

The Promise of a New Constitution— Achieving Equal Inheritance Rights for Women in Swaziland: A Human Rights Report and Proposed Legislation

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I. INTRODUCTION

A. The Current Crisis of Widows and Children in Swaziland

Regardless of age, women in Swaziland are considered as perpetual minors. This situation, which infiltrates every aspect of life, has particular significance in the area of inheritance law. Depending on the legal regime governing, women either cannot inherit property at all, or can inherit no more than a child's share of their husband's estate. The law of succession is governed by both civil law and customary law in Swaziland. Within this dual system, widows and female children have nowhere to turn. Customary law grants no right to women to inherit property from their deceased husbands and fathers whatsoever. Within the civil framework, the statutes related to succession, administration of estates, and marriage law contain provisions which force most Swazi women back into the customary system where they are discriminated against based on gender and cannot claim the inheritances sorely needed for survival. For those women who contract out of the pass through provision and are governed entirely under the civil system, they are entitled only to divide their husband's estate up equally with his children. This often does not leave a sufficient amount for a woman to live on and support her dependents.

Rampant poverty and staggering numbers of deaths due to the HIV/AIDS crisis have brought inheritance issues to the forefront. Now, more than ever, women and children must be able to vindicate their fundamental human rights to equality before the law, non-discrimination, inheritance and property. Regardless, the Swazi Parliament has been slow to enact laws which would effectually guarantee these rights in accordance with Swaziland's new Constitution and the several international treaties to which Swaziland is a state party. This report will highlight the dire situation in Swaziland, which can be seen most clearly within the sphere of women's rights and the inability to correct persistent inequality and discrimination in the realm of succession and inheritance.

Currently in Swaziland, violations of Swazi law and custom are prevalent which help to maintain the status quo. This can be seen specifically in the areas of property grabbing, forced evictions and cases of coerced mourning rituals, all of which have become pervasive throughout the region. Strong community support for these practices, which pervert the original intentions of customary law, function to hold women hostage in a system devoid of protection. Therefore, women need increased rights to inheritance and access to remedies in support of those rights. In a country with no legal aid or pro bono system, where women cannot afford to hire private lawyers, increasing such avenues for redress is crucial. The government of Swaziland must act now to implement the statutory and educational reforms necessary to bring an end to a regime that treats widows as less than equal to men in the same situation and which discriminates against them at every turn.

B. Research and Analysis Methodology

This report was prepared by the students of the International Women's Human Rights Clinic at Georgetown University Law Center in conjunction with partners in Swaziland, the Women and Law in Southern Africa Research Trust (WLSA)

and the Justice, Peace and Reconciliation Department of the Council of Swaziland Churches (JPR). Following several months of research into background reports analysis of Swazi laws, regional, comparative, and international human rights standards, in March of 2005, the clinic students and faculty traveled to Swaziland to undertake a fact-finding investigation. Together with attorneys from WLSA and JPR, students conducted about 80 interviews with a range of stakeholders, including parliament members, community and religious leaders, NGOs, attorneys, judges, academics, government officials, and men and women, such as widows and widowers, affected by the laws. The findings from the interviews, along with in-depth research of Swazi laws, constitute the factual basis for this report.

C. Proposals for Change

Swaziland has unequivocally committed to upholding gender equality and non-discrimination. In 2005, the country adopted a new Constitution which states that “[a]ll persons are equal before and under the law...and...shall not be discriminated against on the grounds of gender” and that “[w]omen have the right to equal treatment with men.”¹ Also, the Constitution states that “Parliament shall, as soon as practicable...enact legislation regulating the property rights of spouses ...”² In addition, as a state party without reservations to several international law treaties which call for gender equality and non-discrimination, Swaziland has affirmed that commitment.³ Specifically, Swaziland is a party to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) which states a promise “[t]o adopt appropriate legislative and other measures...prohibiting all discrimination against women [and]...[t]o establish legal protection of the rights of women on an equal basis with men.”⁴

To reach these goals the country must act to ensure women and children receive equal shares of inheritance from the estates of their deceased husbands and fathers as required by the new Constitution.⁵ The Intestate Succession Act must be amended to guarantee all married women and children the right to remain in

1. SWAZ. CONST. 2005 ss. 20(1)-(2), 28(1).

2. *Id.* at ss. 34(2), 29(7)(b) (“Parliament shall enact laws necessary to ensure that a child is entitled to reasonable provision out of the estate of its parents . . .”).

3. See Convention on Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR (34th Sess. No. 46) at 193, U.N. Doc. A/34/46 (1979), art. 2, entered into force Sept. 3, 1981, ratified by Swaziland Mar. 26, 2004, available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> [hereinafter CEDAW]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, ratified by Swaziland Mar. 26, 2004, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No 16, at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976, ratified by Swaziland Mar. 26, 2004, available at <http://www1.umn.edu/humanrts/instree/b2esc.htm> [hereinafter ICESCR]; African Charter on Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, ratified by Swaziland Sept. 15, 1995, available at <http://www1.umn.edu/humanrts/instree/z1afchar.htm> [hereinafter African Charter].

4. CEDAW, *supra* note 3, art. 2(b)-(c).

5. SWAZ. CONST. 2005 ss. 34(1), 29(7)(b).

their marital home after the death of a husband regardless of the type of marriage entered into. In addition, when a spouse dies, it is essential that the surviving spouse be entitled to half of the deceased's estate, leaving the remaining half to be divided among the children. Further, widows (and widowers) must be granted the automatic right to both control and administer the estate of their deceased spouses under the Administration of Estates Act. Without these guarantees, women are all too vulnerable to property grabbing and forcible eviction.

Parts II and III of this report will discuss the legislative changes necessary to guarantee all women and children equal rights to inheritance and access to effective remedies. This includes codification of certain aspects of Swazi Law and Custom so that it can not be violated in such a way as to discriminate against women.

Swaziland can achieve meaningful change if the government will commit to the suggested reform. In that vein, this report discusses several legislative solutions proposed by the clinic in conjunction with WLSA and JPR - Churches. Also, a draft bill is attached as an appendix. Included are substantive changes to the law as well as methods for promoting both education and enforcement as discussed in Part VII. These initiatives focus on bringing an end to endemic discriminatory practices, such as coercion of the mourning rituals and property grabbing discussed in Parts IV and V respectively. Swaziland must increase access to legal services in order for women to vindicate their human rights. Specifically, it is imperative that NGO attorneys be empowered to bring cases to court, as is shown in Part VI of the report. Without the remedies described below, Swaziland leaves women entirely powerless to effectuate change.

II. CURRENT SWAZI INHERITANCE LAWS AND CUSTOMS HARM WOMEN AND GIRLS

Parliament must update its existing inheritance laws, eliminate existing discriminatory provisions, and write into legislation provisions that explicitly provide for equal treatment in inheritance that grant women and children inheritance shares, and that comply with the Constitution's "reasonable share" provision and Swaziland's obligations under international law. The two most important aspects of the proposed legislative provisions on inheritance shares are (1) that the surviving spouse inherit—explicitly, by statute—the marital home upon the death of a spouse, and (2) that the remainder of the deceased's estate devolve half to the surviving spouse and half to the children (to be shared equally among them). These recommendations are based on comparative legal structures in countries in Africa and around the world, as well as on the responses of many interviewees during the March 2007 fact-finding trip to Swaziland. The proposals maintain gender equality throughout, without sex playing a role in inheritance shares between sons and daughters, brothers and sisters, or widows and widowers (so far as is compatible with the continued practice of polygamy).

According to one principle magistrate judge, "the biggest problem we're facing at this point in time is that we, Swazis, on the ground we have not seen the will, the political will or desire to really reform the laws that would not be in step with the

Constitution.”⁶ But the political will is mounting, as demonstrated by the work of WLSA and the JPR—Churches, for example, and by the attitudes of their various clientele. Parliament cannot wait. The time to act—and enact—is now.

A. Inheritance Laws Preclude Women and Girls from Inheriting

Swaziland’s inheritance laws discriminate against women under both the civil system and customary law. Under customary law (Swazi Law and Custom), the system under which most of the population falls, women and female children have no right to inheritance. Even if there is no boy in the family, the property is given to a male relative. Under the civil system, the laws are facially neutral, and do provide a share for women and all children, but that spousal inheritance share is grossly inadequate and the intestate succession structure currently fails to sufficiently provide for women and children upon the death of a husband or father. Inequality in the inheritance laws is not tolerable under the recently enacted Constitution or under a number of international treaties which have been ratified by the Government of Swaziland.

1. Customary law excludes women and girls from inheritance counter to the Constitution’s reasonable share and equality provisions and to current social conditions.

Swazi Law and Custom, which affects the vast majority of the population, excludes women and girls from inheritance. Swazi customary succession is “uncompromisingly patrilineal” and all the rules “aim at identifying a male heir.”⁷ Professor Ronald Thandabantu (R.T.) Nhlapo, an expert on succession laws, explained, “even in those cases where there is no son the widow or the female children still cannot inherit.”⁸ This custom of the estate going to the heir disinherits the wife, female children, and illegitimate children, thereby constituting sex discrimination, age discrimination, and a violation of children’s rights. A man under customary law *may* indicate his preferred heir during his lifetime; however, even if he were to choose his wife as his heir, confirmation of his choice “rests exclusively with the family council (*lusendvo*) which may ignore his wishes with impunity.”⁹ As a result, the practice under customary inheritance law places women and girls in a precarious situation and constitutes an egregious violation of their human rights.

Many aspects of the proposed succession laws are in fact closer to the real values and purpose of customary law than what is currently taking place in practice. For example, writing into legislation the surviving spouse or children’s automatic right to the family home embraces the ideals of Swazi Law and custom’s inheritance structure free from corruption, under which, the “care of the deceased person’s surviving family” is “the most important thing that happens after his or her death.”¹⁰

6. Interview with a Principal Magistrate Judge, in Manzini, Swaziland (Mar. 6, 2007).

7. R.T. Nhlapo, *The Legal Situation of Women in Swaziland*, in *THE LEGAL SITUATION OF WOMEN IN SOUTHERN AFRICA* 97, 124 (WLSA 1990).

8. *Id.* at 124-125.

9. *Id.* at 124.

10. Women and Law in Southern Africa Research Trust (WLSA), *A GUIDE TO INHERITANCE LAWS IN*

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The provision relating to the marital home and household goods further strengthens the widow's position and may protect her from eviction by her deceased husband's relatives, an all too common occurrence under corrupted customary practice. This is not to say that many heirs would not care for the family. Indeed, many do. However, while some heirs do take care of and provide for the whole family, the custom has been corrupted and suffers from abuse. The proposed changes in the succession laws, therefore, try to make sure that families are looked after as intended under Swazi Law and custom.

2. Swazi inheritance statutes are archaic and discriminatory.

The current statutes governing women's inheritance in Swaziland are outdated and demonstrably inadequate in light of the new Constitution. There is a pressing need to develop and implement laws that protect the inheritance rights of women and children, and to "review and repeal all discriminatory laws that currently exist," whether statutory, common law, or customary.¹¹ The relevant laws that urgently need modification include The Intestate Succession Act, 1953; The Administration of Estates Act of 1902; and the Wills Act, 1955. As Khontaphi Manzini, an intestate succession professor at the University of Swaziland, aptly described the need for new legislation governing inheritance: "[T]he law should reflect society today...all of these [laws] have arcane connotations because they were enacted so long ago."¹²

Each of these statutes was enacted prior to Swaziland gaining its independence from Great Britain in 1968. As a result, each contains a discriminatory "pass through" provision that treats Africans differently than non-Africans, or those married under customary law differently than those individuals married under civil law. For example, section 4 of the Intestate Succession Act states:

This Act shall not apply to any African if the estate of such African is required to be administered and distributed according to the customs and usages of the tribe or people to which the African belonged by virtue of section 68 of the Administration of Estates Act, No. 28 of 1902.¹³

Nearly 40 years after Swaziland's liberation, racist laws such as this are still lingering on the books. Yet Parliament has failed to adopt new legislation to replace the old provisions.

Another example of a current discriminatory provision is The Administration of Estates Act's section 68,¹⁴ which as Professor Manzini explained, "has caused lots

ZIMBABWE (2000), available at www.zwot.com/inheritance_laws.htm (discussing similar changes made to Zimbabwe's inheritance laws and the rationale behind the changes) (last visited May 10, 2007) [hereinafter INHERITANCE LAWS IN ZIMBABWE].

11. International Center for Research on Women (ICRW), "To Have and To Hold: Women's Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa," (June 2004).

12. Interview with Khontaphi Manzini, Intestate Succession Professor, in Mbabane, Swaziland (Mar. 9, 2007).

13. Intestate Succession Act, 1953 s. 4 (Swaz.).

14. That provision reads in full: "(1) If any African who during his lifetime has not contracted a lawful marriage, or who, being unmarried is not the offspring of parents lawfully married, dies

of problems because we are all left guessing....Section 68 does not help us much because of the fact that its description of who an African is...[a] person belonging to an aboriginal race south of the equator. It could be a person from Namibia. It doesn't necessarily focus on the Swazis."¹⁵ She went on to say "things like that, those things need to be reformed, put into their proper perspective."¹⁶ When asked about any other changes that are needed relating to succession matters, she asserted, "[a]ll of them need to be overhauled, because they are so old."¹⁷

Furthermore, these antiquated laws continue to discriminate against women in spite of the equality status provided women in various provisions of the new Constitution.¹⁸ This largely happens again as a result of the pass through provisions. Because once the governing structure is customary law, women are not treated as equals to men. In fact, they are treated as minors and, as a result, inferior to men in many aspects of Swazi life. The time to update Swaziland's legislation has long passed. Parliament's delay is far from excusable and it must rise to the occasion today without further delay to remedy the inequalities and discrimination in the current laws.

In addition to the discriminatory provisions of the antiquated laws, a number of other provisions are demonstrably outdated and should have been revised long ago to keep up with the times. For example, sections 2(2)-2(4) of the Intestate Succession Act. According to an Intestate Succession Professor at the University of Swaziland, those provisions have been "giving us problems for some time... not only in terms of how to interpret [them]...[T]he jargon that is used is rather confusing, and also it is opaque..."¹⁹ He specifically points to the language in 2(2): "or to so much as together with the surviving spouse's share that not exceed 1,200e[malangeni] in value" and contends, "Nobody really know[s] what that means."²⁰ The numerical value alone illustrates how extremely outdated and in need of revision this provision is. "[M]aybe in 1953 1200 emalangeni was a lot of money, but it certainly is not now. It is certainly ludicrous now to say that the surviving spouse's share in the joint estates, together with the child's share, should not exceed 1200e. So it's basically unworkable."²¹ These "unworkable" provisions

intestate, his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged; and if any controversies or questions shall arise among his relatives, or reputed relatives, regarding the distribution of the property left by him, such controversies or questions shall be determined by a Swazi Court having jurisdiction. (2) The Master may not be called upon to interfere in the administration and distribution of the estate of any such African. (3) For the purposes of this section, "African" shall mean any person belonging to any of the aboriginal races or tribes of Africa south of the Equator, or any person one of whose parents belongs to any such race or tribe." Administration of Estates Act 28 of 1902 s. 68 (Swaz.) [hereinafter Swaz. Admin. of Estates Act].

15. Interview with Khontaphi Manzini, *supra* note 12.

16. *Id.*

17. *Id.*

18. See e.g., SWAZ. CONST. 2005 ss.14, 20.

19. Interview with Khontaphi Manzini, *supra* note 12.

20. *Id.*

21. *Id.*

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need to be eliminated from Swaziland's laws so all entitled individuals may begin to realize their inheritance rights.

B. A Uniform System of Equal Inheritance Rights Will Benefit Men and Women

Swazi parliamentarians should rise to their constitutionally mandated role, their explicit obligations under international law, and follow the lead of other African countries and enact legislation that eradicates the discrimination rampant in the customary inheritance laws in Swaziland and creates one uniform system of succession. According to Senator Isabella Bongie Katamzi, "We were concerned actually that the codification of laws didn't come out at [the] same time with the constitution because we feel it would have helped in clarifying issues..."²² Parliament must create a statutory inheritance system that applies to all Swazis and treats men and women equally.

The Swazi Constitution says that all persons "are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."²³ It also clarifies that a person shall not be discriminated against on the ground of gender²⁴ and defines "discriminate" to mean giving "different treatment to different persons attributable only or mainly to their respective descriptions by gender..."²⁵ Moreover, equality before the law is of such importance that it is a right from which the Constitution does not permit derogation,²⁶ thus underscoring the importance of that right.

Furthermore, Swaziland is bound by its obligations under the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Charter on Human and Peoples' Rights (African Charter) to enforce equal treatment of men and women [in inheritance]. ICCPR article 26 explicitly states that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law,"²⁷ thus mandating equal treatment of men and women by all States Parties. In *General Comment 18*, the U.N. Human Rights Committee made an important assertion regarding the right(s) provided in article 26:

22. Interview with Isabella Bongie Katamzi, Senator, in Ezulwini, Swaziland (Mar. 6, 2007).

23. SWAZ. CONST. 2005 s. 20(1).

24. SWAZ. CONST. 2005 s. 20(2).

25. SWAZ. CONST. 2005 s. 20(3).

26. SWAZ. CONST. 2005 s. 38(a).

27. ICCPR, *supra* note 3, art. 26. *See also* ICCPR, *supra* note 3, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals...the rights recognized in the present Covenant, without distinction of any kind, such as race [or] sex..."), art. 2(2) ("[E]ach State Party...undertakes to take the necessary steps...to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."), art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."); *see also*, African Charter, *supra* note 3, art. 2 ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race...sex...").

In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof....the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the covenant.²⁸

An amended intestate succession statute must apply to “any person” who dies intestate—treating all persons equal before the law, as required by both the Swazi Constitution,²⁹ and these international treaties.

The international treaties and/or their respective committees have gone beyond simply declaring the equality between men and women to explicitly oblige States Parties to take action. The U.N. Human Rights Committee (HRC), for example, elaborated on this obligation: “[States Parties] must not only adopt measures of protection, but also positive measures in all areas so as to achieve the effective and equal empowerment of women.”³⁰ Moreover, the ICCPR guarantees “equality of rights and responsibilities of spouses as to marriage...and at its dissolution.”³¹ The HRC specifically connected these rights to inheritance: “Women should...have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.”³²

Not only do these treaties condemn discrimination and call for equal rights, but CEDAW explicitly commands States Parties to “pursue *without delay* a policy of eliminating discrimination against women... .”³³ As part of this obligation, Swaziland must “*adopt legislation* and other measures...prohibiting *all* discrimination against women.”³⁴ Several fellow African States Parties to CEDAW, includ-

28. Human Rights Committee, *General Comment No. 18, Non-discrimination* (37th Sess., 1989), para. 12, U.N.Doc. HRI/GEN/1/Rev. 1 at 26 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcom18.htm> [hereinafter *HRC General Comment 18*].

29. Section 20(1) states in full: “All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.”

30. Human Rights Committee, *General Comment No. 28, Equality of rights between men and women (article 3)*, (68th Sess., 2000), paras. 3, 4, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), available at <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm> (last visited April 23, 2007) [hereinafter *HRC General Comment 28*].

31. ICCPR, *supra* note 3, art. 23(4); see also CEDAW, *supra* note 3, art. 16(1)(c) (“States Parties...shall ensure, on a basis of equality of men and women...the same rights and responsibilities during marriage and at its dissolution.”); Universal Declaration of Human Rights, G.A. Rs. 217A (III), U.N. GAOR, 3d Sess. 1st plen. mtg., art. 16(1), U.N. Doc A/810 (Dec. 12, 1948), available at <http://www1.umn.edu/humanrts/instrce/budhr.htm> [hereinafter UDHR] art. 16(1) (“Men and women...are entitled to equal rights as to marriage, during marriage, and at its dissolution.”).

