute a further useful point: that plans for the family house may be left unwritten, and many people see family houses as private matters to be sorted out away from state oversight. One elderly couple, sitting at their dining table, explained that they 'verbally wrote' a will. This meant that they had sat their children down and informed them what would happen to the house and its contents when they died: their youngest son would inherit the house,<sup>6</sup> which would come with the car; the furniture would be split among all six children. Writing these wishes would not constitute a distinctly different act, in their view – a means of proving intention after death, or a document with legal weight. In any case, they said, if someone has written a will, you just read it in the house with the family, just as though it had been an oral will – once again, what matters is communicating within the family. The problem, though, is if a will is written about the house, then people who are not in it will come and damage it. Ideally, they said, they hope that the family can themselves handle any dispute. People go to the government office because of a fight, they added, only if the uncles cannot contain it. The appropriate venue for solving such issues should not be the state.

Just across the street was Sanele, in his fifties and a couple of years short of government pension age. Sitting on a low step in the yard of the house in which he himself had grown up, and which he inherited as youngest son, he described how he had written a will using an attorney who was his cousin. His four children would share the house and its contents, with the teenage daughter who now looks after it to continue as the head. This would bypass his community-of-property wife, a decision with which she had agreed. But neither the will nor the lawyer placed legal process itself centre-stage. He had spoken to his children about the document, and he saw it simply as a way to emphasise what he wants. Indeed, he expected the will only to be read at home, rather than taken to the 'government office' – an assertion again of the primacy of family. Yet neither did he subscribe to a model of kinship where extended family intervene. That, in fact, is why he didn't want his lawyer cousin to come back – not because the latter was a lawyer, *per se*.

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<sup>6</sup> Male ultimogeniture. This is an important alternative principle to male primogeniture in popular norms of inheritance.

These examples underline how complex and varied the very idea of the family house is – defended as a particular property form, but nevertheless available for multiple uses and possibilities for making a living. Mirroring what we saw in the examination of the family house as idea, there are substantial differences in how people see the family house in practice. An assertion of family privacy over state intervention, family house plans may nevertheless be combined with reporting estates and/or writing wills. They may rely on principles of male primogeniture (first born) or ultimogeniture (last born). Or, as in the High Court matter, they may be a defence of family against an earlier era of legally sanctioned male primogeniture.

## THE FAMILY HOUSE AS A CLAIM

Despite this variation, one significant general point is that the family house is not only a description – whether of an ideal or of practices. Invoking the family house is also a way to make claims. These can be grouped as follows:

- **Claims about kinship:**
  - Asserting the entitlements of siblings – the children of an earlier patriarch in whose name the apartheid-era family permit was issued.
  - Asserting the entitlements of brothers, and especially oldest or youngest brothers. It is important to note that this claim can diverge in its implications from the previous one about siblings. We saw this in the High Court example above.
  - Attempts to marginalise spouses (especially wives) of the deceased. This makes family house claims difficult territory. Existing intestate succession law diverges from popular notions of urban custom, but it does also protect wives.
  - Attempts to marginalise children outside the marriage. Again, this is difficult ground, with the law's emphasis on biological descent an uncomfortable fit with popular norms, but with the effect (in theory) of protecting children.
  
- **Claims about property:**
  - Asserting the significance of the house beyond its value as a market asset.
  - Asserting attachments to houses beyond individual ownership.
  - It is clear that the results of inclusion in a housing market – promoted since the 1980s – have been extremely complex. This is comparable to issues surrounding the ownership and sale of RDP houses. Section 10A of the Housing Act<sup>7</sup> prevents voluntary sale of state-subsidised property. In a parliamentary inquiry, the Minister of Human Settlements explained the provisions as follows: 'The provision of houses is intended to provide beneficiaries with self-respect, dignity and it is viewed as a life opportunity for the less privileged South Africans to own an asset in the form of a house, hence the selling of state subsidised houses is not encouraged at all unless their economic situation has improved for the better'. State attempts to promote property ownership in South Africa –

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<sup>7</sup> Housing Act 107 of 1997.

whether through new RDP stock or through older township houses – are thus deeply entangled with attempts to ensure security, dignity, self-respect and decent lives broadly, and not just assets.