32. *HRC General Comment 28, supra* note 30, at para. 26.

33. CEDAW, *supra* note 3, art. 2 (emphasis added).

34. CEDAW, *supra* note 3, art. 2(b) (emphasis added). See also African Charter, *supra* note 3, art. 18(3) (“The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.”).

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ing Ethiopia,³⁵ Rwanda,³⁶ Kenya,³⁷ Cote d'Ivoire,³⁸ and Benin,³⁹ have equalized the inheritance rights of men and women in their respective laws. Swaziland should follow the international convention's mandate, and the lead of these countries, and eradicate discrimination in its inheritance laws.

The Swazi Parliament must embrace its legislative role to ensure that inheritance laws do not violate women's fundamental right to equality and equal protection, and adopt one uniform succession law as many countries with customary or other existing traditional systems have done. Considering that the majority of the people still adhere to customary law, tearing away at the discrimination embraced by customary law is of key importance to enhancing the status of women in Swaziland (in particular, in regards to property and inheritance rights). The obvious injustices of customary succession evidence the dire need to create statutory succession laws that extend to customary laws and practices and eradicate the discrimination imbedded in customary inheritance. A number of African countries with prominent traditions and customary law have already created uniform intestate succession regimes or have statutory provisions that explicitly supersede customary law. Ethiopia,⁴⁰ Ghana,⁴¹ Zimbabwe,⁴²

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35. See Ethiopia, Fourth and Fifth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women (30th Sess. 2004), para. 27, U.N. Doc. CEDAW/C/ETH/4-5 (Oct. 28, 2002), available at <http://daccessdds.un.org/doc/UNDOC/GEN/No2/673/04/PDF/No267304.pdf?OpenElement>. ("Revision of the law of succession under the Civil Code is under way. Under the proposed laws, women and men will be treated equally in accordance with the constitutional provision. In regard to the succession of property, both men and women will be given the same rights and entitlements under the revised Code.")
 36. See UN Commission on Human Rights, *Economic Social and Cultural Rights: Women's Equal Ownership of Access to, and Control over Land and the Equal Rights to Own Property and to Adequate Housing*, E/CN.4/2002/53, para. 23 (Jan. 15, 2002) (noting Rwanda's law No. 22/99, passed in Nov. 1999, provides the same rights to both women and men to inherit).
 37. See Women of the World Anglophone Africa, Kenya, at 67 (noting the Succession Act "grants men and women equal rights to inherit from a parent or sibling").
 38. See Women of the World: Francophone Africa, 125 ("children and their descendants can inherit from parents, grandparents, or other relatives regardless of gender. . .").
 39. See Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Benin Country Report on Human Rights Practices for 2000 section 5 (2001), available at http://www.state.gov/www/global/human_rights/2000_hrp_report/benin.html (released Feb. 25, 2001) (stating "by law women have equal inheritance and property rights").
 40. See Gita Gopal, *Gender Related Legal Reform and Access to Economic Resources in Eastern Africa [Part 3 of 10]*, The International Bank for Reconstruction and Development (1999) (stating that Ethiopia's Civil Code invalidated customary law when it was enacted in 1960), available in Contemporary Women's Issues.
 41. See Intestate Succession Law of 1985 Memorandum (Ghana) ("This Law is aimed at removing the anomalies in the present law relating to intestate succession and to provide a uniform intestate succession law that will be applicable throughout the country irrespective of the class of the intestate and the type of marriage contracted by him or her.")
 42. See Administration of Estates Amendment Act of 1997 s. 68 (Zimb.) (noting that the amendment subjects individuals under customary law to the provisions of the amendment).

Kenya,⁴³ Mozambique,⁴⁴ Zambia,⁴⁵ and Liberia⁴⁶ have all enacted such statutes. Moreover, in a recent decision by the Constitutional Court of South Africa, South Africa's customary inheritance system which excluded women and girls was declared discriminatory, and therefore unconstitutional.⁴⁷

C. South Africa's Equal Inheritance Precedent Bans Sex Discrimination

Swaziland's Parliament, in addressing its own discriminatory inheritance laws, should regard South Africa's *Bhe v. Khayelitsha* decision as highly persuasive authority. In 2004, South Africa's Constitutional Court struck down a discriminatory customary inheritance law that precluded "(a) widows from inheriting as the intestate heirs of their late husbands; (b) daughters from inheriting from their parents; (c) younger sons from inheriting from their parents; and (d) extra-marital children from inheriting from their fathers."⁴⁸ Judge Ngcobo, author of one of the Court's opinions, effectively captured the need for equal inheritance rights in striking down this discriminatory inheritance scheme: "[W]hatever the role the rule of male primogeniture may have played in traditional society, it can no longer be justified in the present day and age."⁴⁹ (Under that structure – as under the customary system in Swaziland – women do not participate in the intestate succession of deceased's estates.⁵⁰) Swaziland's rules of succession in customary law have not, as the *Bhe* decision articulates in regards to South Africa's similar system, "been given the space to adapt and to keep pace with changing social conditions and values."⁵¹ The customary succession laws in Swaziland embody each of the four discriminatory practices challenged in *Bhe* (and listed above). The customary laws in Swaziland therefore identifiably "constitute unfair discrimination on the basis

43. See The Center for Reproductive Law and Policy, *Women of the World: Laws and Policies Affecting Their Reproductive Lives: Anglophone Africa* Kenya at 67 ("The Succession Act, which took effect in 1981, sought to provide uniformity to an area of the law that had been governed according to four legal regimes....").

44. See Women in Law in Southern Africa Research Project, *Widowhood, Inheritance Laws, Customs and Practices in Southern Africa* (1995) at 94 (stating that the law contained in a code is based on the Roman-Dutch common law) and at 101 (stating that customary law is inapplicable to Mozambique because it has been superseded by statute).

45. See Women in Law in Southern Africa Research Project, *INHERITANCE LAW IN ZAMBIA: LAW AND PRACTICE* 81 (1993) (stating the Act applies to all persons resident in Zambia to whom "customary law would have applied had the Intestate Succession Act not been passed.").

46. *Equal Rights of the Customary Marriage (Liberia)* (giving equal inheritance rights for both customary and civil marriage types).

47. *Bhe v. Khayelitsha* 2004 (S. Afr.), available at <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/712lGHd7Y1/30750013/503/965> (declaring that South Africa's Intestate Succession Act applies to customary marriages) [hereinafter *Bhe*].

48. *Id.* at para. 88.

49. *Id.* at para. 190. "Primogeniture" refers to the general rule that only a male who is related to the deceased qualifies as intestate heir." *Id.* at para. 77.

50. *Id.* at para. 77.

51. *Id.* at para. 82.

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of gender...and are part of a scheme underpinned by male domination.”⁵² The South African court concluded that:

exclusion of women from inheritance on the grounds of gender is a clear violation of [the South African] Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order.⁵³

Ultimately, South Africa’s Constitutional Court found customary law’s rule that only a male relative qualifies as an intestate’s heir “inconsistent with the constitutional guarantee of equality.”⁵⁴ The Parliament of Swaziland should embrace the South African court’s guidance as to the legislature’s role in this matter: “[T]he legislature is in the best position to deal with the situation and to safeguard the rights that have been violated by the impugned provisions. It is the appropriate forum to make the adjustments needed to rectify the defects identified in the customary law of succession.”⁵⁵ However, the Court in *Bhe* found the matter so important, and urgent, that its decision demanded immediate equality—until the South African legislature acts.⁵⁶

D. Inheritance Laws Must Apply to Wives and Daughters

In addition to eradicating unequal treatment of men and women in Swaziland’s inheritance laws, Parliament must also enact new succession provisions that provide inheritance shares for women and children in accordance with the Swazi Constitution. Section 34(1) of the Constitution entitles a surviving spouse to a “reasonable provision out of the estate of the other spouse *whether the other spouse died having made a valid will or not and whether the spouses were married by civil or customary rites.*”⁵⁷ Not only are women and children entitled to a “reasonable provision” out of the estate of a deceased spouse or parent, respectively, but the Constitution explicitly charges Parliament with a duty to enact legislation to ensure these rights: “Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses.”⁵⁸ Yet although section 34(2) calls upon the Swaziland Parliament to enact this legislation, no such legislation has been enacted to date. One Principal Magistrate Judge has said, “[This is] another area where Parliament could be given a jolt or a nudge.”⁵⁹ He further elaborated, “But then if you have a vibrant Parliament...there is nothing stopping

52. *Id.* at para. 88.

53. *Id.* at para. 91. The specific provision in the South African Constitution to which the Court is here referring provides that “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex...” S.AFR. CONST. 1996 s. 9(3).

54. *Id.* at para. 109.

55. *Id.* at para. 114.

56. *Bhe*, *supra* note 47.

57. SWAZ. CONST. 2005 s. 34(1) (emphasis added).

58. *Id.* at s. 34(2).

59. Interview with a Principal Magistrate Judge, *supra* note 6.

the Parliament from making corrective inroads into the common law; passing laws that are going to remove these inequalities.”⁶⁰

1. The surviving spouse, or in the case of no surviving spouse, the children, must receive automatic right to the marital home to ensure continuation of their livelihood.

First, a surviving spouse must be entitled to the marital home upon the death of his or her spouse, to the full extent of the deceased’s ownership rights.⁶¹ The current Intestate Succession Act is silent on the right to the matrimonial home and household chattels. However, a surviving spouse’s right to the house (and household chattels) is supported by the practice/laws in a number of other countries around the world.⁶² In addition, as a State Party to ICESCR, Swaziland “recognize[s] the right of everyone to an adequate standard of living”⁶³ It would be very difficult for a surviving spouse, particularly a widow, and children to maintain an “adequate” standard of living without remaining in the family home and continuing life there following the death of the spouse or parent. Furthermore, the CEDAW Committee, in *General Recommendation 21*, has explained that as a result of discriminatory practices, “women may receive a smaller share of the husband’s or father’s inheritance than would widowers or sons.”⁶⁴ As a result, in-

60. *Id.*

61. This proposal applies to every spouse in a monogamous customary, civil, or common law marriage, and to each wife (if possible) in polygamous customary marriages. However when a woman in a polygamous marriage dies, her home passes to her children. *See* Proposed Bill, Intestate Succession (Amendment) Act 2007 (amending Intestate Succession Act 1953 (Swaz.)).

62. *See, e.g.*, Deceased Estates Succession Act of 1997 (Zimb.), available at <http://www.parlzim.gov.zw/inside.aspx?mpgid=14&spid=49> (last visited May 15, 2007) (“The surviving spouse...shall be entitled to receive...(a) the house...in which the spouses or the surviving spouse...lived in immediately before the person’s death; and (b) the household goods and effects which, immediately before the person’s death were used in relation to the house or domestic premises...”); INTERNATIONAL SUCCESSION LAWS (Tottel Publishing 2001), Mauritius, Issue 10 (Oct. 2006) (“In addition to a share of the succession...the surviving spouse has a lifetime usufruct in respect of the matrimonial home...its furniture and the rights attached thereto...[the] usufruct rights accruing to the surviving spouse cannot be reduced or revoked by the deceased, either freely or by testamentary disposition.”); Intestate Succession Act of 1995 (Zambia) (providing that the surviving spouse receives a “life interest in the house and, in the case of polygamy, all wives receive absolute homestead rights and equal shares”); Law No. 22/99 of 1999 (Rwanda) (1999), available at <http://www.grandslacs.net/doc/2740.pdf> (last visited May 14, 2007) (“The surviving spouse remains the usufructuary of the conjugal house as well as of the movable furniture where they are the only property in the succession or are part of the inheritance property.”). *See also* INTERNATIONAL SUCCESSION (Louis Garb ed., 2004) at 38 [Austria] (“The widow/widower is entitled to the use of the family home, irrespective of his/her needs & may therefore use it even after remarriage.”); *id.* at 83 [Brazil] (“Maintenance is provided to the surviving spouse...by means of the right to live in the house destined to be the home of the family if it is the only property of that type in the estate.”); *id.* at 258 [Greece] (“[T]he surviving spouse...will receive in addition to his hereditary share upon intestacy the furnishings, implements, clothing and other similar household objects which were used either by him alone or the couple.”); *id.* at 448 [New Zealand] (“The spouse of the intestate gets the personal chattels,” plus a monetary amount, in addition to its share in the balance of the estate.).

63. ICESCR, *supra* note 6, art. 11.

64. Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21*,

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heritance rights for widows often do not reflect the principles of equal ownership and property acquired during marriage. In Swaziland one example of such unequal treatment is that at the death of a woman, there is no question that the man stays in and continues to own the marital home. The women in Swazi society do not have such assurance. As *General Recommendation 21* makes clear, “Such provisions contravene the Convention and should be abolished.”⁶⁵ By giving the surviving spouse the home outright—regardless of whether the surviving spouse is a man or a woman—this provision is intended to ensure equal inheritance rights in accordance with CEDAW and Swaziland’s Constitution. Moreover, the people of Swaziland also endorse giving the surviving spouse the house outright at the death of the other spouse. The Acting Deputy Master of the High Court has called it a “brilliant idea.”⁶⁶ Professor Khontaphi Manzini said in her interview that the proposal was “perfectly logical.”⁶⁷

2. The surviving spouse must receive a greater proportion of the remainder of the estate.

In addition to the surviving spouse inheriting the marital home and household chattels, Parliament needs to revise the division of the remainder of the deceased’s estate to provide the protection guaranteed in the Constitution and international treaties and embodied in many countries’ intestate succession laws for widows and widowers. The current Intestate Succession Act, granting the surviving spouse with the equivalent of a child’s share, is grossly insufficient. The proposed division of half the remainder of the estate to pass to the surviving spouse (or wives in a polygamous marriage) and half the remainder to pass to the children in equal shares is an attempt to provide the requisite “reasonable share” to the surviving spouse(s) as demanded by the Swazi Constitution.

The division of the remainder of a deceased’s estate into a spousal half (to be shared equally among the wives in a polygamous marriage) and a child’s half (to be shared equally among all the deceased’s children) reflects the views of many of those interviewed in Swaziland in March 2007 and the practices of many countries around the world. Although many interviewees acknowledged that what constitutes a “reasonable share” is a subjective determination, they tended to find this breakdown of 50-50 to be “fair” and/or “reasonable” when questioned on the issue. For example, when one Swazi widower was asked who should get the “money or assets” (i.e., the remainder of the estate), he replied, “The surviving spouse and

Equality in Marriage and Family Relations (13th Sess. 1994), para. 35, U.N. Doc. A/49/38 at 1 (1994) available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> [hereinafter *CEDAW General Rec. 21*].

65. *Id.*

66. Interview with Acting Deputy Master of the High Court, in Mbabane, Swaziland (Mar. 6, 2007) (Q: “If a law proposed that any surviving widow or widower [living in the house at the time of death] maintains a right to live in that house until death . . . would it be a good idea or a bad idea?” A: “I think it’s a brilliant idea because the building of the house was actually done by these two people, to be honest. It’s the only way it comes about.”).

67. Interview with Khontaphi Manzini, *supra* note 12. (Q: “[W]ere thinking of giving the house automatically to the wife. Do you think that . . .” A: “I think it is perfectly logical, yes.”)

children.” Asked subsequently how it should be split, he answered, “Depending on the age of the children, the surviving spouse should get . . . half, and the other half should be divided amongst the children.”⁶⁸ The Chief Editor of the Swazi Observer expressed similar sentiments: “I’m thinking the wife must get 50% of the estate, then the remainder must go to the children. Immediately, that’s what I think.”⁶⁹ Other interviewees, including Senator Winnie Magagula, held even more generous views of what share the surviving spouse should receive: “[F]ifty percent would be fine. But why not 100%?”⁷⁰ Moreover, comparative research on this topic reveals that many countries all over Africa and around the world provide widows and widowers a significant share in their inheritance laws.⁷¹ Swaziland should em-

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68. Interview with Widower #1, in Mbabane, Swaziland (Mar. 9, 2007). *See also* Interview with Lildwe Mngomezulu, Widow, in Manzini, Swaziland (Mar. 5, 2007) (Q: “The new Constitution says that each wife is entitled to a reasonable share. . . . How much should each wife get?” A: “The wife should get half.” Q: “What should happen to the other half?” A: “It must go to the kids or to the other wife.”); Interview with Sihlengiwe Dlamini, Law Student, in Mbabane, Swaziland (Mar. 8, 2007) (Q: “We’re thinking that reasonable might mean the giving the wife the house and then all of the furniture and things in the house. And then in addition to the house, fifty percent of the rest of the property, whatever’s remaining. . . . Does that seem reasonable to you, or do you think it seems like too much?” A: “Well, to me, it would seem reasonable because when the other spouse dies, obviously you would need to have means to continue living, so you definitely need the house and its contents, and other means of generating money, so that you can be able to live. So I think we are. . . . I would think that is reasonable.”).
69. Interview with Musa Ndlangamandla, Chief Editor, The Swazi Observer, in Mbabane, Swaziland (Mar. 6, 2007).
70. Interview with Winnie Magagula, Senator, in Ezulwini, Swaziland (Mar. 8, 2007); *see also* Interview with Isabella Bongie Katamzi, *supra* note 22 (A: “For [the Constitution’s reasonable share provision] our concern as far as inheritance was when the husband dies. That what the women owned jointly with him should not be removed from her. She should still be in control. . . .” Q: “So, in your opinion, should the surviving spouse get everything?” A: “Well, I think so. I think if the two people have worked and built a home, one of them dies. . . . I think it’s fair that [the surviving spouse] continues. . . .”).
71. *See* International Succession Laws (Tottel Publishing 2001) at South Africa, Issue 10 (Oct. 2006) (“[I]f the spouses were married in community of property, the surviving spouse automatically takes one half of the joint estate before the intestate succession rules apply.”; also noting that where the deceased is survived by a spouse but not a descendant, the spouse takes the entire estate); Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, Republic of Congo Country Report on Human Rights Practices for 2000 section 5 (2001), http://www.state.gov/www/global/human_rights/2000_hrp_report/republicofcongo.html (released Feb. 25, 2001) (stating that the “legal code provides 30% of a husband’s estate goes to his wife.”); Administration of Estates Amendment Act 6 of 1997, *supra* note 42, at s. 68 (Zimb.) (stating where a man dies and leaves one widow and children, the widow receives one-third of the deceased’s estate); Equal Rights of the Customary Marriage Law of 1998 (Liberia) (guaranteeing a widow a one-third share); Bureau of Democracy, Human Rights and Labor, U.S. Dep’t of State, Mozambique Country Report on Human Rights Practices for 2000 section 5 (2001), *available at* http://www.state.gov/www/global/human_rights/2000_hrp_report/mozambique.html (released Feb. 25, 2001) (“[A] woman is entitled to one-half of those goods that are acquired during the marriage.”); *see also* INTERNATIONAL SUCCESSION at 127-128 [Canada - Quebec] (noting the Civil Code of Quebec provides that one-third of the estate passes to the surviving spouse and two-thirds to the descendants); *id.* at 184-185 [Denmark] (“If the intestate leaves a spouse. . . one-third of the deceased’s estate will go to the surviving spouse. . . the remaining two-thirds will be distributed equally between the children of the deceased. . . .”); *id.* at 315 [Ireland] (“If an intestate dies leaving a spouse and issue: the spouse shall take two thirds of the estate. . . .”); *id.* at 343-44 [Israel] (stating that the spouse of the de-

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brace the views of its people and the examples set by other nations and increase the spousal inheritance share as suggested in the proposed intestate succession legislation.