## THE FAMILY HOUSE AND THE LAW

Given that the family house has no legal reality, how do people for whom it is an important category encounter the law relating to immovable property? ProBono.Org's own client statistics offer useful context for Gauteng. Combining numbers from help desks at the Johannesburg Master's Office, the Johannesburg and Pretoria Deeds Offices, the Johannesburg Family Court, and a weekly housing clinic, the total client count in 2017 was 1555, 920 of whom were African women. This provides an initial indication of who is especially affected by the gap between popular adherence to the family house and its non-recognition in common or Roman Dutch law. In a context of widespread attempts to side-line spouses or female relatives from inheriting family houses, many more women seek legal assistance to protect their rights to the property in terms of normal intestate succession provisions.

When an estate was reported shapes encounters with the law even today. Estates reported between 1978 (the first 99-year leaseholds) and 2004 (the repeal of the Black Administration Act following the Bhe judgment) went to apartheid-era Commissioners' Courts, and then to district Magistrates' Courts once the former were collapsed into the latter. Even following Bhe, they continue to handle matters that were reported before the deracialisation of the law. Those reported since the demise of the Black Administration Act are handled by the Master of the High Court. Despite the shift, the family house concept has persisted. In Johannesburg, the Magistrate's Court and the Master's Office equally encounter it as a central principle of popular urban custom. This is especially evident because immovable property is regarded among many African families as a collective asset only held in trust by individuals. It is often at the centre of disputes, and formal legal processes are resorted to only in instances where disputes arise regarding use, access and control. In attempting to retain broad family entitlement to a house, it also becomes useful to leave the property registered in the deceased's names. Again, this demonstrates the centrality of extra-legal agreements in contrast to the law itself.

In order to appreciate how people encounter the law, it is also important to distinguish between the inheritance of upgraded and converted properties. Upgraded properties were automatically registered to the apartheid-era permit holders who then acquired leasehold and, in turn, upgraded title. Converted properties, on the other hand, were previously rented municipal housing stock, and a title holder then had to be decided by process of adjudication. The distinction takes us back to the 1970s efforts of the Urban Foundation, mentioned above, in which certain areas were granted leasehold as a step towards creating a 'middle-class' stratum of homeowners. Because upgrading relied on the previous sole right of men to lease township houses, these houses have seen fights specifically over the legal conditions under which previous generations inherited. We saw this earlier. In converted properties, it is harder to give one overarching scenario. This is because the conversion of ownership of property has depended on local municipalities and the types of permits under which property

has been held. There was further complexity in the very process of conversion, as discussed in the History section above.

Regardless of administrative differences, both upgrade and conversion have seen numerous applications to reverse title awarded to the first claimant and to review the decision to award the property to one individual (in the absence of others, and/or to their exclusion).<sup>8</sup> The High Court's stance towards these matters is guided by the Promotion of Administrative Justice Act, which reviews any procedural flaws in adjudication processes. For the most part, courts do not contest decisions by the Department of Human Settlements, except to order the Department to hear the claim *de novo* and make a ruling in terms of the Conversion Act. Crucially, the court has not yet dealt with family houses in terms that recognise the category as a customary law concept – albeit an urban one – or that interrogate its application in any particular scenario. The concept is thus largely used as a mitigating factor in such applications and not as the basis of a right. This is generally influenced by how legal professionals phrase their client's case in court proceedings.

Evictions are another focus of people's encounters with the law. In eviction proceedings, most respondents (i.e. those contesting eviction) argue for their right to the property in terms of familial relationships or the documented family rights agreement. The courts tend to afford the respondents the right to seek legal advice. This is to enable them to make a case – either for the family rights agreement or for their familial relationship to the property – in a separate court application. Failing that, the application to evict will be ordered. Yet orders are also granted when respondents cannot access legal services. Outside the legal system, family members are often assisted by neighbours or community members to regain physical occupation of the property once eviction has been executed by the Sheriff of the Court. This results in further legal action: here, criminal proceedings against trespass. The criminal court's response is, once again, to afford the defendant(s) the opportunity to consult and obtain legal assistance in bringing a High Court application against reversal of title. In short, eviction involves a complex to-and-fro between legal and extra-legal processes and dynamics, mirroring the entanglements we describe elsewhere in the paper.