3. Surviving spouses and children must receive a share of the deceased's inheritance even where the deceased left a will.

Swaziland's Parliament also must create statutory compulsory inheritance shares for the surviving spouse(s) and child or children. Swaziland's Constitution contains language explicitly requiring compulsory shares for a surviving spouse: "a surviving spouse is entitled to a reasonable provision out of the estate of the other spouse *whether the other spouse died having made a valid will or not . . .*"⁷² And although for children the Constitution only states that the child is entitled to a "reasonable provision out of the estate of its parents,"⁷³ with no language about a will, many countries around the world provide for compulsory shares for both the surviving spouse and surviving children.⁷⁴ This is particularly true in civil law systems.⁷⁵ The statutes vary in how much the spouse or child is entitled to as a compulsory share, but whatever the specific scheme, such laws prevent an individual from writing a spouse or child out of his or her will. For example, under Ireland's intestate succession laws a surviving spouse inherits two-thirds of the deceased spouse's estate if there is "issue" (i.e., children) and the whole estate if there is no issue.⁷⁶ If the deceased left a will, the wife is entitled to one-third of the estate if there is issue and one-half if there is not, regardless of whether the deceased provided for such shares in the will.⁷⁷ As it is becoming more and more common for people married under

ceased "takes the chattels and a passenger car" and one-half the remainder of the estate when the deceased is survived by children or parents); *id.* at 359 [Italy] ("[W]here there are children...the surviving spouse is entitled to half of the estate if there is one child and to a third if there is more than one child."); *id.* at 380 [Japan] (noting that where the spouse and children are the successors, the statutory shares one-half of the estate, respectively); *id.* at 462 [Norway] ("[T]he surviving spouse will, as a minimum, inherit one-quarter of the deceased's estate..."); *id.* at 564 [Sweden] ("The surviving spouse inherits the estate before the children."); *id.* at 576 [Switzerland] ("The *surviving spouse* is always the heir. He has the right to half the estate if the deceased has left direct descendants..."); U.S. - New York (noting that where the deceased is survived by a spouse and "issue" the spouse takes the first USD50,000 and 50 per cent of residue and where there is no issue, the spouse "inherits all").

72. SWAZ. CONST. 2005 s. 34(t) (emphasis added).

73. SWAZ. CONST. 2005 s. 29(7)(b).

74. INTERNATIONAL SUCCESSION, *supra* note 60. Among those countries that provide for compulsory inheritance shares are Albania, Argentina, Austria, Bahrain, Belgium, Brazil, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Guyana, Hungary, Iceland, Ireland, Israel, Liechtenstein, Poland, Portugal, Sweden, Taiwan, Turkey, Venezuela, and Zimbabwe. *See generally* Garb; *see also* Civil Code of the Republic of Albania (1981) art. 361 ("In any event the spouse receives one-half of the inheritance."); Bahrain Law 23.264 of 1985 and Law 23.515 of 1987 (on Civil Marriage) (saying spouse and children cannot be disinherited); Finland Code of Inheritance, *available at* <http://www.finlex.fi/en/laki/kaannokset/1965/en19650040.pdf>; Wills and Inheritance Act 25 of 1976 (Malawi) (saying no individual can disinherit the spouse).

75. INTERNATIONAL SUCCESSION, *supra* note 60, at 7.

76. Succession Act of 1965 ss. 67(1)-(4) (Ir.).

77. Succession Act of 1965 ss. 111(1)-(2) (Ir.).

customary systems in Swaziland to make wills,⁷⁸ it is important for Swaziland to follow this trend of statutorily requiring portions of the deceased's estate to go to a surviving spouse in order to fulfill the rights enshrined in its Constitution.

E. Custom May Not Excuse Violating Women's and Girls' Constitutional and Human Rights

With the Constitution now in effect, "custom" cannot be viewed as a legitimate justification for discriminatory laws or practices in Swaziland. Although according to the new Constitution, "the principles of Swazi customary law (Swazi law and custom) are...recognised and adopted and shall be applied and enforced as part of the law of Swaziland,"⁷⁹ the drafters explicitly limited Swazi law and custom in two other provisions. First, section 2(1) functions as the Constitution's supremacy clause, stating, "The Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."⁸⁰ Second, the Constitution discusses the role of custom again later in the text, where it refuses to extend recognition and adoption of the principles of Swazi Law and Custom to "any custom that is, and to the extent that it is, inconsistent with a provision of this Constitution."⁸¹ The Constitutional Court of Uganda recently ruled on two provisions in its own constitution that contain nearly identical language to that in the Swazi Constitution.⁸² The Uganda Court put it simply: "The provisions of this article are clear. Any law or custom that is inconsistent with any of the provisions of the Constitution is void to the extent of the inconsistency."⁸³ Therefore, any law or custom that violates a woman's right to equality, to non-discrimination, to own property, or to a reasonable share of inheritance is void.⁸⁴ The customary law depriving women and girls an inheritance is "inconsistent" with sections 34(1) and 29(7)(b) of the Constitution, which explicitly provide for inheritance rights and that principle of Swazi Law and Custom is therefore, according to the Constitution, null and void.⁸⁵

Moreover, CEDAW explicitly demands that State Parties "modify the social and cultural patterns of men and women...to... eliminat[e]...prejudices and customary and other practices which are based on the idea of the inferiority or the

78. Telephone interview with L. Magagula, Feb. 8, 2007.

79. SWAZ. CONST. 2005 s. 252(2).

80. SWAZ. CONST. 2005 s. 2(1).

81. SWAZ. CONST. 2005 s. 252(3).

82. UGANDA CONST. 1995 art. 2(1) ("This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.") and art. 2(2) ("If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that law or custom shall, to the extent of the inconsistency, be void.")

83. *Law Advocacy for Women in Uganda v. Attorney General - Constitutional Petitions Nos. 13/05/05/06* 2007, UGCC 1(Uganda).

84. SWAZ. CONST. § 28(3).

85. See, e.g., *Bhe*, *supra* note 47, at para. 136(4) ("The rule of male primogeniture as it applies in customary law to the inheritance of property is declared to be inconsistent with the Constitution and invalid to the extent that it excludes or hinders women and extra-marital children from inheriting property.").

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superiority of either of the sexes or on stereotyped roles for men and women.”⁸⁶ While the role of the male heir in the customary inheritance system may, in its uncorrupted form, be intended to care and provide for the deceased’s surviving wife and children, that practice is embedded with the idea of female inferiority and stereotyped roles for men and women. In ratifying CEDAW, Swaziland committed itself to modifying – and ultimately eliminating – such practices. By creating a uniform succession law that extends to those Swazis married under customary law, Swaziland will fulfill at least one of its duties under CEDAW.

Many laws and customs continue to exist in Swaziland in spite of their clear inconsistency with the Constitution and the international treaties ratified by Swaziland. Such laws must be repealed and such customs must be abandoned. Swaziland’s Parliament must take action to repeal the existing discriminatory provisions regulating inheritance, particularly in the intestate succession laws and the administration of estates, and replace them with laws that provide women with equal rights as guaranteed in the Constitution and the various international treaties.

III. A NEW ADMINISTRATION OF ESTATES ACT MUST ENSURE EFFECTIVE ACCESS TO EQUAL INHERITANCE RIGHTS

To give effect to constitutional and international obligations mandating equal inheritance rights for women and children, Swaziland must also amend its administration of estates laws to ensure that the deceased’s property is distributed to them. Appointing the widow the executor is the most effective strategy for safeguarding the estate’s assets for herself and her children, since “[i]n the normal course of events she is the person who would rightfully, properly and honestly safeguard the assets of the estate for herself and her children.”⁸⁷

Current Swazi laws, however, either bar women from administering and distributing property entirely, or operate to exclude them in practice, often resulting in a total denial of inheritance rights. To cure gender inequalities and protect widows and children’s entitlements, Parliament must (1) repeal and prohibit current discriminatory laws and practices; (2) enact a new Administration of Estates Act that is modern and streamlined; and (3) grant widows automatic rights, establish financial accounting mechanisms at the Master’s Office, and decentralize to Magistrate’s Courts.

A. The Administration of Estates Laws Fails to Protect Women and Children from Eviction and Dispossession

Swaziland’s administration of estates laws either bar women from administering and distributing property entirely, or operate to exclude them in practice, solely on the basis of sex. While a widow is denied rights to manage property and children, a widower assumes complete control and ownership of his wife’s property and their children.⁸⁸ Because Swazi laws presume that property and children belong to the man, there is no need to administer an estate, divide inheritance, or appoint a

86. CEDAW, *supra* note 3, art. 5(b).

87. *Re Kibiego*, Probate Cause 15 of 1972, High Court of Kenya (6 March 1972).

88. See Interview with Government Official, in Mbabane, Swaziland (Mar. 5, 2007).

guardian at a woman's death.⁸⁹ This differential treatment not only violates equal protection guarantees in Swaziland's Constitution and international laws, but also widows' and children's rights to property, dignity, family, an effective remedy and an adequate standard of living.⁹⁰ Swaziland must take action to abolish civil and customary laws that deny widows "a legal capacity identical to that of men," and enact legislation granting them equal property and guardianship rights at the dissolution of marriage.⁹¹

1. Laws prohibiting women but not men from decision-making regarding their households and families contravene their equal rights to property and guardianship.

Swazi laws that deny women on an equal basis with men the right to administer property and manage children violate Swaziland's Constitution and international law obligations. Under customary law, women are prohibited both from inheriting and making decisions regarding property and children. When a man dies, his family meets and appoints his eldest brother the property's custodian.⁹² Widows are excluded from these meetings and are not considered candidates to take custody of the property under any circumstances because "customary law says [a custodian] can never be a female."⁹³ When the mourning period ends, his family reconvenes and selects the deceased's eldest son as heir and executor of the property. Although, "[t]heoretically, a female can [administer the property] if there are no males," she "rarely does because the family is defined so broadly that there is almost always a male relative who can be found."⁹⁴

Moreover, because customary law treats widows as minors who require care, customary law delegates the responsibility of taking care of the widow, her children and the children's property to the deceased's heir.⁹⁵ To discourage remarriage or a sexual relationship outside the family, the widow may also be inherited by one of her husband's brothers.⁹⁶ If a widow remarries or has a sexual relationship outside

89. WOMEN AND LAW IN SOUTHERN AFRICA, RESEARCH AND EDUCATIONAL TRUST, INHERITANCE IN SWAZILAND: LAW AND PRACTICE (1994) [hereinafter INHERITANCE IN SWAZILAND].

90. See SWAZ. CONST. 2005 s. 20(1)-(2) ("All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law ... [regardless] of gender [or] race."). See also UDHR, *supra* note 31, art. 7 ("All are equal before the law and are entitled without any discrimination to equal protection of the law"); ICCPR, *supra* note 3, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law"); CEDAW, *supra* note 3, art. 15(1) ("States Parties shall accord to women equality with men before the law"); African Charter, *supra* note 3, art. 3 ("Every individual shall be equal before the law [and] ... [e]very individual shall be entitled to equal protection of the law").

91. CEDAW, *supra* note 3, art. 15(2).

92. INHERITANCE IN SWAZILAND, *supra* note 89.

93. *Id.*

94. *Id.*

95. *Id.*

96. See Government Official, *supra* note 88, at 3 (stating "if it's a woman, the brother of the late husband can take over the responsibility of the homestead—women, children, everything there").

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the clan, she is evicted from her home and forfeits her parental rights.⁹⁷ Marjorie B. Mavuso, Assistant Representative of the UNFPA adds, “it is true that you cannot take [what] your husband left and...go and start a family with another...man.”⁹⁸

Even under The Administration of Estates Act women face gender inequalities with regard to property and guardianship rights. Although The Administration of Estates Act names the widow as first in line to be appointed the property’s executor and children’s guardian,⁹⁹ it grants the Master discretionary power to appoint another person to take charge of the estate and distribute the property “where it may be necessary or expedient to do so”¹⁰⁰ or if “any good reason exists against the [widow’s] appointment.”¹⁰¹ Moreover, The Administration of Estates Act also grants the father, but not the mother, the power to usurp the mother’s guardianship rights by will.¹⁰² All of these laws clearly violate women’s equal right with men to administer and manage property and care for children at the dissolution of marriage and must be abolished to bring Swaziland in line with its Constitution and international law mandates.

Widows have an equal right with men to own, acquire and administer property under Swaziland’s Constitution and international law. Swaziland’s Constitution recognizes that every “person has a right to own property,”¹⁰³ and CEDAW requires that states provide “[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property.”¹⁰⁴ The HRC specifically instructs states parties to “review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property, where necessary.”¹⁰⁵

Not only do these laws recognize that women have equal rights to manage property, but also children. The Constitution obligates Parliament to “enact laws necessary to ensure that parents undertake their natural right and obligation of care, maintenance and proper upbringing of children,”¹⁰⁶ and under CEDAW states must “ensure, on a basis of equality of men and women...[t]he same rights and responsibilities with regard to guardianship...of children”¹⁰⁷ The HRC speaks directly to this issue:

97. INHERITANCE IN SWAZILAND, *supra* note 89.

98. Interview with Marjorie B. Mavuso, Assistant Representative, UNFPA, in Mbabane, Swaziland (Mar. 5, 2007).

99. Swaz. Admin. of Estates Act, *supra* note 14, s. 25.

100. *Id.* at s. 21(1).

101. *Id.* at s. 25.

102. *Id.* at s. 69.

103. SWAZ. CONST. 2005 s. 19(1).

104. CEDAW, *supra* note 3, art. 16(1)(h). *See also* CEDAW, *supra* note 3, art. 15(2) (“States Parties shall... give women equal rights to...administer property”).

105. HRC General Comment 28, *supra* note 30, para. 25.

106. SWAZ. CONST. 2005, s. 29(7)(c).

107. CEDAW, *supra* note 3, art. 16(1)(f).

State parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the custody and care of children, the children's religious and moral education, the capacity to transmit to children the parent's nationality, and the ownership or administration of property, whether common property or property in the sole ownership of either spouse.¹⁰⁸

2. Swazi laws that interfere with widows' relationship with their children and prohibit their remarriage violate the right to family.

Both customary law and The Administration of Estates Act prohibit widows from remarrying. Under customary law, a widow forfeits her right to reside at her late husband's homestead and parental rights if she "remarr[ies] or court[s]" outside the clan.¹⁰⁹ The Administration of Estates Act also bars widows from remarrying unless they seek court approval to do so and pay a bond or relinquish their guardianship rights to their children's property.¹¹⁰

Laws that interfere with a widow's relationship with her children and obstruct her remarriage violate her right to family.¹¹¹ Swaziland's Constitution states that "[t]he family is the natural and fundamental unit of society and is entitled to protection by the state."¹¹² This protection is reiterated in international human rights conventions, which recognize the family as "the natural and fundamental group unit of society."¹¹³ According to the HRC, "The right to found a family implies, in principle, the possibility to...live together."¹¹⁴

3. By treating widows as minors and part of the deceased's estate, Swazi laws offend women's right to dignity.

Customary laws that treat widows as minors, instead of capable adults who can manage property, and "as objects to be given, together with the property of the deceased husband, to his family"¹¹⁵ violate their rights to dignity as provided under the Constitution and international law.¹¹⁶ The Constitution provides that "[t]he

108. *HRC General Comment 28*, *supra* note 30, para. 25.

109. INHERITANCE IN SWAZILAND, *supra* note 89.

110. Swaz. Admin. of Estates Act, *supra* note 14, s. 89(3). The penalty for remarrying without the Master's approval and either paying the requisite bond or relinquishing guardianship rights to the children's property is stiff. A widow "forfeits...a sum equal to one-fourth of such...widow's share in the joint estate" and "a fine." *Id.*

111. Swaziland's Constitution provides that "[t]he family is the natural and fundamental unit of society and is entitled to protection by the state." SWAZ. CONST. 2005 s. 27(3).

112. *Id.*

113. ICCPR, *supra* note 3, art. 23(1); ICESCR, *supra* note 3, art. 10(1); African Charter, *supra* note 3, art. 18.

114. Human Rights Committee, *General Comment No. 19, Article 23* (39th Sess., 1990), para. 5, U.N.Doc. HRI/GEN/I/Rev. 6 at 149 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcom19.htm>.

115. *HRC General Comment 28*, *supra* note 30, at para. 19.

116. UDHR, *supra* note 31, Preamble ("Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person

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dignity of every person is inviolable” and “[a] person shall not be subjected to . . . inhuman or degrading treatment.”¹¹⁷ The CEDAW Committee recognized this link between dignity and “[a] woman’s right to choose a spouse and enter freely into marriage,”¹¹⁸ explaining:

A woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States Parties’ reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages. . . . [A] woman’s right to choose when, if, and whom she will marry must be protected and enforced at law.¹¹⁹

4. Separating children from their mothers is not in their best interests and violates children’s rights to reside with their parents.

Children also have a corresponding right to reside with their parents. Swazi laws that treat children as belonging to the father and remove them from the guardianship of their mother if she remarries or the father wills to the contrary violate children’s constitutional “right to be properly cared for and brought up by parents.”¹²⁰ The Constitution explicitly requires Parliament to “enact laws necessary to ensure that a child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents.”¹²¹ Under the CRC states parties must “ensure that a child shall not be separated from his or her parents against their will,” and “use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child.”¹²²

....”); ICCPR, *supra* note 3, art. 1 (“Recognizing that these rights derive from the inherent dignity of the human person . . .”); ICESCR, *supra* note 3, Preamble (“[T]he Charter of the United Nations reaffirms faith in the fundamental human rights, in the dignity and worth of the human person and in equal rights of men and women.”); CEDAW, *supra* note 3, Preamble (Noting that the Universal Declaration of Human Rights . . . proclaims that all human beings are born free and equal in dignity and right. . . .); African Charter, *supra* note 3, art. 5 (“Every individual shall have the right to respect of the dignity of inherent in a human being and to recognition of his legal status.”).

117. SWAZ. CONST. 2005 s. 18.

118. CEDAW *General Rec. 21*, *supra* note 64, at para. 16.

119. *Id.*

120. SWAZ. CONST. 2005 s. 29(3).

121. *Id.*

122. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. (No. 49) at 167, art. 18(1), U.N. DOC. A/44/49 (1989), *entered into force* Sept. 2, 1990, *ratified by Swaziland* Oct. 6, 1995, *available at* <http://www.unhcr.ch/html/menu3/b/k2crc.htm> (last visited May 15, 2007) [hereinafter CRC].

B. In Practice, Customary and Civil Laws Deny Widows and Children Equal Inheritance Rights under the Constitution and International Law

Despite statutory language to the contrary, the Master's Office is administering and distributing estates of spouses married according to Swazi law and custom.¹²³ This practice has exacerbated the impact of discrimination rules on women and children and operated to deny them effective access to their inheritance rights under the Constitution and international law. Swaziland's courts' failure to effectively address this practice has resulted in estates being distributed according to a hybrid of the most gender discriminatory aspects of civil and customary law, mandating legislative action.¹²⁴ Swaziland itself has recognized the inadequacy of present laws and practices to meet the needs of Swazi citizens, stating, "we are of the view that urgent amendments to all the related pieces of legislation should be made. At the same time, plans should be for the drafting of new pieces of legislation which will be reflective of the ethos of our times."¹²⁵

1. The Administration of Estates Act is a relic of Swaziland's Colonial racist past and is woefully inadequate given current socio-economic realities.

The Administration of Estates Act is a relic of Swaziland's racist past and demonstrably inadequate in light of recent socioeconomic changes. As discussed above, the Administration of Estates Act violates equal protection guarantees in Swaziland's Constitution and international laws on the basis of race and sex, because it funnels the majority of women into the discriminatory customary inheritance regime.¹²⁶ It was enacted to govern only small numbers of European colonialists' and people of economic means' estates, relegating the bulk of "African"

123. See Swaz. Admin. of Estates Act, *supra* note 14, s. 68.

124. See *Dudu Dorothy Dlamini and the Master of the High Court and Mphosi John Dlamini* 1989 (367) (HC) (Swaz.) (holding that "all estates in Swaziland should be administered by the Master of the High Court, inclusive of estates of persons married by Swazi Law and Custom). *But see Jameson Zondo Simelane and the Master of the High Court* 1994 (1284) (HC) (Swaz.) (interpreting section 68 "in the context it was passed in 1902 and hence excluded Estates of Africans married by Swazi Law and Custom from being administered by the Office of the Master of the High Court"). The Report of the Commission of Enquiry into the Operations of the Office of the Master of the High Court adds further, "there is no uniformity of opinion as to how exactly Section 68 should be interpreted as in 1994 another decision was made on the same section which conflicted with the earlier one." COMMISSION OF ENQUIRY, REPORT OF THE COMMISSION OF ENQUIRY INTO THE OPERATIONS OF THE OFFICE OF THE MASTER OF THE HIGH COURT VOL. 1, 53 (1999) [hereinafter COMMISSION REPORT].

125. COMMISSION REPORT, *supra* note 124, at 70.

126. See *CESCR General Comment 16*, General Comment 16, Committee on Economic, Social and Cultural Rights, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, 34th Sess., U.N. Doc. E/C.12/2005/4, para. 13 (2005), available at <http://www.interights.org/doc/Fiji%20Colloquium%2006/General%20Comments/General%20comment%2013.pdf>. ("Indirect discrimination occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented."). Both the HRC and CESCR Committee recognize that "[d]iscrimination against women is often intertwined with discrimination on other grounds such as race...." resulting in a "compounded disadvantaged." *Id.* See also *HRC General Comment 28*, *supra* note 30, at para. 30.

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estates to “be administered and distributed according to the custom and usages of the tribe or people to which [they] belonged.”¹²⁷

To protect beneficiaries’ interests of large estates, the Administration of Estates Act sets forth an onerous list of procedural duties.¹²⁸ Parliament has not amended these requirements, however, to meet the needs of customary estates, which are commonly only comprised of the house, household chattel and some livestock. Since these assets pass to the surviving spouse and minor children on the deceased’s death, complex accounting processes are unnecessary and especially arduous.

Moreover, because the Master’s Office is administering customary estates with no corresponding rule of law, many of the procedural safeguards set forth in The Administration of Estates Act have been discarded and replaced with aspects of customary law. The requirement to submit a final accounting of the property’s distribution, for example, is often ignored because customary laws recognize the rights of male family members to simply take all the property such that no account is needed. Parliament’s failure to legislate in light of actual practices has disproportionately impacted women because the Master’s Office tends to apply the most gender discriminatory aspects of both civil and customary law to deceased’s estates.

2. Exploitive practices in the Master’s Office exacerbate the impact of discriminatory laws on widows and children.

Parliament’s failure to amend the Administration of Estates Act to fit small, customary estates works to the detriment of women and children. Because the Act’s language is archaic and its process complex, the Commission’s Report notes that most of the procedural safeguards are no longer respected, resulting in exploitive practices that seriously undermine widows’ and children’s rights to an effective remedy and an adequate standard of living.¹²⁹

Women and children are disproportionately impacted because, unlike men, custom does not respect their claims to property and children, mandating recourse to the Master’s Office. The Act’s burdensome procedural requirements coupled with the increased caseload burden due to rising numbers of HIV/AIDS-related deaths each year has resulted in “years long delays”¹³⁰ in the conclusion of estates,

127. Swaz. Admin. of Estates Act, *supra* note 14, s. 68.

128. *See e.g.* Swaz. Admin. of Estates Act, *supra* note 14. Namely, the Administration of Estates Act requires surviving spouses to “cause a notice of death to be framed . . . [and] delivered or transmitted to the Master,” prepare “an inventory of all property, goods and effects . . . in the presence of two impartial witnesses of good credit and repute,” “attend at [the Master’s] office . . . to see letters of administration granted,” find “security to the satisfaction of the Master for the due and faithful administration of the estate,” pay all debts and “cal[] upon all persons having claims due or not yet due as creditors against the deceased or his estate,” “administer and distribute the estate . . . according to law,” and “frame and lodge with the Master a full and true account supported by vouchers of the administration and distribution of the said estate.” *Id.* at s. 2(1), 11, 24(1), 30, 42(1), 51(1)-(2).

129. *See, e.g.* COMMISSION REPORT, *supra* note 124.

130. COMMISSION REPORT, *supra* note 124, at 44.

“overcrowded”¹³¹ offices, “multiple trips,”¹³² “cost[s],”¹³³ “widows queuing up for days,”¹³⁴ and journeys of over “300 kilometers [only] to be turned back,”¹³⁵ depriving widows and children of an immediate means of support and often resulting in a total denial of inheritance rights. NGO worker Doo Aphane sums up the experiences of most widows as a “nightmare,” adding that when “[d]ealing with the Office of the Master...[y]ou need time. You need energy. It’s a maze really.”¹³⁶

Moreover, the Master’s Office’s practice of administering customary estates without a corresponding rule of law results in the application of the least advantageous aspects of both civil and customary laws to widows. “Presently it is not clear how an estate, according to Swazi Law, is administered and distributed,”¹³⁷ notes the Commission Report. Attorney and Director of WLSA, Lomcebo Dlamini, adds, “He’s doing everything.”¹³⁸ The Master combines elements of customary and civil laws to deny widows’ inheritance most frequently in next of kin meetings. Although widows are first in line to be named executor under the Act, explains the Acting Deputy Master of the High Court, the Master will apply customary laws that prohibit the widow from administering property where the family is opposed to her appointment.¹³⁹ As a result, many widows, like Nonhlanhla Nene, Founder and Director of the organization Hope for Widows, “ended up sharing that money with [their] in-laws.”¹⁴⁰ Moreover, because civil laws do not recognize polygamous marriages, “[y]ou also find that where there are two surviving spouses, a meeting is held in the absence of the other surviving spouse.”¹⁴¹ These practices violate women’s rights to an effective remedy and an adequate standard of living.

Gross financial mismanagement as a result of the government’s failure to bring laws into the modern era also seriously undermine women and children’s right to an adequate standard of living. Because the Act was written before the introduction of modern banking institutions, regulated by international standards and the competitive marketplace, estate moneys and guardian’s funds are not deposited in safe, interest yielding trust accounts and instead are misappropriated by officials in the Master’s office.

131. Interview with Acting Registrar of the High Court/Deputy Registrar of the High Court, in Swaziland (Mar. 7, 2007).

132. COMMISSION REPORT, *supra* note 124, at 44.

133. Interview with Motsa Simangele, Law Student/Police Officer, in Swaziland (Mar. 6, 2007).

134. Interview with Isabella Bongie Katamzi, *supra* note 22.

135. Interview with Sibonelo Mdluli, WLSA Attorney, in Ezulwini, Swaziland (Mar. 5, 2007).

136. Interview with Doo Aphane, NGO worker, in Mbabane, Swaziland (Mar. 7, 2007).

137. COMMISSION REPORT, *supra* note 124, at 53.

138. Telephone Interview with Lomcebo Dlamini, WLSA Director, in Mbabane, Swaziland (May 3, 2007).

139. Interview with Acting Deputy Master of the High Court, *supra* note 66 (Mar. 6, 2007).

140. Interview with Nonhlanhla Nene, Widow and Founder/Director of Hope for Widows, in Ezulwini, Swaziland (Mar. 8, 2007).

141. COMMISSION REPORT, *supra* note 124, at 55.

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Swaziland's government has documented a pattern of abuse in the Master's Office, offering a scathing review and calling for immediate action. The Commission found "[h]undreds of cheques worth in excess of E4 million were found lying on the floor and on tables at the conference room,"¹⁴² "cheque[s] in excess of 20,000 Emalangenzi issued by the Royal Swazi Insurance Company and sent to the Master's Office,"¹⁴³ that had been misappropriated by an accounts officer, and that "the Accounts Officer does not know how to calculate interest."¹⁴⁴ "With this litany of irregularities occurring," notes the Commission, "there is no way that the office can operate efficiently as it is clear that the nerve centre is clinically dead."¹⁴⁵ Most widows opt to forgo their right to inheritance and start from scratch, because, as one widow explains, "[w]hat's the use of taking the estate to the Master's office if at the end you're not going to get anything?"

C. Parliament Must Enact an Updated, Streamlined, Gender-Neutral Administration of Estates Law to Remedy Current Inequities

Swaziland must enact an updated, streamlined, gender neutral law to ensure widows and children access to their inheritance rights, an effective remedy, and an adequate standard of living, as mandated under its Constitution and international laws.

1. Granting widows automatic rights to manage property ensures their rights to an adequate standard of living and economic independence.

Current customary laws and Master's Office practices violate widows' and children's right to an adequate standard, and encourage their economic dependence. Widows, rather than a male heir or the Master's Office, should be entrusted with property because they are the most likely to safeguard it for themselves and their children. Swaziland must grant widows automatic rights to administer property and manage children, removing property from family members and the Master's Office and ensuring their right to an adequate standard of living.¹⁴⁶

The CEDAW Committee recognized the link between property rights and living standards, explaining that "the right to own, manage, enjoy and dispose of property...will be critical to a woman's ability to an adequate standard of living."¹⁴⁷ Swazi administration of estates laws are based on the assumption that women can-

142. *Id.* at 6-7.

143. *Id.* at 7.

144. *Id.* at 31, 33.

145. *Id.* at 29.

146. See UDHR, *supra* note 31, art. 25(1) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of . . . widowhood"); ICESCR, *supra* note 3, art. 11 ("States parties recognize the right of every child to an adequate standard of living for himself and his family"); CRC, *supra* note 122, art. 27 ("States parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development).

147. CEDAW General Rec. 21, *supra* note 64, at para. 26.

not and should not support themselves financially. Under customary law, widows are entitled to care by the heir or an adult son, but as the CEDAW Committee states:

Any discrimination in the division of property that rests on the premise that the man alone is responsible for the support of the women and children of his family and that he can and will honourably discharge this responsibility is clearly unrealistic. Consequently, any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.¹⁴⁸

Under the Administration of Estates Act, the Master steps into the shoes of the customary heir and doles out property to the widow. Widows are prohibited from managing their children's funds because of societal fears that they will remarry and allow a new spouse to squander the children's inheritance.¹⁴⁹ Such stereotypes offend the dignity of women and encourage long-term dependency on family members and the Master's Office. The Commission Report notes that the Master's Office is "constantly inundated with requests for school fees and maintenance monies for minors, particularly from estates still in the process of being finalized." Senator Katamzi adds "we have seen many widows queuing up for days, because the Master of the High Court becomes custodian, even for the asset . . . Sometimes, these people go there several days, especially when school's open, because they want some school fees to be released."¹⁵⁰

Granting women automatic rights to manage property and children also severs the link between children and inheritance, discouraging family members from obtaining custody of children without assuming a corresponding duty of care. Swaziland is under a constitutional duty "to ensure that children receive special protection against exposure to physical and moral hazards within . . . the family"¹⁵¹ as well as an international obligation to "ensure to the maximum extent possible the survival and development of the child,"¹⁵² including securing "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."¹⁵³

148. *Id.* at para. 28.

149. Nonhlanhla Zanele Dlamini, the Gender Coordinator at Swaziland's Ministry of Home Affairs estimates that only two percent widows neglect their children. Interview with Nonhlanhla Zanele Dlamini, Gender Coordinator, Ministry of Home Affairs, in Mbabane, Swaziland (Mar. 5, 2007).

150. Interview with Isabella Bongie Katamzi, Senator, *supra* note 22.

151. SWAZ. CONST. 2005 s. 29(7)(d).

152. CRC, *supra* note 122, art. 6(2).

153. *Id.* at art. 27(1).

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2. Extending access to the Magistrate's Courts would ensure widows' right to effective remedy.

Not only does Swaziland have a duty to enact legislation "to modify or abolish existing laws, customs and practices which constitute discrimination against women,"¹⁵⁴ but also to "establish appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality, including the poorest and most disadvantaged and marginalized men and women."¹⁵⁵

Widows have two avenues of redress under current Swazi laws, both of which operate to deny them an effective remedy when disputes arise over the administration and distribution of estates. Under customary law, an aggrieved widow must first go to the family council. The family council, however, is comprised entirely of the deceased's family members and excludes the widow and her children.¹⁵⁶ WLSA explains:

Widows and children should not be present because of their strong personal interests when their merits and demerits are discussed since it is undignified to push one's self forward and humiliating to be rebuffed and passed over in one's presence. There may therefore be no one to argue her case strongly.¹⁵⁷

A widow can appeal the family council's decision to her chief, but she "needs a man to speak on her behalf,"¹⁵⁸ "[t]he decision-making process is completely dominated by males,"¹⁵⁹ and the chief's council "suspends decisions until the end of the mourning period,"¹⁶⁰ preventing disputes from being resolved in a timely manner and allowing relatives to "property grab" in the early stages after a man's death with no immediate recourse. Swazi courts have jurisdiction to review chiefs' decisions, but they prohibit legal representation and apply Swazi law and custom, under which women are prohibited from inheriting.¹⁶¹ Although the High Court has final jurisdiction, a widow must appear before the Swazi Court of Appeal, High Swazi Court of Appeal, and Judicial Commissioner before accessing the High Court, discouraging most widows from seeking redress.¹⁶²

154. CEDAW, *supra* note 3, art. 2(f).

155. CESCR *General Comment 16*, *supra* note 126, at para. 21.

156. INHERITANCE IN SWAZILAND, *supra* note 89.

157. *Id.* WLSA further states, "[t]he role of the family council is to protect family interests, not individuals. It does not attempt to be impartial but seeks to fulfill its role of protecting and guarding family interests." *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. See The Swazi Courts Act 80 of 1950 s. 11(a), 23 (providing that "a Swazi Court shall administer the Swazi law and custom prevailing in Swaziland," and prohibiting any "advocate or legal practitioner" from "appear[ing] or act[ing] for any party before a Swazi Court") [hereinafter Swazi Courts Act].

162. The Swazi Courts Act section 33 provides:

(1) A person aggrieved by an order or decision of a Swazi Court of first instance may within

Although the Master's Office provides widows with a second avenue of redress, its central location and the Administration of Estates Act's onerous procedural requirements operate to deny widows any relief. The HRC speaks directly to the problems in the Master's Office, stating:

Even when the legal systems of States parties are formally endowed with the appropriate remedy violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice.¹⁶³

Moreover, even if widows successfully navigate this process, there is no guarantee that they will access their inheritance, since the Master is administering and distributing estates without a corresponding rule of law. A widow may appeal the Master's decision to the High Court, but, as the Commissioner's Report noted, "the Master is unlikely to heed High Court Orders."¹⁶⁴

While a widow is required to navigate this complex and time-consuming process to access inheritance, a widower assumes complete control and ownership of his spouse's property. Widowers are presumed to own the entire marital property, making it unnecessary to administer an estate and divide inheritance at the wife's death. This explains why "widows report more cases [to the Master's Office] than widowers."¹⁶⁵ Thus, not only do these laws violate women's right to equal protection of the law, but also their right to an effective remedy as mandated under the Swaziland's Constitution and international laws.

To ensure this effective remedy, the Master's Office needs to be decentralised and it must be decentralised immediately so it can begin to effectively perform its duties and better serve the people of Swaziland. Government officials cannot continue to allow this plan to sit "in the pipeline" while widows, widowers, and children go without funds for basic needs such as food, clothing, and school fees. When asked how she would change the court system to make it more accessible for people, Director Dlamini said, "[w]hen it comes to issues of inheritance and property, the Master's Office, I think, needs to be decentralised because being in Mba-

thirty days from the date of such order or decision appeal therefrom to a Swazi Court of Appeal.

(2) A person aggrieved by an order or decision of a Swazi Court of Appeal may within thirty days from the date of such order or decision appeal therefrom to the Higher Court of Appeal.

(3) A person aggrieved by an order or decision of the Higher Swazi Court of Appeal in a criminal proceeding may within thirty days from the date of such order or decision appeal therefrom to the Judicial Commissioner.

(4) A person aggrieved by an order or decision of the Higher Swazi Court of Appeal in a civil matter may within thirty days from the date of such order or decision appeal therefrom to the High Court . . .

Id. at s. 33(1)-(4).

163. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant* (80th Sess., 2004), para. 20, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), available at <http://www1.umn.edu/humanrts/gencomm/hrcom31.html> [hereinafter *HRC General Comment 31*].

164. COMMISSION REPORT, *supra* note 124, at 45.

165. INHERITANCE IN SWAZILAND, *supra* note 89.

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bane, it presents a whole lot of difficulties....”¹⁶⁶ Similarly, in response to a question about whether it would be practical to decentralise the Master’s Office and have more than one Master, CANGO Director Clement Dlamini replied, “Yes. They need to do that to get the service....One is too far for other people. The rest of the people have no money because of the funeral expenses and then they need to be driving up and down [going to and from the Master’s Office].” Moreover, in a report produced by The Commission of Enquiry into the Operations of the Office of the Master of the High Court, the Commission explicitly recommends decentralisation of the office, stating, “We established that centralising the office worked great hardship for most of the people, the majority of whom come from rural areas outside Mbabane.”¹⁶⁷ Unfortunately, although the Commission of Enquiry recommended in 2001 that the Master’s Office be decentralised, in 2007 that recommendation is yet to be realized in full. The four regional offices established after the Commission Report are not functional.

The Government of Swaziland must put an end to the Master’s Office’s failure to act by writing into legislation a specific decentralisation program and allocating sufficient resources to the Master’s Office for staffing and training purposes. When asked if the Master’s Office currently has regional administrators, the Acting Deputy Master of the High Court replied:

Not yet. We’re working on the decentralisation process...[b]ut they are not yet in the regions, they are still stationed here in the headquarters. We are still trying to allocate offices in the regions and prepare documents for them before they can actually operate in those regions.¹⁶⁸

But how long must the people of Swaziland wait? One widow from the rural area of Lavumisa has gone to the Master’s Office numerous times, including three times to attend next of kin meetings at which the “next of kin” did not appear (and so no distribution of funds have taken place). When asked how long it takes to get to the Master’s office on public transportation she said, “I leave early in the morning at 6:30, by 10:30 I’ll be in Mbabane.”¹⁶⁹ Four hours in each direction on public transportation, to return home at the end of the day empty handed because, without the next of kin, she was unable to even get maintenance from the Master. Ms. Nonhlanhla Nene illustrated that this experience by the widow from Lavumisa is a typical problem suffered by many people who deal with the Master’s office after the death of a loved one:

We’ve got the Master of the High Court here in Mbabane...you have to travel all the way here with those people that the Master of the High Court wants. For the first time you go there, you don’t know what is expected of you. You are made to go back home and collect those things they want. You have to transport these in-laws and that and those...It’s not over. Even on that day you are not attended.