The family house concept itself, however, offers only an indirect and limited basis for legal argument. As noted above, should the respondents access legal assistance, an application to reverse title will deal with how title was obtained by the current owner and if the said process was fraudulent in any way (for both conversion and succession). The court seldom hears applications which directly rest on the basis of the property being a family house. This might be because the application must be brought against the Registrar of Deeds, who is regulated by the Deeds Registries Act of 1937 on how title registration is to take place. This makes provision for registration of individual or co-ownership title but not for a 'family house'. It is equally notable that the Deeds Registries Act and its amendments do not recognise indigenous customary law as the basis of norms and practices regarding land. Nor do these measures

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<sup>8</sup> In terms of the Conversion Act, authority and decision-making regarding a property vests with the Director-General of Human Settlements. He/she must be cited as a respondent in any application to reverse title of a converted or upgraded property.

provide for the registration or adjudication of tenure in such settings. Many writers and scholars have written on how problematic it is to attempt to fit African customary law into the prescripts of common law.

## **THE FAMILY HOUSE IN THE ADMINISTRATION OF DECEASED ESTATES**

Claims about the family house take on particular significance in relation to the state when estates are reported.<sup>9</sup> Reporting estates in South Africa means going to a Master's Office, each attached to one of the regional High Courts. In Johannesburg, this is the Office of the Master of the High Court for South Gauteng, a 'creature of statute' staffed by officials often with law degrees, who make decisions specifically in terms of legal regulation. According to statute, the Master, the supervisory Deputy Masters, and the much larger number of Assistant Masters who make the bulk of day-to-day decisions are all equivalent in terms of the law. Decisions may be taken on review to the High Court. But this must contend with the fact that many South Africans cannot afford the money or time to take their matters to court, and a number of postponements may be necessary to prepare a matter for hearing. People are also aware that court judgments may be hard to enforce where non-state forms of coercion are central to struggles over family houses.

Johannesburg's is the biggest and busiest Master's Office, processing 32,000 to 33,000 files a year, around double the next largest office in Pretoria. Its building is routinely teeming with people: queues on the ground floor, where estates without wills can be reported on the spot; rows of chairs in upper-level corridors, where clients wait to report to supervisory officials about the distribution of inheritance, or to fight out a dispute in an organised mediation.

The actual work of estates in the Masters Office requires extraordinary flexibility, even though the whole process is sharply defined by law. For officials, making the system work involves interacting with relatives of the deceased, lawyers, and messengers shuttling paperwork to and from banks and trust companies. It involves paperwork, but also maintaining goodwill among stakeholders in the ecosystem of inheritance, and trying to explain to the aggrieved why 'fair' does not always mean 'legal'. The flexibility impresses on officials that what is at stake is always simultaneously bureaucratic process, the law, the future of property, and the realities of death. As one Assistant Master put it, 'You know, these legal issues, they transgress into other areas. Everything gets brought into the estate'.

With limited staff and resources, this is all undertaken under considerable time pressure. Offering more space to kin to express their grievances generally means a radically eroded lunchbreak, or longer hours in the office. Allowing direct access to officials has the important benefit of making government available to the public, but it also presents challenges when it comes to controlling an environment where people and files rush around the building.

At the same time, the law often provokes surprise and disagreement, in meetings and mediations with members of the public in the Master's Office and elsewhere. It equally

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<sup>9</sup> Much of this section draws on Bolt's draft articles, mentioned in footnote 3.

shocks law students, such as at the University of the Witwatersrand when succession law is taught on the LLB programme. Perhaps the most common complaint at the Master's Office is from the siblings, or even the parents, of the deceased, who now find themselves facing eviction at the hands of spouses. Siblings or parents are shocked that a short-lived or informally separated spouse will keep the family home; conversely long-term unmarried partners realise with disbelief that their only claim to the deceased's estate is as guardian for any minor children.

This is exacerbated by the broader disconnect between succession as simply acquiring assets and succession as stepping into the shoes of the deceased patriarch as custodian. Notions of individual ownership rub up against those of kin-based access to a multi-generational home, which becomes at the same time a site of engagement with ancestors as successive generations pass on. At the same time, the house-as-shelter contends with the house-as-asset, whether by outright sale, or through mortgage bonds that themselves presume a particular model of ownership, transferability, and the possibility of 'attaching' houses as collateral for debt obligations. Inserting family houses into a property market, then, is no simple matter from the point of view of families themselves.

In this context, the 'family house' has become central to everyday administration, despite its lack of any legal weight. Understanding why families want to find ways to protect it through the system means acknowledging the concept's everyday reality. Officials may recognise that the original process of transfer in the 1990s was sufficiently murky to be challenged. Families might then seek legal assistance, on the off-chance that the deeds can be reversed a generation, ownership legally divided among all siblings, and – in a sense – the ideal of the family house recognised legally.

The framework of administration has particular effects for poorer families, among whom family houses are concentrated. Last reviewed in the apartheid 1960s, the system is exacting. But it is also sharply stratified, with de facto class and racial implications. Intestate estates under a threshold of R250,000 – 18(3)s – have a simplified administrative track. After a meeting to determine next of kin, and whether there is agreement about what will happen to the property, someone is given a letter as 'Master's Representative'. Yet, to members of the public, that all-critical 'Letter of Authority' equates to ownership. While this is legally wrong, in practice these pieces of paper enable their holders to transfer any assets as they deem fit, with no further oversight. Indeed, people may simply move into the house on the strength of the letter rather than formally transferring it. Unsurprisingly, the most bitter fights revolve around whose name will be on the letter. Assistant Masters are aware of this, of course. It is their job to catch the cases of fraud, the non-reporting of inconvenient heirs, or attempts to bully or disinherit the vulnerable. But they lack investigative powers. They have no choice but to suspect, until convinced otherwise, that people are lying about their struggles to meet unwieldy regulatory requirements – claims, for example, that relatives have lost touch or are too far to be brought to the Master.

As mentioned, a parallel process exists at Magistrates' Courts for black estates reported before 2004. In the Family Court building, the Johannesburg Magistrate's Court has an estimated 165,000 unresolved deceased estates in terms of the Black Administration Act, which go back to the late 1970s. In many instances, the matters are brought repeatedly before the court due to disputes between heirs on use and

control of, and access to, the immovable property. Indeed, the Johannesburg Family Court has decided to hear these matters in open court in the hope that its authority and subpoena powers help achieve resolution. Such dispute, complaint and mediation resemble dynamics at the Master's Office, where heirs opt to follow common law processes only insofar as doing so supports their own claims to the immovable property. As noted above, this is further affected by non-disclosure of persons entitled to inherit, resulting in transfers to some parties to the exclusion of others. In other cases, the heirs together elect to transfer the property into the name of one heir. But this leaves no record of any agreement on future use and control of, or access to, the property in question, which is therefore beyond the purview of the state or legal protection. The law remains hemmed in by popular notions of family privacy – a key issue relating to the family house.

Mediation in grass-roots level organisations such as Community Advice Offices and local parliamentary constituencies plays a critical role in mediating family disputes that involve the family house. For many people, seeking such assistance offers an important way to access information; bridge the gap between popular norms and state law; and access practitioners who can take disputes forward without immediately having to approach the state itself. However, due to a lack of formal authority or legal process, mediations depend on the parties adhering to agreements – indeed, often on goodwill. When mediation fails, many matters are then referred to the Master's Office or Family Court to commence formal administrative processes or to obtain legal advice from legal aid institutions.

The family house thus meets legal and administrative process in very particular ways. It is a category and claim that Assistant Masters, Magistrates and mediators have to engage with in meetings, so as to understand the perspectives, circumstances and grievances of members of the public. But attempts to bridge the gap between popular norms and law are limited by the stark nature of that gap: the family house concept is key to disputes and to popular norms surrounding property and inheritance, but the law does not accommodate it. Nevertheless, the family house also takes on a particular reality because of the reduced oversight of the 18(3) process and the power of the Letter of Authority. This, however, is a gap that has to exist because of the elaborate nature of deceased estates regulation – itself a legacy of apartheid law-making that is now extended to a South African population with radically diverse social and economic circumstances.