166. Interview with Lomcebo Dlamini, Director of Women and Law in Southern Africa (WLSA), in Mbabane, Swaziland (Mar. 4, 2007).

167. COMMISSION REPORT, *supra* note 124, at 35.

168. Interview with the Acting Deputy Master, *supra* note 66 (Mar. 6, 2007).

169. Interview with Widow#1, in Lavumisa, Swaziland (Mar. 8, 2007).

'We are closing now, come tomorrow.' Those are the things. Convenience. It has to happen....[b]ecause if you are a widow...you don't have money...but you are struggling for 100 Rand that is in the bank. By the time you get the 100 Rand, we have wasted more than that.¹⁷⁰

Decentralisation must be a priority of the Master's Office and the Swazi Government as a whole until the situation described by Ms. Nene and experienced by the widow from Lavumisa is no longer the reality of so many suffering widows.

The most effective means for decentralising the process utilizes the magistrates courts to serve the same function as the Master or regional master. This plan is superior to the Commission Report's recommendation, which included creating seven regional offices, because it makes the functions of the Master's office even more accessible. The magistrate's courts are already conveniently located in each region, with 19 courts in all.¹⁷¹ Since they are already located in the various jurisdictions, such a plan could therefore keep the costs of decentralisation down and could effectuate a decentralisation program more quickly. The delay in the decentralisation process is currently due, in part, to them trying to "allocate offices in the regions and prepare documents before they can actually operate in those regions."¹⁷² Using structures already in place - offices of the magistrate courts, for example—could expedite the decentralisation process.

Currently, the jurisdiction of Swaziland's magistrate courts tends to allow them to handle smaller cases, while the High Court handles appeals and cases involving more complex issues. The idea is with the decentralisation for it to follow this breakdown. Basically, the regional offices - those located in the magistrate offices - could handle estates that are smaller or less complex (i.e., rural estates), while the Master's Office at the High Court would function as a headquarters and be reserved for big and more complex estates. This suggestion coincides with a suggestion from the Commission of Enquiry to have the Headquarters deal with only larger estates, leaving the regional offices to deal with the poorer estates. For example, the Commission suggested that estates below E30,000 should be handled by the regional offices, while estates greater than that amount could be referred to the headquarters.¹⁷³ Additionally, with the present office in Mbabane remaining as the headquarters, once the decentralisation is effective, the number of people attending that office will be significantly reduced and therefore that office will be better able to serve those individuals.¹⁷⁴

This decentralisation scheme would permit women like the widow from Lavumisa to go to a regional master or magistrate in her own area, saving them countless hours on public transportation and money that they really can't afford to spend. As discovered by the Commission, it would be "less inconvenient and less costly" to enable people like this widow from Lavumisa to bring their claims (typically for

170. Interview with Nonhlanhla Nene, *supra* note 140.

171. Interview with a Principal Magistrate Judge, *supra* note 6.

172. Interview with the Acting Deputy Master of the High Court, *supra* note 66 (Mar. 6, 2007).

173. COMMISSION REPORT, *supra* note 124, at 36.

174. *Id.*

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maintenance and school fees) in regions closer to their homes.¹⁷⁵ Parliament must act now to take the Commission's recommendations seriously and enact a decentralisation program that will effectively address the needs of a growing portion of Swaziland's population.

3. Numerous African countries grant widows automatic rights and run decentralized courts.

There is a growing trend among countries to modernize their administration of estates laws and grant widows equal rights to manage property and children. A number of African countries have moved to grant widows automatic executor and guardianship rights at the dissolution of marriage. South Africa has recently answered the call of its High Court to enact a new, gender-neutral Administration of Estates law, governing civil and customary estates and granting women enhanced property and inheritance rights.¹⁷⁶ Swaziland itself has evidenced its intent to follow the lead of South Africa, stating:

This law was inherited from the Union of South Africa in 1902. Ever since that time, the legislation in South Africa has undergone many amendments. The task of reviewing these laws would, in the view of the Commission, be a less difficult thing as those in South Africa can be used for comparative purposes.¹⁷⁷

Swaziland must follow these other countries leads and grant women automatic rights to manage property and children at the dissolution of marriage, decentralize to magistrate's courts, and place estate and guardians moneys in a banking institution regulated by international banking standards and the competitive marketplace.

African countries have identified the need to reform discriminatory inheritance laws that prohibit women from administering and distributing property. Tunisia "grants women, whatever their civil status and on equal terms with men, the right to conclude contracts in their own name, to dispose of their property or serve as the administrator thereof, and to institute proceedings before any court, including administrative tribunals."¹⁷⁸ Rwanda provides that "in case of death of one of the spouses, the surviving spouse shall ensure the administration of the entire patrimony while assuming the duties of raising the children."¹⁷⁹ Liberia's Equal Rights of the Customary Marriage Law of 1996 provides for polygamous estates, with an explicit right of appeal:

175. *Id.* at 35.

176. See e.g. *Bhe*, *supra* note 47. SOUTH AFRICA LAW COMMISSION REPORT, ADMINISTRATION OF ESTATES, available at http://www.doj.gov.za/salrc/dpapers/dp_110.pdf (last visited May 15, 2007) (implementing *Bhe* by including polygamous spouses in legislation).

177. COMMISSION REPORT, *supra* note 124, at 68.

178. INHERITANCE IN SWAZILAND, *supra* note 89.

179. Law No. 22/99 (Rwanda), available at <http://www.grandslacs.net/doc/2740.pdf> (last visited Feb. 28, 2007).

Widow or multiple widows collectively, children or collateral heirs, shall have the unrestricted right to petition the Probate Court in their jurisdiction of Letters of Administration to administer the property of said decedent and which right shall not be denied by Probate Court within the Republic. Any denial of this right shall entitle the aggrieved party to appeal to the Supreme Court of Liberia.¹⁸⁰

Moreover, the Kenya High Court has observed that, “[a] widow is the most suitable person to obtain representation to her deceased husband’s estate. In the normal course of events she is the person who would rightfully, properly and honestly safeguard the assets of the estate for herself and her children.”¹⁸¹ The Swaziland government itself has recognized that “[t]he law should be clear that the first person eligible for the office of executorship should be the surviving spouse.”¹⁸²

African countries have also recognized the right of widows to manage children. Ethiopia provides women with “equal rights in the management of the family.”¹⁸³ Nigeria’s Child’s Rights Act of 2003 explicitly states that “in the death of a parent, the surviving parent shall be the guardian of the child.”¹⁸⁴ Liberia automatically grants the surviving spouse guardianship rights and explicitly prohibits the separation of mother and child: “[u]pon the death of either spouses (husband or wife), said children, if minors, shall remain with spouse living as of right; no member of the deceased family shall deprive the living spouse of the right to custody of said minor children, taking into consideration the best interests of the child.”¹⁸⁵

Namibia’s Child Status Bill proposes legislation providing, “[w]here one of two parents dies, the surviving parent shall, unless a competent court directs otherwise, acquire sole guardianship over the child.”¹⁸⁶ The stated objective of the South Africa’s Children’s Act 2005 is “to promote the preservation and strengthening of families,” “to give effect to the Republic’s obligations concerning the well-being of children in terms of international instruments binding on the Republic,” and “that the best interests of a child are of paramount importance in every matter concerning the child.”¹⁸⁷

These countries have also legislated in other areas affecting women’s rights to property and children. Liberia’s Equal Rights of the Customary Marriage Law of 1996 criminalizes wife inheritance, prohibiting any “family member of the de-

180. Equal Rights of the Customary Marriage Law of 1996 s. 3.5 (Liberia).

181. *Re Kibiego*.

182. COMMISSION REPORT, *supra* note 124, at 68.

183. CTR. FOR REPRODUCTIVE LAW AND POLICY, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, ANGLOPHONE AFRICA PROGRESS REPORT 2001, at 24, *available at* http://www.reproductiverights.org/pub_bo_wowaf-rica.html (last visited May 15, 2007) (citing Rev. Family Code art. 50(1), 66 (200) (Eth.)).

184. Child’s Rights Act, Act No. 26 (2003) 116:90 O.G., G.N. 210, s. 71 (Nig.).

185. Equal Rights of the Customary Marriage Law of 1996 s. 3.7 (Liberia).

186. Child Status Bill 23 of 2003 s. 20, *available at* <http://www.parliament.gov.na/parlidoocs/Childrens-Status-A.pdf> (last visited May 16, 2007).

187. Children’s Act 38 of 2005 s. 2 (S. Afr.), *available at* <http://www.info.gov.za/gazette/acts/2005/a38-05.pdf> (last visited May 15, 2005).

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ceased husband [from]...compel[ing] the widow or widows to remain within the family, or marry a kin of her/their late husband.”¹⁸⁸

Moreover, both Zimbabwe and South Africa open estate accounts in banks to safeguard widows’ and children’s rights. Additionally, Zimbabwe requires estate executors to become registered, and thus ethically and personally liable for misdeeds.¹⁸⁹ South Africa deposits estate monies into a banking institution to ensure that the monies are not fraudulently misappropriated.¹⁹⁰ Swaziland’s government has also recognized that the financial systems need to be updated stating, “[t]he financial systems for handling these large volumes of transaction have seldom been updated.”¹⁹¹ Swaziland must follow the lead of these countries and require executors and guardians to deposit monies directly into estate trust accounts, rather than at the Master’s Office, to safeguard the interests of widows and children.

The proposal to use the magistrate courts is also modeled after programs in other African countries, namely South Africa and Zimbabwe. Both South Africa and Zimbabwe use magistrate offices as service points for the Master.¹⁹² As a result, deaths and estates can be reported to and handled by the magistrate courts, and the magistrates fill the role of the Master. Use of the magistrates went into effect in South Africa as recently as December 2002. The South African system explicitly indicates which estates the Master should handle, and therefore must be transferred to the Master if reported to a magistrate. The legislative proposal for decentralization breaks down the matters to be handled by each in a similar manner.¹⁹³ Swaziland should follow the lead of its neighboring countries and modify its administration of estates system to better serve the people of Swaziland.

IV. CORE HUMAN RIGHTS REQUIRE THAT WIDOWS CHOOSE WHEN AND HOW TO MOURN

Swaziland’s Parliament, to protect a widow’s fundamental human rights, must ensure that she has a meaningful choice over her own mourning rituals. During the mourning period, a widow is forced to observe a 30-day confinement in her father-in-law’s home and two years of wearing the mourning gowns and participating in mourning rituals. During this 2-year period, a widow cannot go to certain public places,¹⁹⁴ is not allowed to walk on the path or look a man in the eyes, must

188. Equal Rights of the Customary Marriage Law of 1996 s. 3.4 (Liberia), *supra* note 46.

189. See Estates Administrators Act 27:20 of 2002 (Zimb.).

190. See Administration of Estates Act of 1965 (S. Afr.).

191. COMMISSION REPORT, *supra* note 124, at 9.

192. See Master of the High Court of South Africa, online, http://www.doj.gov.za/master/m_deceased/deceased_report.html (last visited May 10, 2007); INHERITANCE LAWS IN ZIMBABWE, *supra* note 10, at 6 (“After someone has died . . . the estate has to be reported to the Master’s Office in [the capital] or to the nearest magistrate’s court.”).

193. See Proposed Bill, Administration of Estates (Amendment) Act 2007.

194. Interview with Government Official in Mbabane, Swaziland (Mar. 5, 2007).

put her hands behind her back when walking,¹⁹⁵ and must sit on the ground. When asked about the specific requirements, one widow explained:

When you are talking to a male person, you don't look at them straight in the eye. You don't sit on a chair, you sit on the floor...if any livestock, cows, goat[s], whatever, if you find them grazing, you don't walk in their midst or something. You are supposed to go all the way around. There are so many [rituals].¹⁹⁶

Many widows told heart-wrenching stories describing their own mourning period. A former Senator, who lost her husband nearly 10 years ago, described the pain she still feels because of the mourning period requirement that a widow must be covered in blankets if she leaves the home during the 30-day confinement period:

[During] the proceedings of your husband's funeral, you are covered with the blanket. You live with it a lifetime. You don't know what happened there during his burial. You go and put a stone...you open [the blanket] and just a small opening, just to put the hand there, you don't know where you are putting it. You don't know whether he is in there. You live with that pain a lifetime....

You are made to...you are not supposed to be seen. It's like you are now something which is...you are no more yourself. You are not supposed to be seen by people. So they put all the blankets...sometimes the blankets are too heavy for you. They come around you. You do not know who is in the funeral in the first place. You don't see anything. And, you can still wonder, it is 10 years down the line, but the pain is still fresh.¹⁹⁷

The Senator continued to describe how the mourning restrictions prevented her from properly healing after her husband's death:

You don't have to look people in the eyes.

You cannot sing freely even in a church.

You cannot mix with people in the funeral.

I remember one time I went to a funeral [and] after the funeral, as we do, we don't mix with people, we don't stand, we have to sit right there. So when I looked at myself with the women there, it was, it was in my eyes as if I was just like a wizard, somebody who has killed somebody. You know it was so strange, in such a way that I stopped going to funerals from that day because I felt that I was useless. Because it's like I am going there to show off myself that I don't have a husband now. Because I don't sing, I don't do anything, you don't participate in anything.

195. Interview with Widow#2, in Mbabane, Swaziland (Mar. 6, 2007).

196. *Id.*

197. Interview with Former Senator in Mbabane, Swaziland (Mar. 8, 2007).

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You know when you sing, you heal, you heal yourself, but I am not allowed to sing as a widow. It's like a taboo, you cannot sing in a funeral. You cannot start a song...you have to stay separately. So by then I stopped going to funerals until I took away the gown.¹⁹⁸

To protect widows from having to endure a painful and regretful mourning process, Swaziland must enact appropriate legislation to uphold these widows' most fundamental rights. Parliament must make the mourning period optional and create both civil and criminal penalties for anyone who seeks to coerce a widow into participating in the rituals. Only by doing so will Swaziland ensure a widow's constitutional and international rights to freedom of movement, freedom to participate in political and public life, equal treatment under the law, and the right to work.

A. Legislation Must Make the Mourning Period Optional and Provide Redress for Interference with Widows' Mourning Process

To combat societal pressure, Swaziland's Parliament must enact national legislation with both civil and criminal remedies to send a clear signal that any type of coercion to force a widow to observe the mourning period violates her most fundamental rights. The mourning period is mostly culturally imposed, and it would be difficult to effect change without substantial influence from the highest branches of government. Currently, if a widow decides not to wear the gowns, she "would be treated as an outcast" by the surrounding community.¹⁹⁹ Widows are often coerced into participating, and if they don't participate they must either pay a cow or be removed from the homestead.²⁰⁰ One widow described the repercussions of deciding not to participate: "We have to pay a cow. We have to wear the black gown whether you like it or not. If you don't [participate], you have to pay a cow. We are breaking a law."²⁰¹

Parliament, to uphold its constitutional and international commitments, must enact legislation to eliminate discriminatory cultural practices that force widows to mourn. Swaziland's Parliament, by enacting the Constitution, has already guaranteed that "A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed."²⁰² Yet, many women feel cultural pressure to participate in the mourning period. The CEDAW Committee recognizes the "importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights by women."²⁰³

198. *Id.*

199. Interview with Married Woman in Lavumisa, Swaziland (Mar. 8, 2007).

200. Interview with Widow #3, in Ezulwini, Swaziland (Mar. 8, 2007).

201. *Id.*

202. SWAZ. CONST. 2005 s. 28(3).

203. *CEDAW General Rec. 21*, *supra* note 64, at para 3. *See also* CEDAW, *supra* note 3, art. 5(a) (obligating States Parties to "take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of

Civil and criminal remedies, to combat this cultural coercion, are necessary to effectively enforce the legislation. If anyone attempts to coerce a widow into observing the mourning period, a widow should be able to file for a temporary restraining order and injunction to prevent the individual from contacting her. Additionally, the legislation should protect a widow by making it a criminal offense to physically harm her for not participating in the mourning period. This legislation would alleviate the current predicament widows find themselves in when they do not want to participate in the mourning periods. Director Dlamini, described their predicament and the difficulty widows face if they refuse to wear the gowns:

Where will that woman be living? On whose Earth? On which land? Because no woman who refuses to mourn for her husband will be able to walk around in this community freely. Do you understand what I'm saying? It would be very difficult for women...unless you have an extremely empowered woman...it can be very difficult for a woman to speak up and say, "I won't do this." You're a child! How are you going to say you won't when it's not even up to you whether you do it or not?²⁰⁴

Criminal penalties are essential to protect a widow from physical violence. The CEDAW Committee emphasizes the invasiveness of cultural attitudes and stereotypes, and their connection with violence against women:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse...The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms...²⁰⁵

either of the sexes or on stereotyped roles for men and women"); CEDAW, *supra* note 3, art. 2(b) (requiring States Parties to "adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women"); CEDAW, *supra* note 3, art. 2(c) (obligating States Parties "to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise"); ICCPR, *supra* note 3, art. 2(2) (obligating States Parties "to take the necessary steps... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant"); ICCPR, *supra* note 3, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as... sex..."); African Charter, *supra* note 3, art. 1 (obligating States Parties to "recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them"); African Charter, *supra* note 3, art. 18(3) (States Parties must "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions").

204. Interview with Lomcebo Dlamini, *supra* note 166.

205. Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19, Violence Against Women* (11th Sess., 1992), para. 11, U.N. Doc. A/47/38 at 1 (1993), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> [hereinafter *CEDAW General Rec. 19*] (the General Comment, in paragraph 24, also recommends States Parties to "take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act" and that "[e]ffective complaints procedures and remedies, including compensation, should be provided").

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While there are challenges to enacting it, legislation would effectively enable widows to decide their own mourning process. Parliamentarians mentioned particular challenges in creating such legislation. Senator Magagula described how Parliament had previously sought to reduce the mourning period from 2 years to 6 months, but the effort failed because many people were against it.²⁰⁶ Another Senator, Isabella Bongie Katamzi, believed that the observance of the rituals should be a family decision and that legislation would cause conflict because many widows would still want to wear them.²⁰⁷ However, even in lieu of these concerns, widows would have more options with substantive legislation because widows could still decide to observe the mourning rituals if they chose to do so, but the legislation would protect widows who chose not to do so.

With the onslaught of the AIDS crisis, many families have already realized the necessity of allowing widows to not observe the mourning period so that the widows can adequately provide for themselves and their families. Senator Katamzi recognized this change and explained:

[T]here are those other families who have relented and said, “You can’t go in the mourning gown to work,” maybe some of them even saying, “Wear it only on weekends when there is no work.” You can see already that because of the economic situation we are in now, families are beginning to rethink.²⁰⁸

Swaziland, by enacting legislation with civil and criminal penalties that allows widows to choose when and how to mourn, would codify what is already occurring in many families, and ensure the protection of widows’ fundamental rights.

B. Mandatory Mourning Period and Rituals Violate Widows’ Right to Movement and to Participate in Political and Public Life

“Because as a woman, you are not independent up until your mourning period is over... [I]n mourning, you live at his homestead, and they dictate how you move... how you walk....”²⁰⁹

The reality of the mourning period, depicted above by Sandile Dlamini, a law student from the University of Swaziland, is that it places a widow at the mercy of her in-laws and others around her: a widow is confined to the home for 30 days, she cannot appear in certain public places for 2 years, and she is told where and how to walk. These restrictions violate a widow’s right to movement and her right to participate in political and public life.