## **THE FAMILY HOUSE AS A RIGHT**

We first must acknowledge that the family house exists as social form/system governing a family's relation to a particular immovable property.

The Constitution of South Africa, Section 25(5), makes provision for the state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. Further, Section 15 (3)(a) (ii) of the Constitution recognises everyone's right to freedom of conscience, religion, thought, belief and opinion and enables the enactment of legislation recognising systems of personal and family law under any tradition or adhered to by persons professing a particular religion. The family house's status as a

right can also be inferred in terms of section 31(1)(a) which provides for the rights of cultural, religious and linguistic communities.

Reading these provisions, it is evident that the current land registration system does not speak sufficiently to how customary law views land in relation to the people who use it. The Department of Human Settlements attempted to recognise this 'right' by drafting agreements between family members during the conversion process. But these agreements were not endorsed against the title, further demonstrating how the family house as a customary law concept cannot be shaped within the context of common law. In addition, a crucial point is that urban custom overall remains unrecognised, even where it is clear that popular norms exist and have been established over generations.

Thus far, the family house concept has been viewed as an inferior right to social tenure, and one unfortunately terminated once the individual owner disposes of the property, or requires the eviction of its users. We have demonstrated how this concept is not viewed as a tangible defence in instances when the continued occupation of the property is threatened.

The family house concept is founded on the premise that those who control the property have a collective kin-based obligation to preserve it. This implies that their 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.

## THE FAMILY HOUSE – WAYS FORWARD

LAND REFORM – The conversation on land reform from a constitutional perspective should not exclude the very important consideration that land on its own has huge social connotations for many black South Africans. This should be about land not only being available, but available in the terms that are identifiable by the majority of the population. The fact that a White Paper on land reform was last published in 1997, with no follow-up on the Green Paper since, suggests that the conversation is long overdue. Addressing this also means recognising that the right to land registration is just as important as the right to secure tenure. **Given that a need for land reform has been established, could other existing legislative frameworks such as the Deeds Registries Act or Land Titles Adjustment Act be used or amended to recognise the family house concept?**

RECOGNITION OF INDIGENOUS LAND TENURE – An important step is recognising that a common law understanding of property is not superior to indigenous customary law understandings, and considering possible amendments to the current legal framework to ensure this recognition. Doing so could assist in framing intervening legal measures while the land reform question is tabled. The practice of using common law as a measure of customary law provisions continues to stunt the development of customary law, which is seen as inferior to common law, especially when immovable property is involved. **Will the registration of customary property rights be possible? What considerations need to be developed to enable those wishing to do so against a conventional title?**

URBAN CUSTOM – For the family house specifically, it is important to consider the possibility that custom is not just rural, despite the longstanding assumption that urban areas lack customary norms. The persistence of urban custom affects how policy and legislation influence society. **To what extent should urban custom be taken into account when developing policy and legislation? How can urban custom be recognised while also protecting the marginalised – especially surviving spouses and children – as legislation and the Constitution emphasise?**

ADMINISTERING ESTATES – The deceased estates system is staffed by practitioners and experts who are aware of the gaps between popular norms and the law, and who try to address the gaps in their own professional practice. Yet such gaps are stark, and attempts to bridge them are often restricted to counselling and popular education. **How might the administrative and legal system make the gaps between legislation and urban custom less stark and more easily navigable?**

PROPERTY IN RELATION TO KINSHIP AND THE MARKET – Expanding property ownership and inclusion in a real estate market has been a central way for the state to address South Africa’s apartheid legacy. Yet this has been far from straightforward, because property is seen as the means to a range of ends, including protecting family and dignity beyond the market. **What, in South Africa, are the limits of property as a market asset, and how should this relate to property as an anchor of the family and its possible futures? What, in short, is a house?**

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