Freedom of movement is protected by both the Swazi Constitution and international law.²¹⁰ Swaziland’s Constitution expressly grants all citizens the freedom of

206. Interview with Senator Winnie Magagula, *supra* note 70.

207. Interview with Senator Isabella Bongie Katamzi, *supra* note 22.

208. Interview with Senator Isabella Bongie Katamzi, *supra* note 22.

209. Interview with Sandile Dlamini, a law student at the University of Swaziland, in Mbabane, Swaziland (March 6, 2007).

210. *CEDAW*, *supra* note 3, art. 15(4) (“States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their resi-

movement and explicitly states that it includes the “right to move freely throughout Swaziland.”²¹¹ The Human Rights Committee stresses the importance of ensuring the right to movement:

Liberty of movement is an indispensable condition for the free development of a person....The State party must ensure that the rights guaranteed in article 12 [the right to movement in the ICCPR] are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent. For example, it is incompatible with article 12...that the right of a woman to move freely and to choose her residence be made subject, by law or practice, to the decision of another person, including a relative.²¹²

The mourning rituals, by violating a widow’s right to movement, further infringe on a widow’s right to participate in government. Because a widow is not allowed in certain public places and cannot be near the King, she may be prohibited from voting or running for office.²¹³ Swaziland, under CEDAW, must protect a widow’s right to participate in political and public life.²¹⁴ The CEDAW Committee stresses:

[F]actors that in some countries inhibit women’s involvement in the public or political lives of their communities include restrictions on their freedom of movement or right to participate.²¹⁵

CEDAW further urges state parties to “ensure that barriers to equality [in participation in political and public life] are overcome, including those resulting from...impediments to women’s freedom of movement.”²¹⁶

dence and domicile”); *ICCPR*, *supra* note 3, art. 12(1) (“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”); *African Charter*, *supra* note 3, art. 12(1) (“Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.”).

211. SWAZ. CONST. 2005 s. 26(1).

212. Human Rights Committee, *General Comment No. 27, Freedom of Movement* (67th Sess., 1999), para. 6, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), available at <http://www1.umn.edu/humanrts/gencomm/hrcom27.htm> [hereinafter *HRC General Comment 27*].

213. U.S. State Department, *Swaziland: Country Reports on Human Rights Practices 2005* (released by the Bureau of Democracy, Human Rights, and Labor in March 2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61595.htm>.

214. CEDAW, *supra* note 3, art. 7 (ensuring the right to vote, hold public office, and participate in NGOs); see also ICCPR, *supra* note 3, art. 25 (right to participate in public affairs, vote, and to have access to public service); African Charter, *supra* note 3, art. 13 (right to participate in government and to equal access to public service).

215. Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 23, Political and Public Life* (16th Sess., 1997), para. 20(d), U.N. Doc. A/52/38/Rev.1 at 61 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 260 (2003), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom23> [Hereinafter *CEDAW General Rec. 23*].

216. *CEDAW General Rec. 23*, para. 45(c).

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To ensure a widow's rights to free movement and political and public participation, Swaziland must make the mourning period optional with strict civil and criminal penalties.

C. The 30-day Confinement Period for Widows Precludes Them from Securing their Rightful Inheritance

The 30-day confinement period, imposed upon widows but not widowers, violates a widow's right to equal treatment under the law because the 30-day confinement period prevents her from securing her inheritance rights, while a widower does not have to shoulder this burden. Under the Administration of Estates Act,²¹⁷ a relative must register the death with the Master's Office within 14 days, after which the Master begins the process of administering the estate. However, a widow is in seclusion for 30 days and thus, unlike widowers, she is precluded from this process. Khosi Mdluli, the Estate Account Examiner in the Office of the Master of the High Court, described the difficulty many widows find themselves in:

[I]n most cases, because of the mourning gowns...they are not allowed to meet with people, they are not allowed to go to offices. You find that the surviving spouse will say she won't be able to, then she asks maybe a member of the family or they end up choosing one of the in-laws but they find that the person they choose is delaying in working the files.²¹⁸

As such, the mourning rituals preclude a widow from being able to successfully administer the estate or secure her property, while widowers have complete freedom over the process; thus violating a widow's right to equal treatment under the law. The Swazi Constitution emphasizes that "equality before the law and equal protection of the law" is a fundamental human right.²¹⁹ CEDAW emphasizes that "States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity."²²⁰ The 30-day confinement period inhibits a widow from having the same opportunity as a widower to secure her inheritance rights because she is unable to register the death with the Office of the Master of the High Court, administer the estate, or

217. Swaz. Admin. of Estates Act, *supra* note 14, s. 2.

218. Interview with Khosi Mdluli, Estate Account Examiner, at the Office of the Master of the High Court, in Mbabane, Swaziland (Mar. 6, 2007).

219. SWAZ. CONST. 2005 s. 14(a); s. 20(1) ("All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law."); s. 20(2) ("For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender....").

220. CEDAW, *supra* note 3, art. 15(2) ("States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals."); ICCPR, *supra* note 3, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); African Charter, *supra* note 3, art. 3 ("Every individual shall be entitled to equal protection of the law."). See also CEDAW, *supra* note 3, art. 16(1) (providing for equal rights at the dissolution of marriage); ICCPR, *supra* note 3, art. 23(4) (ensuring equal rights at the dissolution of marriage).

adequately protect her property. Sandile Dlamini described how the 30-day confinement period inhibits a widow from protecting her inheritance rights: “During the mourning period, when a widow is confined to the home, “they’ll [the family] be enjoying themselves in whatever the husband has left you. By the time you gain your freedom, you’ll have to start from scratch.”²²¹ As this law student explained, since a widow cannot leave the home for 30 days, she is highly vulnerable to property grabbing.

To fully empower widows and ensure their rights to administer their deceased husband’s estate, it is essential that Swaziland give widows a meaningful choice to leave the homestead so that they are able to secure their inheritance rights. Once a widow is given the ability to have control over her deceased husband’s estate, she will be able to protect herself and her children from others who dispossess her of property that is rightfully hers.

D. Mourning Rituals Imposed on Widows Prevent Them from Working

The 30-day period of confinement, along with the 2-year period of observing the mourning rituals, affects a widow’s economic rights because she is unable to work during confinement and she faces additional obstacles trying to work during the 2-year mourning period. During the 30-day period of confinement, a woman cannot leave the homestead to continue her employment. One widow stated that “if you leave the marital home with the mourning gowns, you will be accused of sleeping with other men...so I didn’t want the same accusations to come my way.”²²² Additionally, if a woman tries to sell goods in a market place wearing the mourning gowns, people do not want to approach her because she is seen as a “bad omen.”²²³ A WLSA legal officer described the blatant reality many widows faced by being unable to continue their employment: “Maybe she’s involved in something, doing whatever to keep going, but she can’t due to the fact that she is wearing mourning gowns.”²²⁴

These rituals infringe upon a woman’s fundamental right to work. Swaziland’s Constitution obligates Parliament to enact laws to “provide for the right of persons to work under satisfactory, safe, and healthy conditions.”²²⁵ By forcing a widow to wear the mourning gowns to work, Swaziland is not providing them with suitable conditions in which to pursue employment. Additionally, CEDAW declares that the right to work is an “inalienable right of all human beings,”²²⁶ and that States Parties should “take all appropriate measures to eliminate discrimination against

221. Interview with Sandile Dlamini, a law student at the University of Swaziland, in Mbabane, Swaziland (March 6, 2007).

222. Interview with Widow #2, *supra* note 195.

223. Interview with Government Official, in Mbabane, Swaziland (Mar. 5, 2007).

224. Interview with a WLSA Legal Officer, in Ezulwini, Swaziland (Mar. 4, 2007).

225. SWAZ. CONST. 2005 s. 32(4)(b).

226. CEDAW, *supra* note 3, art. 11(1)(a); *see also* ICESCR, *supra* note 3, art. 6(1)(encouraging States Parties to “recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right”).

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women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.”²²⁷ As such, Swaziland must end the 30-day mourning period and the 2-year mourning rituals to allow women to pursue the same employment opportunities as men.

V. PROPERTY GRABBING AND FORCED EVICTIONS OF WIDOWS SUBJECT THEM AND THEIR CHILDREN TO VIOLENCE AND DIRE POVERTY

In 2003 my husband got sick and passed away. After that I experienced a miserable life. . . . [T]he in-laws took everything even before the funeral. . . . I went to his parental home one week later and stayed for one month. . . . because of the custom. During the month the in-laws went and claimed all the employee benefits and his belongings. . . . for themselves. . . . [T]hey asked if I wanted to go to my parental home. . . . I thought they were being supportive, so I went. I spent a week at my parental home and came back. My mother-in-law was sitting with her friends and they laughed at me. They said there was no relationship between us anymore. I should just take my children and go. . . . One time I went back to his parent's home. . . . [and] found my house, a three bedroom house, occupied by my sister-in-law.

- *Swazi Widow and Employee of SWANNEPHA*²²⁸

Property grabbing and forced eviction have each emerged as two of the main challenges faced by women in Swaziland with respect to inheritance rights. The term “property grabbing” refers to the forcible taking of property, often accompanied by compelled eviction, usually after the death of a spouse. The property taken includes cattle, household goods, personal possessions, money, and most importantly, one’s own home. These practices directly contravene many of the human rights promised to women in both the Constitution of Swaziland and the international human rights treaties to which Swaziland is a party.

A. Endemic Property Grabbing and Forced Eviction Render Widows Destitute and Homeless

Widows are particularly vulnerable to victimization in the forms of property grabbing and forced eviction for a variety of factors. To begin, most Swazi women live on a marital homestead, which is land occupied by their husband’s family. For that reason, in-laws, who are commonly identified as the biggest threat in this area, have easy access to the property of their deceased family members.²²⁹ Due to poverty, and distortions of the Swazi law and custom, in-laws also often believe they have a valid claim to that property. Additionally, as discussed above, most Swazi women are expected to partake in mourning rituals, which not only identify them as widows but also restrict their movement. This renders many women defenseless to invasions of their property. Further, the prevalence of HIV/AIDS and poor socioeconomic conditions largely contributes to struggles over estates and inheritances. Moreover, difficulty with police enforcement has made stemming the tide of property grabbing difficult, and prevention nearly impossible. As a result, the phenomenon is widespread. A statement by Celiwe Seyama, a UNICEF em-

227. CEDAW, *supra* note 3, art. 11(1).

228. Interview with Widow/NGO employee, in Mbabane, Swaziland (March 9, 2007).

229. WOMEN AND LAW IN SOUTHERN AFRICA RESEARCH AND EDUCATIONAL TRUST, INHERITANCE IN SWAZILAND: LAW AND PRACTICE 88 (1994).

ployee, is illustrative of the current attitude toward these acts. When discussing the increased numbers of women being disinherited after men die, she said, "There's nothing you can do about it...it's becoming the norm."²³⁰

- i. Exploitative practices subject widows to property grabbing, infringing on their rights to equality, property, and dignity.

The rights to equality, property, and dignity, enshrined in Swaziland's Constitution, are frequently disregarded by common practices embedded in the country's culture.²³¹ As a result of certain traditional practices, widows and their children are consistently placed in vulnerable situations where they face the threat of losing their personal belongings, their homes, and any chance of a future. These challenges to their security and well-being are rarely imposed on male counterparts who have lost a spouse. Therefore, the rights granted by the Parliament of Swaziland in their new Constitution, as well as the ones agreed to in international treaties, are violated consistently by acceptance of current practices.

Traditional practices and expectations regarding marriage make the threat of property grabbing pervasive throughout Swaziland. Entrenched in Swazi culture is the practice that when a woman marries a Swazi man, she will leave her parental home for his.²³² However, women are never fully accepted as members of their new marital home and are frequently treated as outsiders.²³³ Therefore, when the link to the marital homestead is no longer present after the death of a husband, the in-laws often feel entitled to the property on their homestead and take it. When asked how his parents would have treated his wife should he die first, one Swazi widower replied that they would have "thought everything should belong to [my family], and not only my wife. Because what I have seen mostly is that people are greedy. And knowing them, they would have done this thing."²³⁴

Under Swazi law and custom, although a woman is unable to inherit property, she is entitled to remain in her marital home after the death of a spouse. The same widower agreed that although Swazi law and custom provides this protection from eviction, people are actively disregarding those provisions of the custom.²³⁵ In fact, it has been found that widespread manipulation of the system prevents women from enjoying those rights of protection.²³⁶ This practice is particularly destructive to women who are forced from their homes, because they may have no where else

230. Interview with Celiwe Seyama, UNICEF Employee, in Mbabane, Swaziland (March 6, 2007).

231. SWAZ. CONST. 2005 sec. 20(1) ("All persons are equal before and under the law..."); SWAZ. CONST. 2005 sec. 19(2) ("A person shall not be compulsorily deprived of property or any interest in or right over property..."); SWAZ. CONST. 2005 sec. 34(1) ("a surviving spouse is entitled to a reasonable provision out of the estate of the other spouse..."); SWAZ. CONST. 2005 sec. 18(1) ("The dignity of every person is inviolable.").

232. WOMEN AND LAW IN SOUTHERN AFRICA RESEARCH TRUST, FAMILY IN TRANSITION: THE EXPERIENCE OF SWAZILAND 96 (1998) [hereinafter FAMILY IN TRANSITION].

233. *Id.*

234. Interview with Widower #1, *supra* note 68.

235. *Id.*

236. FAMILY IN TRANSITION, *supra* note 232, at 188.

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to turn. Since the parents of most women are not expecting to have to take care of them after marriage, they could be left impoverished and destitute. Thabsile Langa, Senior Parliamentary Counsel in the Attorney General's Office has said: "People are abusing the system. When you apply Swazi law and custom the heir is supposed to take care of the family. He assumes responsibility as well. He has to look after women and children. Surely [property grabbing] is a crime unless he will step into the shoes of the husband."²³⁷

Another factor which increases the occurrences of property grabbing is the mourning rituals performed by widows. The confinement of widows discussed above, which can last for up to 30 days after the death of a spouse, is particularly injurious in terms of increasing women's vulnerability to having property taken. This point was illustrated by Senator Magagula, who stated:

You'll find that if your husband dies, you'll have to follow the mourning period and...you sit inside your house for a month. You don't go out to do your normal duties. That is the critical time. The property grabbing comes in because a sister will come and take this, a mother will come in and take this, and a brother will come in. So women have no protection. That is where it came about because they need to be protected while they're still observing custom.²³⁸

Because the mourning ritual is so ingrained in Swazi culture, many women who fear that their property and homes will be taken during this period nevertheless engage in the practice.

2. Current socioeconomic conditions have perpetuated property grabbing and forced evictions, stripping women of their means to survive.

Pervasive poverty levels and increasing mortality rates due to HIV/AIDS are major contributing factors to property rights violations such as property grabbing. These conditions put a massive strain on individuals who lack the resources to care for their families and to provide healthcare for loved ones who are sick. The increase in AIDS related deaths among young adults in Swaziland has caused large numbers of children to be left parentless. This requires other family members to maintain those children. Additionally, the familial structure in Swaziland is such that extended family members will often live together in compounds, accepting responsibility for one another.

The effect of the current circumstances, compounded by poverty and increased mortality rates among the young, was crystallized in an interview with Sthembile Tsabedze, a WLSA Client whose aunt had been the victim of property grabbing. When asked whether she feared a similar thing happening to her, Ms. Tsabedze replied: "Yes, I'm worried because my husband owns livestock, and if he should pass his parents would take property from me to pay [for] school for [the] children. My in-laws have other children around the homestead to take care of, so they

237. Interview with Thabsile Langa, Senior Parliamentary Counsel in the Attorney General's Office, in Ewulzini, Swaziland (March 7, 2005).

238. Interview with Winnie Magagula, *supra* note 70 (emphasis added).

would use the livestock to care for other children.”²³⁹ This fear is pervasive among many Swazis whose families are overburdened with mouths to feed and children to educate. Therefore, when a family’s son dies and leaves behind a wife seen as an “outsider,” she is particularly at risk for forced eviction and property grabbing.

Another area of concern arising out of the HIV/AIDS crisis and high rates of poverty is that of child-headed households. When children are left parentless, they are particularly at risk for property deprivation on the part of both relatives and other individuals posing as friendly parties. Senator Magalula has stated that in “children-headed families, what the trend is now, you’ll find that unscrupulous people out there would grab the land from the children.”²⁴⁰ For that reason, it is particularly important to find a method of controlling property grabbing so that it will not perpetuate the increasing levels of poverty in Swaziland.

Many of the practices that are part of traditional Swazi culture have been changed in such a way so as to violate women’s constitutional and international human rights. In addition to the fundamental right to equality “under the law in all spheres of political, economic, social and cultural life,” as well as the freedom from discrimination on the grounds of gender, guaranteed to women in section 20 of the Constitution, section 28 also gives women the right to equal treatment with men.²⁴¹ When a woman in a customary marriage is forced to leave her marital home after the death of her husband, she is not being treated equally because this scenario does not arise for men. It is always the woman who leaves the safety of her parent’s homestead to live as an outsider among her husband’s family. A similar argument applies to the mourning ritual which opens women up to victimization through property grabbing. Men, however, are never confined in the same way.

These constitutional rights are confirmed and elaborated on by international treaties to which Swaziland is a party without reservation. Most notably, Article 5(a) of CEDAW states that “State Parties shall take all appropriate measures: To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes . . .”²⁴² Further, in reference to article 15 of CEDAW the Committee states specifically in regards to custom that “[w]hen countries limit a women’s legal capacity by their laws, or permit individuals or institutions to do the same, they are denying women their rights to be equal with men and restricting women’s ability to provide for themselves and their dependents.”²⁴³ The traditional practices described above put women in a subjugated position, thereby stripping them of the ability to provide for themselves and their children, leaving many destitute. CEDAW and other in-

239. Interviews with Abigail Fakudze and Sthembile Tsabedze, married women, in Mbabane, Swaziland (March 7, 2007).

240. Interview with Winnie Magagula, *supra* note 70.

241. SWAZ. CONST. 2005 ss. 20, 28.

242. CEDAW, *supra* note 3, art. 5(a).

243. CEDAW, *supra* note 3, art. 15 (“States Parties shall accord to women equality with men before the law.”); CEDAW General Rec. 21, *supra* note 64, art. 15, para. 8.

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ternational bodies explicitly restrict circumstances that lead to that result.²⁴⁴ Therefore, as a state party to these bodies, Swaziland is in violation of their spirit and purpose by allowing these practices to continue.

B. Civil and Criminal Penalties Can Deter Property Grabbing

Parliament must enact new statutes in support of the Constitution which would define property grabbing and forced evictions as offenses which contravene the law. The laws presently on the books in Swaziland are insufficient to provide women with the relief that they need in this area. There is currently no provision under which they may claim deprivation of inheritance or contest an eviction, and little protection is available from the violence often associated with these acts. Further, since both the Constitution²⁴⁵ and international treaties²⁴⁶ to which Swaziland is a state party call for enactment of the laws necessary to ensure the rights they provide, Parliament must act now.

1. New civil laws against the deprivation of inheritance and forced evictions will ensure widows' rights.

Women in Swaziland should be free from unlawful deprivation of property, and forcible evictions from their homes. Article 16(1)(h) of CEDAW requires "States parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure...the same rights for both spouses in respect to ownership, acquisition...

244. See ICCPR, *supra* note 3, art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."); ICESCR, *supra* note 3, art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant."); African Charter, *supra* note 3, art. 3 ("Every individual shall be equal before the law. 2. Every individual shall be entitled to equal protection of the law.").

245. SWAZ. CONST. 2005 sec. 34(2) ("Parliament shall, as soon as practicable after the commencement of this Constitution, enact legislation regulating the property rights of spouses..."); SWAZ. CONST. 2005 sec. 29(7)(b) ("Parliament shall enact laws necessary to ensure that...a child is entitled to reasonable provision out of the estate of its parents . . .").

246. CEDAW states that countries who are state parties must "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women." CEDAW, *supra* note 3, art. 2(f). See also ICCPR, *supra* note 3, art. 2(2) ("[E]ach State Party to the present Covenant undertakes to take the necessary steps...to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant."); CRC, *supra* note 122, art. 4 ("State Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention); African Charter, *supra* note 3, art. 1 ("[P]arties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."); Protocol to the African Charter on Human's and People's Rights on the Rights of Women in Africa, 2nd Ordinary Sess., Assembly of the Union, *adopted* July 11, 2003, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), art. 20(a), *entered into force* Nov. 25, 2005, *available at* http://www.achpr.org/english/_info/women_en.html [hereinafter Protocol to African Charter] ("States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions: that widows are not subject to inhuman, humiliating or degrading treatment....").

[and] enjoyment of property... .”²⁴⁷ In regards to that section the CEDAW Committee stated, “[o]ften inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.”²⁴⁸ Further, according the Convention on Economic, Social and Cultural Rights General Comment 16, when you combine ICESCR article 3, calling for equal rights of men and women, with article 10, which provides for protection of the family, States parties are required to “ensure that women have equal rights to...inheritance upon their husband’s death.”²⁴⁹ These provisions are in harmony with Swaziland’s Constitution. Lastly, in accord with Swazi law and custom, article 21 of the African Protocol on the Rights of Women explicitly states that a “widow shall have the right to continue to live in the matrimonial house.”²⁵⁰

In order to bring about an end to property grabbing and forced evictions, commission of those acts should be deemed a civil offense under Swazi law, and a violation of international law commitments. A provision must be added to the Intestate Succession Act providing victims with a means to achieve civil remedies for rights violated. That provision would state that no person will be able to deprive a surviving spouse or child of the use of any property to which they are entitled under the law. In addition, the statute should also provide that no person will be able to eject a surviving spouse or child from the matrimonial home following the death of a spouse or parent. If a surviving spouse or child is the victim of such offenses, they will have the right to bring a case for civil remedies, including monetary compensation, punitive damages, and injunctions to force violators to stop their actions, to court. These provisions are based on the section 17 of Ghana’s Amended Intestate Succession Act, which provides similar protections and imposes both fines and imprisonment to offenders.²⁵¹ The memorandum to Ghana’s 1985 statute states that the “idea is to protect the often relatively defenseless spouse and children, at the time when they are probably in mourning, from the harassment of those who, claiming entitlement to the property, use self-help against them.”²⁵² Further, in 1991 the statute was amended to include punitive damages in that the court or tribunal may “make such other orders as it considers necessary for the re-instatement of or reimbursement to the person thus ejected or deprived.”²⁵³ All of these civil remedies must be made available to widows and children in Swaziland as well.

2. Legislation must criminalize property grabbing, punish offenders, and protect women from related violence.

247. CEDAW, *supra* note 3, art. 16(i)(h).

248. CEDAW General Rec. 21, *supra* note 64, para. 35. See also HRC General Comment 28, *supra* note 30, para. 26 (“Women should...have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.”).

249. CESCR General Comment 16, *supra* note 126, para. 27.

250. Protocol to African Charter, *supra* note 246, art. 21.

251. Intestate Succession Law of 1985 s. 17 (Ghana).

252. Intestate Succession Law of 1985 Memorandum (Ghana).

253. Intestate Succession (Amended) Law of 1991 s. 17 (Ghana).

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In order to eradicate the practice of property grabbing, Swaziland must criminalize it and attach penalties for those convicted. A new statute, entitled the Inheritance Crimes Act should be enacted which would provide, among other things, for the levying of fines and imprisonment to property grabbing offenders. This Act would provide that any person who committed the offences described above, namely deprivation of property and forced eviction, would be subject to criminal penalties, thus providing a deterrent to those contemplating the practice.

The Inheritance Crimes Act must clearly state that unlawful deprivation of inheritance or forcible eviction will violate the law. As was previously mentioned, families will frequently not recognize a women's right to inherit under customary law. They will attribute all property to the husband, and when he passes away, determine that it belongs to their family. Therefore, as most Swazi men die intestate, strengthening of the intestate succession laws against deprivation of inheritance with support of a criminal act is essential. Additionally, under Swazi law and custom, a woman is entitled to remain in her marital home after the death of her husband. Therefore, forced evictions should be included in the law so that women without a legally recognized right to inherit may still have their right to remain in their home codified.

Further bolstering this proposal is the fact that criminalizing property grabbing has wide support in Swaziland. The majority of interviewees spoken with during the fact-finding trip to Swaziland—ranging from academics, to law makers, to rural women - support a statute criminalizing property grabbing. Member of Parliament, Vulindlela David Msibi, stated that those who deprive a woman should be punished for “[m]any years. It’s very serious depriving people of their rights. Women lose their homes. Losing a home is very serious—it’s your life.”²⁵⁴ Thabisile Langa characterized the problem as one of greed and abuse.²⁵⁵ She stated that “[t]he police would probably do something but...people don’t want to go to the police.”²⁵⁶ However, regardless of fear over going to the police, “[p]eople want to see their things returned and the perpetrators go to jail.”²⁵⁷ Abigail Fakudze, whose sister was victimized at the hands of her in-laws, has seen the damage caused by property grabbing first hand.²⁵⁸ She stated that “[p]eople need to be punished and know what they are doing is not okay because people think it is easy to get property from a widow.”²⁵⁹ This sentiment was common among those who were seeking help for property grabbing and related incidents.

A similar scenario existed in the southern African country of Zambia whose Intestate Succession Law can provide valuable guidance for Swaziland’s Parlia-

254. Interview with Vulindlela David Msibi, Member of Parliament, in Mbabane, Swaziland (March 7, 2005).

255. Interview with Thabisile Langa, Senior Parliamentary Council in the Attorney General’s Office, in Ewulzini, Swaziland (March 7, 2005).

256. *Id.*

257. *Id.*

258. Interviews with Abigail Fakudze and Sthembile Tsabedze, married women, in Mbabane, Swaziland (March 7, 2007).

259. *Id.*

ment in terms of structuring penalties for property grabbing and improper eviction violations. As Human Rights Watch reported “[their]... 1989 Intestate Succession Act, which covers those who die without leaving a will, seeks to protect the dependants of the deceased; it is designed to provide for the surviving spouse, children, and other dependants and to protect against the unlawful appropriation of property by relatives.”²⁶⁰ In the section entitled “Offenses against an entitled person,” the Act provides that anyone who “(a) unlawfully deprives any person of the use of any part of the property of the deceased to which that person is entitled under this Act; or any property shared with the deceased to which this Act applies; or (b) otherwise unlawfully interferes with the use by any person of any property referred to in paragraph (a); shall be guilty of an offence and liable on conviction to a fine not exceeding seven hundred and fifty penalty units or imprisonment not exceeding two years, or both.”²⁶¹

C. The Police Refuse to Protect Widows and Orphans from Abuse and Dispossession

Non-involvement by police in issues relating to the family, specifically instances of property grabbing, has become a major obstacle to ending the practice. According to Maxine Langwenya, a professor of constitutional and criminal law at the University of Swaziland, “[t]he police won’t get involved. They say it’s a private matter.”²⁶² Further, there is no recourse for removal from Swazi Nation Land, as is often the situation with forced evictions.²⁶³ Police reluctance extends, in her opinion, to the most extreme scenarios. For example, “[e]ven with a civil order [in-laws would] still go and burn a women’s house.”²⁶⁴ Confirming that sentiment, Motsa Simangele, a female law student and police officer, stated that the “problem lies with training at Police College. Most officers lack training of legal knowledge of the law, especially [in] civil matters.”²⁶⁵ Without proper training, and the awareness that these particular acts violate women’s human rights, police officers continuously stand by and allow the violations to continue.

1. Police inaction compounds property grabbing and violence against women and children.

Property grabbing and extreme violence often go hand in hand. This reality is epitomized by the story of Qubile Simelane, the director of a Swazi NGO. Ms. Simelane has scars from a machete used in an attack by a man her in-laws hired to hurt her.²⁶⁶ On the same day the Master told Ms. Simelane’s in-laws that she may

260. *Suffering in Silence: The Links between Human Rights Abuses and HIV Transmission to Girls in Zambia*, <http://www.hrw.org/reports/2003/zambia/zambiar202-06.htm> (Last visited on April 2, 2007).

261. Intestate Succession Act of 1995 (Zambia); *see also* Intestate Succession (Amended) Act of 1991 (Ghana), s. 17.

262. Interview with Maxine Langwenya, Professor, in Mbabane, Swaziland (March 6, 2007).

263. *Id.*

264. *Id.*

265. Interview with Motsa Simangele, *supra* note 133.

266. Interview with Qubile Simelane, NGO Director, in Ezulwini, Swaziland (March 6, 2007).

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stay in her marital home, she came back to find a man she suspects they hired in her house.²⁶⁷ “I think he thought we were already sleeping,” she said.²⁶⁸ “I came home late, and I found him. He saw the car lights and he ran away. Then he ran in front of me with a butcher knife.”²⁶⁹ She believes her in-laws were responsible for the attack “because if it was just a thug, wanting just some property in the house, he would have taken them.”²⁷⁰

In another instance, Fikile Emily Maziya, a WLSA client whose in-laws ejected her from her home following her husband’s death, was beaten by her mother and sister-in-law. She said, “Now I have a problem with hearing. I went to the hospital after they beat me.”²⁷¹ When asked whether she reported the matter to the police, Ms. Maziya replied that she did.²⁷² The police took her away from the home because it was not safe, but they made no attempts to retrieve her property.²⁷³ These instances of violence even extend as far as death threats by family members to widows who refuse to leave or hand over property. One Swazi woman reported that her in-laws came and demanded money from her to pay for her husband’s funeral, claiming if she didn’t pay, they would kill her. She stated, “I decided to leave [after the mourning period] because I feared for my life, and one of the aunts-in-law told me to leave because they arranged with some people to come and kill me.”²⁷⁴ The high correlation between violence against women and property grabbing is further evidence that intervention on the part of law enforcement is sorely needed.

Often these instances are never even reported to the police. The reason for that is both because of a lack of enforcement on the part of police, as well as reluctance on the part of victims to implicate their family members. One widow interviewed specifically said that she did not report her harassment to the police because they “are reluctant to interfere in matters of family disputes.”²⁷⁵ When asked whether or not she has seen cases of widow abuse, Mpumi Lukhele, a deputy public prosecutor, responded:

I will say yes and no. Why I say yes...because I know these cases do happen. And no, because I have never prosecuted one. I have reason to believe that these cases do happen and might not be reported to the police. Because for instance it means taking my husband’s brother to court and I still want to maintain good relations even after the death...because this house was built within the homestead of my in-laws and what will happen [to me]?²⁷⁶

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. Interview with Fikile Emily Maziya, widow, in Mbabane, Swaziland (March 5, 2007).

272. *Id.*

273. *Id.*

274. Interview with Widow #2, *supra* note 195.

275. *Id.*

276. Interview with Mpumi Lukhele, Deputy Public Prosecutor, in Mbabane, Swaziland (March 7,

A victimized widow may find herself unable to report maltreatment at the hands of her in-laws if she still depends on them. One married woman stated that “[t]he majority of women in Swaziland, they stay with their in-laws. You build a house, you advance [in] life, [and] you have property....but within the compound of the in-laws.”²⁷⁷ Additionally, because many wives come from different areas to live on their husband’s family’s homestead, they fear that police will know the husband’s family better than they know the widow, and not provide assistance. When discussing an incident involving her sister, Abigail Fakudze, a WLSA client, stated that the Master of the High Court’s office would be a preferable place to report in-laws who were trying to steal property because the “police know each other and the family. The wives are from the side and are just [there] for marriage.”²⁷⁸ Without faith in the impartiality of law enforcement officials, instances of violence and property grabbing will not be reported. Further, the occurrences will continue to increase with no fear of repercussions on the part of perpetrators.

2. New laws banning property grabbing and forced evictions must include public legal literacy provisions and mandate police and judicial enforcement

Education is an important step in the effective prevention of property grabbing. Police officers need a greater sense of awareness in order to successfully involve themselves in areas of family law. Currently, police officers are wary of involvement in situations that had been traditionally handled privately among families.²⁷⁹ However, if academy training were to include courses in family law which would target the new laws proposed, and also the protection suggested for women once they are evicted, and police were instructed to treat these cases just as they would any other criminal issue, then positive change can occur. The Inheritance Crimes Act must include provisions for this education as well as for sensitivity training towards women and children. Completion of courses in these areas and on current updates in the law every five years should be mandatory for all police officers on active duty. Failure to complete the courses will result in discipline under the Police Regulations. Support for this idea can be found in specific recommendations made by the Committee on the Elimination of Discrimination against Women: “State parties should ensure that laws against family violence and abuse...and other gender-based violence give adequate protection to all women.... Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention...”²⁸⁰

2007).

277. Interview with Sicakele Hlatshawayo, NGO director, in Mbabane, Swaziland (March 9, 2007).

278. Interviews with Abigail Fakudze and Sthembile Tsabedze, Married Women, in Mbabane, Swaziland (March 7, 2007).

279. Interview with Maxine Langwenya, Professor, in Mbabane, Swaziland (March 6, 2007).

280. Convention on the Elimination of All Forms of Discrimination against Women, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, *General Recommendation 19, Violence Against Women* (11th Sess., 1992), U.N. Doc. HRI/GEN/1/Rev.1 (1992), para. 24 available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19> (last visited May 14, 2007) [hereinafter *CEDAW General Rec. 19*].

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A major factor in the public's reluctance to use the police would be the general public attitude of skepticism toward law enforcement. A similar situation occurred in Zambia, even after statutory reforms provided women with a legal recourse to property grabbing. While the language of that Act was hailed as "wonderful breakthrough for women's rights," effects of the Act haven't been quite so positive.²⁸¹ According to the Zambian chapter of WLSA which conducted a report in the area:

The law is weakened first and foremost by the lack of conviction among women themselves that they have a legal right to their deceased husband's property, and secondly, by their fear of reprisals should they invoke the law. Furthermore, even the lawyers and the law enforcement agencies such as the police and local courts may have failed to give the new law the respect it deserves and encourage its use.²⁸²

Another problem with the law in Zambia is that the fines implemented were too low, rendering them ineffective.²⁸³ However, training of local court officials has slightly decreased incidences of property grabbing in the region.²⁸⁴

In order to change the perception that police officers are unwilling to help women and children who are being victimized in the family setting, a public education campaign must be employed. Attitudes of the general public must change, along with those of the police department. When asked whether more people would go to the police if they knew that they could help, Abigail Fakudze replied: "Yes, people now are ignorant. The information does not reach us outside. Yes, people need to be educated because they don't know."²⁸⁵ If the police become well equipped to help women in need, but women remain distrustful of them, no advances in this area can be made.

3. Increased police involvement will alleviate property-related violence against women.

Because violence against women so often accompanies property grabbing and forced evictions, police officers must be encouraged to use all possible means of enforcement in order to end these practices. Under article 4 of the Declaration on the Elimination of Violence Against Women:

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to

281. Inheritance in Zambia: Law and Practice, op. cit., p., Cited in *Suffering in Silence: The Links between Human Rights Abuses and HIV Transmission to Girls in Zambia*, <http://www.hrw.org/reports/2003/zambia/zambia1202-06.htm> (Last visited on April 2, 2007); *Suffering in Silence: The Links between Human Rights Abuses and HIV Transmission to Girls in Zambia*, <http://www.hrw.org/reports/2003/zambia/zambia1202-06.htm> (Last visited on April 2, 2007).

282. Inheritance in Zambia: Law and Practice, op. cit., p., Cited in *Suffering in Silence: The Links between Human Rights Abuses and HIV Transmission to Girls in Zambia*, <http://www.hrw.org/reports/2003/zambia/zambia1202-06.htm> (Last visited on April 2, 2007).

283. *Crime and Society: A Comparative Criminology Tour of the World*, <http://www-rohan.sdsu.edu/faculty/rwinslow/africa/zambia.html> (Last visited on April 2, 2007).

284. *Id.*

285. Interviews with Abigail Fakudze and Sthembile Tsabedze, *supra* note 278.

its elimination. States should pursue all appropriate means and without delay a policy of eliminating violence against women, and to this end, should . . . develop penal, civil . . . and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence; women who are subjected to violence should be provided with access to mechanisms of justice and, as provided for by national legislation, to just and effective remedies for the harm that they suffered; States should also inform women of their rights in seeking redress through such mechanisms....²⁸⁶

Women need to be able to obtain both temporary restraining orders and permanent injunctions against those who wish to cause them harm, and police officers must enforce those orders. Law enforcement should perform two functions. They must ensure that women and children in danger have a mechanism by which they can remain safe, and they must facilitate a system by which possessions lost through violence can be reclaimed. Restraining orders are an important means of achieving both of those goals.

Women are frequently driven out of their homes by in-laws who threaten violence. In those cases, an order could be used to get back her belongings. When asked how to help these women regain property, police officer Motsa Simangele stated that what is needed is “a court order to the effect that she must get some property, and police officers [must] provide security and get [her] everything listed in the court order. A woman often leaves just with her clothing...and [has] to leave the property in the homestead. She needs to get everything. It must be stated in the court order that they have to ensure she gets everything”²⁸⁷ Under the proposed Administration of Estates Act, an estate must be inventoried before it may be administered.²⁸⁸ The form for this inventory is contained in Schedule C of that proposed act.²⁸⁹ As a means to combat property grabbing, women should have the opportunity to inventory their household belongings, and then file that list with the local police department. Therefore, should a property grabbing scenario arise, a woman would have the means to show what items are missing so that they may be included in the order, and returned.²⁹⁰

Many of these situations are compounded by coercion of widows to turn over property using threats of violence. Ms. Simangele also stated that some women opt to leave their homes because otherwise they are faced with the same violence

286. Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, 48 U.N. GAOR, Supp. (no. 49) at 217, U.N. Doc. A/48/49 (Dec. 20, 1993), art. 4. *See also* CEDAW General Recommendation 19, *supra* note 281, at para. 24 (“[T]he Committee on the Elimination of Discrimination against Women recommends: States parties should take appropriate and effective measures to overcome all forms of gender-based violence.... Effective complaints procedures and remedies, including compensation, should be provided....”).

287. Interview with Motsa Simangele, *supra* note 133.

288. Proposed Bill, Administration of Estates (Amendment) Act (amending Administration of Estates Act 1908 (Swaz.)), *supra* note 14.

289. *See* Proposed Bill, Administration of Estates (Amendment) Act (schedule C: Inventory Form For Remainder Of Property In An Estate).

290. This inventory could be filed with and attached to a petition for a temporary restraining order and injunction, as discussed below.

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over and over again.²⁹¹ Another woman who was threatened by her in-laws while still in mourning stated: “I gave them the money because at the end of the day, I really feared for my life and I really thought they wanted to kill me... I think they would have killed me.”²⁹² Later, she added: “I decided to leave [after the mourning period] because...one of the aunts-in-law told me...they arranged with some people to come and kill me.”²⁹³

Swaziland must implement measures to stop imminent threats against women. Legislation must be adopted which would provide that a person who suffers the type of persecution described above may seek a temporary restraining order and an injunction prohibiting harassment.²⁹⁴ Once a petition is filed for an injunction with either a magistrate or the High Court, the petitioner will be able to obtain a temporary restraining order. Within fifteen days a hearing will be held on the temporary restraining order, and an injunction may be issued.²⁹⁵ Further, offenders found in contempt of any temporary restraining order or injunction may be punished by a fine, imprisonment, or both. In order for this provision to be most successful, it is necessary for police officers to be able to enforce these orders. Therefore, once an order is issued, the protected person should be instructed to call the police at the first sign that the order may be violated. If the police are called to assist in such a situation, a record of the incident would be filed by the police officers present and may serve as evidence to show contempt of the order.

In sum, property grabbing has become a widespread problem throughout much of southern Africa for a variety of reasons. This phenomenon is so pervasive that one widow whose property was taken by her in-laws said that her own family told her to “forget about it. It’s not [your] property.”²⁹⁶ Because instances of this violation are so commonplace, eradicating the behavior is difficult. This is particularly true because its prevalence is due in part to cultural practices and societal conditions, which do not recognize these acts as crimes, and in part to a systematic refusal on the part of law enforcement to deal with the issue. The practice of property grabbing and forced evictions clearly violates both Swaziland’s Constitution and its obligations under the international law treaties to which it is a party. Therefore, it is essential that the government of Swaziland recognize these human rights violations and implement reform.

291. Interview with Mosta Simangele, *supra* note 133.

292. Interview with Widow #2, *supra* note 195.

293. *Id.*

294. Harassment for this purpose will be defined as unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, harasses, or pressures a person. Based on California’s code which provides for temporary restraining orders and permanent injunctions for “harassment.” CAL. CODE CIV. PROC. § 527.6 (West 2002).

295. *Id.*

296. Interview with Widow/NGO employee, *supra* note 228.

VI. TO ENSURE LEGAL REFRESS FOR WIDOWS, NGO LAWYERS MUST BE ABLE TO REPRESENT CLIENTS IN COURT AND LEGAL AID CLINICS MUST BE ESTABLISHED

Many poor widows lack the financial means to hire lawyers to pursue their claims in court and are unable to effectively represent themselves. Because Swaziland currently lacks any substantial legal aid system, these widows are stripped of their right to an effective remedy. Swaziland, to uphold these widows' rights, must provide widows with effective means by which to pursue their claims, by both 1) allowing lawyers working for Non-Governmental Organizations (NGOs), such as human rights advocacy and service provision groups, to represent clients in court; and 2) establishing legal aid clinics for pro bono representation by supervised law students.

A. Widows Lack Access to Effective Legal Remedy

Swaziland, to uphold its international obligations, must provide widows with an effective remedy when their rights have been violated. CEDAW obligates States Parties "to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women from any act of discrimination."²⁹⁷ Additionally, the Human Rights Committee emphasizes that States Parties to the ICCPR must "ensure that individuals...have accessible and effective remedies to vindicate those rights [laid out in the ICCPR]....The Committee attaches importance to States Parties establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law."²⁹⁸ Because many widows in Swaziland are unable to afford legal assistance and cannot adequately represent themselves, they are stripped of any means by which to pursue their claims and, therefore, cannot obtain an effective remedy. Under these international obligations, Swaziland must ensure that poor widows have legal representation to protect them against acts of discrimination.

B. NGO Lawyers Must be Allowed to Represent Their Clients in Court

Swaziland's current lack of legal aid could be easily remedied by allowing NGO lawyers to represent their clients in court. NGO lawyers interact daily with many

297. CEDAW, *supra* note 3, art. 2(c).

298. *HRC General Comment 31*, *supra* note 164, at para. 15; *see also* CEDAW, *supra* note X, art. 2(e) (obligating States Parties "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise"); ICCPR art. 2(2) (obligating state parties to "to take the necessary steps... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant"); ICCPR, *supra* note 3, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...sex"); African Charter, *supra* note 3, art. 1 (obligating States Parties to "recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them"); African Charter, *supra* note 3, art. 18(3) (obligating State Parties to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions").

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poor widows who cannot afford representation. NGO lawyers assist their clients in multiple ways, but remain powerless when legal action is needed. As a result, many poor widows return home, without the financial means to pursue their claims, even when their most fundamental rights have been violated.

Swaziland can protect these poor widows by amending the Legal Practitioners Act to allow NGO lawyers to represent their clients in court. While some individuals may claim that allowing NGO lawyers to practice in court would either detract business from other lawyers or create regulation concerns, these concerns can be addressed. First, NGO lawyers would most likely represent poor widows who otherwise could not afford a lawyer; thus providing representation that otherwise would not have been provided by an actual lawyer. Second, the Swazi Law Society, similar to how it regulates regular lawyers, could also regulate NGO lawyers. These concerns, hence, are minimal when compared to the substantial service NGO lawyers would provide to widows who would normally never pursue their claims.

C. Law School Legal Aid Clinics will Expand Access to Legal Justice

The University of Swaziland's website explicitly states an intention to "establish legal aid clinics through which staff and students will render essential legal assistance to indigent clients."²⁹⁹ To help achieve this objective, Parliament must pass legislation that allows law students to practice in court under the supervision of a qualified attorney and permits law graduates to serve their articles in a law school clinic. By doing this, Parliament would enable law school clinics to provide much-needed services to poor widows and also emphasize to students the importance of providing legal aid. WLSA Director Dlamini noted the rarity in lawyers of "doing any kind of social responsibility-related contribution to assisting people who may not be able to afford [it]."³⁰⁰ By beginning at the student level, the government could help address Director Dlamini's concern and instill in students a passion for legal aid that could continue throughout their careers.

Many other African nations have realized the need for law school legal aid clinics. South Africa, for example, has established legal aid clinics in most of its 21 law schools.³⁰¹ The University of Witwatersrand Law Clinic, established in 1972, is one of the largest law school clinics in South Africa.³⁰² In 2000, the University of Witwatersrand's Law Clinic interviewed over 9,000 people and opened 938 new files.³⁰³ The University of Witwatersrand, to emphasize the importance of legal aid clinics, also created a course in "Practical Legal Studies" required for all final

299. University of Swaziland, Faculty of Social Science, Department of Law, <http://www.uniswa.sz/academics/socsci/law/> (last visited May 15, 2007).

300. Interview with Lomcebo Dlamini, *supra* note 166.

301. David McQuoid-Mason, Public Interest Law Institute, *Legal Aid Services and Human Rights in South Africa*, <http://www.pili.org/en/content/view/155/26/>.

302. University of Witwatersrand Law School, Wits Law Clinic, <http://www.law.wits.ac.za/clinic/clinicindex.htm> (last visited May 15, 2007).

303. *Id.*

year law students.³⁰⁴ Additionally, in 1993, South Africa amended its Attorney's Act to help support these clinics by allowing candidate attorneys to serve articles of clerkship at an accredited law clinic.³⁰⁵ As such, law graduates in South Africa can choose to pursue their articles in a law clinic.³⁰⁶ In 1994, the South African Legal Aid Board established law clinic partnerships with University of Witwatersrand³⁰⁷ and the Board employs one qualified lawyer as a supervisor and up to 10 articulated law clerks at each clinic.³⁰⁸ All in all, South African law clinics handle 25,000 cases a year.³⁰⁹

Many African nations, in addition to South Africa, have realized the need to establish law school clinics to help with legal aid. In June 2003, faculty and lawyers from twenty countries attended the All-Africa Colloquium on Clinical Legal Education in Durban, South Africa.³¹⁰ Representatives from Benin, Burkina Faso, Senegal, and other African nations discussed plans to develop law school clinics across Africa, establish training courses for clinical professors, and attend week-long study visits to South Africa's law schools to learn more about their clinics.³¹¹ Law school clinics currently exist in Kenya, Lesotho, Malawi, Tanzania, Uganda, Zambia, and Zimbabwe.³¹² Clinics are also being established in Ethiopia, Mozambique, and Sierra Leone.³¹³ Zimbabwe allows law students, with the permission of the Attorney General, to represent clients in court.³¹⁴

With the advent of the HIV/AIDS crisis, Swaziland needs a legal aid service now more than ever. Many Swazi widows seek advice, but are unable to afford it and are forced to either blindly maneuver the system or remit their claims. By allowing NGO lawyers to represent clients in court and establishing law school legal aid clinics where law students can practice in court and law graduates can serve their articles, Swaziland will effectively instill the importance of legal aid in a whole new generation of lawyers and ensure representation of many widows who otherwise feel helpless.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. David McQuoid-Mason, *Legal Aid Services and Human Rights in South Africa*, available at <http://www.pili.org/en/content/view/155/26/>.

309. *Id.*

310. Justice Initiative, *Combining Learning and Legal Aid: Clinics in Africa, Report on the First All-Africa Colloquium on Clinical Legal Education, 23-28 June 2003*, October 2003, at 2, available at <http://www.justiceinitiative.org/activities/lcd/cle/durban2003>.

311. *Id.*

312. *Id.* at 4.

313. *Id.*

314. *Id.* at 8.

VII. INCREASED LEGAL LITERACY ABOUT WOMEN'S RIGHTS REQUIRES CONCERTED STATE-SPONSORED CAMPAIGNS

Swaziland must pursue a multi-dimensional approach to educate widows on the new Constitution, their legal rights under the proposed new legislation, and the procedures to follow when pursuing an inheritance claim. Currently, many widows in Swaziland are unaware of their rights and, thus, are left vulnerable to the mercy of the system. While NGOs are going out into the villages to teach women about the new Constitution and radio stations are reading the Constitution over the radio, these efforts need to be supplemented in numerous ways. Swazi citizens offered suggestions of how to more effectively teach Swazi people of their rights. Comfort Mabuza, the National Director of the Media Institute of Southern Africa (MISA), highlighted the importance of engaging in a more effective media strategy to enable more citizens to better understand the impact of particular constitutional provisions:

There are times when you need to use the media to simplify...to a level where our people can begin to understand, where information will be packaged in simplest language so that our people will understand what you are talking about. What are human rights to a Swaziland woman sitting under a tree taking care of her husband and children unless she understands and articulates these issues?³¹⁵

Nonhlanhla Zanele Dlamini, Gender Coordinator for the Ministry of Home Affairs, also supported a more creative approach and suggested:

Have a radio program on gender issues that would maybe have forty series. Women in the rural areas, people in the rural areas, they are very fond of the radio. We call it a radio story, it has different episodes. They would listen to it. And then maybe we would act out some of the things, go to the communities with drama, and just do the drama for the people to learn about the gender issues.³¹⁶

In order to achieve a more effective educational program, Swaziland must have a multi-pronged approach. First, Parliament should create a Ministry of Gender Affairs to help coordinate all educational efforts among NGOs, churches, and other organizations and help engage all sectors of society. Second, the legislature must provide adequate funding to educate its citizens about the new Constitution, their legal rights under the proposed new legislation, and the process to follow to secure inheritance rights. Third, the Constitution, relevant laws on women's rights, and the procedures for pursuing inheritance claims should be widely disseminated throughout the population and be translated into sisSwati. Fourth, the educational campaign should consist of skits, plays, and cultural activities to adequately teach Swazi citizens of their rights. In implementing this multi-dimensional approach, Swaziland will be one step closer to ensuring that widows have full knowledge of their legal rights, so widows can more easily pursue inheritance claims.

315. Interview with Comfort Mabuza, the National Director of the Media Institute of Southern Africa (MISA), Mbabane, Swaziland (Mar. 9, 2007).

316. Interview with Nonhlanhla Zanele Dlamini, *supra* note 149.

A. A Newly-created Ministry of Gender Affairs will Coordinate Educational Efforts about Women's Rights and Grievance Process for Inheritance Claims

Swaziland's Parliament must create a Ministry of Gender Affairs to collaborate with NGOs (including WLSA, the Department of Justice, Peace, and Reconciliation in the Council of Swaziland Churches, and Hope for Widows), churches, and other organizations in educating the public on women's rights. The Ministry of Gender Affairs should hold regular meetings with all stakeholders to discuss current educational efforts, challenges, and strategies to effectively educate the public. Additionally, by bringing all stakeholders together to discuss initiatives, Swaziland would ensure that citizens received a uniform message about the meaning of the Constitution, women's rights under the new proposed legislation, and procedures for filing inheritance claims. By centralizing the educational effort, Swaziland would help streamline efforts, save resources, and more efficiently educate the population.

Numerous African countries have recently created a separate Gender Ministry to elevate women's issues to the national stage, coordinate all stakeholders, and help educate the public on women's rights. Tunisia, in 1999, established a Ministry for Women and Family Affairs to coordinate gender-related activities, promote the status of women, and strengthen governmental collaboration with women's organizations.³¹⁷ One of its main goals was to bridge communication among stakeholders and to educate the public on women's rights in an effort to change prejudicial attitudes and customs.³¹⁸ Cameroon also fully established a Ministry of Women's Affairs that has 26 operational centers to advance women's rights.³¹⁹ As part of its mission, Cameroon's Ministry of Women's Affairs devotes substantial resources to educational programs to teach citizens of women's fundamental rights.³²⁰ Ghana, in 2001, established a Ministry of Women and Children's Affairs to collaborate with national and international agencies and educate women on their legal rights.³²¹ Kenya, in 2003, established a Ministry of Gender, Culture, Sports, and Social Services, with an objective to support and collaborate with NGOs and women's organizations to create greater awareness of women's legal rights.³²²

317. Tunisia, *Third and Fourth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women* (23rd Sess. 2000), para. 79-84, U.N. Doc. CEDAW/C/TUN/3-4 (Aug. 2, 2000), available at <http://www.un.org/womenwatch/daw/cedaw/cedaw27/tun3-4.pdf> [hereinafter *Tunisia Country Report*].

318. *Id.* at para. 82.

319. Cameroon, *Initial Reports of States Parties to the Committee on the Elimination of Discrimination Against Women* (20th Sess. 1999), page 57, U.N. Doc. CEDAW/C/CMR/1 (May 9, 1999), available at <http://www.un.org/womenwatch/daw/cedaw/cedaw23/cameroon.pdf> [hereinafter *Cameroon Country Report*].

320. *Id.* at 18.

321. Ghana, *Third, Fourth, and Fifth Periodic Reports of States Parties to the Committee on the Elimination of Discrimination Against Women* (32nd Sess. 2005), Forward, U.N. Doc. CEDAW/C/GHA/3-5 (April 18, 2005), available at <http://documents.un.org>. (After clicking "welcome," then click "simple search," and insert the U.N. Doc. No. at "symbol").

322. Committee on the Elimination of Discrimination against Women, *Concluding Observations: Kenya*, para. 109, U.N. Doc. CEDAW A/48/38 (1993), available at <http://www.bayefsky.com> (After clicking "By State," then click "Kenya," then click "Concluding observations," then click "CEDAW").

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Swaziland must follow the lead of these African countries and establish a fully operational Ministry of Gender Affairs. Currently, Swaziland addresses gender issues through its Ministry of Home Affairs. However, since the Ministry of Home Affairs is responsible for numerous other non-gender-related initiatives, it cannot give sufficient attention to educating the public on women's rights.³²³ Therefore, Swaziland must elevate women's issues to an independent ministry.

Even with funding and resource constraints, many other African countries have elevated the status of women by creating a separate ministry. Uganda, for example, faced funding constraints, yet still created a Ministry of Gender, Labour, and Social Development.³²⁴ Uganda's Ministry of Finance helped finance the Ministry and the national government advised local authorities to provide budgeting for women's programs.³²⁵ Uganda also receives funding from the United Nations Children's Fund and other international agencies.³²⁶ By elevating women's status to a national ministry that would collaborate with all stakeholders to educate the public about women's rights, Swaziland, like many other African nations, would take an important step towards recognizing the importance of women's rights and ensuring a better-educated citizenry.

B. Adequate Funding Must be Allocated to Literacy Campaigns on Women's Equal Rights

Swaziland, to abide by constitutional and international obligations, must provide sufficient funding to educate its citizens on women's equal rights. Swaziland's Constitution explicitly states that "[T]he State shall cultivate among all the people of Swaziland through various measures, including civic education respect for fundamental human rights and freedoms and the dignity of the human person."³²⁷ Additionally, the CEDAW Committee "urges all States Parties effectively to adopt education and public information programmes, which will help eliminate prejudices and current practices that hinder the full operation of the principle of the social equality of women."³²⁸ Swaziland, therefore, has a duty to take appropriate measures of educating its public on women's equal rights to combat discrimination against women.

323. The Government of the Kingdom of Swaziland, <http://www.gov.sz>. (click "Home Affairs") (The Ministry of Home Affairs has numerous responsibilities, including immigration, citizenship, public holidays, sports, culture, and recreation, refugees, national celebrations, NGOs and voluntary organizations, youth, and vocational rehabilitation).

324. Uganda, *Third Periodic Report of States Parties to the Committee on the Elimination of Discrimination Against Women* (23rd Sess. 2000), page 12, U.N. Doc CEDAW/C/UGA/3 (July 3, 2000), available at <http://www.bayefsky.com> (After clicking "By State," then click "Uganda," then click "Concluding observations," then click "CEDAW") [hereinafter *Uganda Country Report*].

325. *Id.* at 12.

326. *Id.*

327. SWAZ. CONST. 2005 s. 58(3).

328. Committee on the Elimination of Discrimination Against Women, *General Recommendation 3, Education and public information campaigns* (6th Sess., 1987), para. 3, U.N. Doc. A/42/38 at 78 (1987), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 231 (2003), available at <http://www1.umn.edu/humanrts/gencomm/general3.htm>; see also CEDAW, *supra* note 3, at art. 2(c) (obligates States Parties "[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise"); ICCPR, *supra* note 3, at art. 2(2) (obligates state par-

To uphold its constitutional and international obligations, the Swazi Parliament must allocate sufficient funds to educating the public of the new Constitution, women's equal rights under the new proposed legislation, and the procedures to follow when pursuing an inheritance claim. Through the fact-finding mission to Swaziland, it was apparent that the current levels of funding were insufficient to adequately educate citizens of their rights. Gender Coordinator Dlamini admitted that lack of resources inhibited a full-scale effort to educate the public on women's rights and declared, "I think for me, what has been stalling us all along has been money, financial constraints."³²⁹

Because of this lack of funding, widows are confused of their rights or the proper procedures for securing inheritance claims. Hope for Widows' Nonhlanhla Nene described the confusion she experienced after the death of her husband and the reality of being unknowledgeable of one's own rights:

Firstly, I went to the bank. I wanted to do something there and they told me to go to the Master of the High Court. I wasn't aware. I think it's something else that needs to be taught to people. Those procedures, what to do, when and how because those things I didn't know even myself that I was supposed to go to the Master of the High Court.³³⁰

A proper educational program, funded by Parliament, will ensure that widows, and the entire country, are aware of women's rights under the Constitution, their rights under the new proposed legislation, and the procedures to follow to secure inheritance claims. Any type of meaningful effort to educate the entire public on women's equal rights must be sufficiently funded from the top, because many organizations face funding and resource constraints. Parliament must provide adequate funding to NGOs, radio stations, churches, civic organizations, and other entities to educate citizens of the new Constitution, the new proposed legislation, and the proper procedures to secure inheritance claims. Once Parliament places its full support behind educating the public on women's rights through adequate funding, Swaziland will be taking an important step in implementing the type of change the new Constitution envisioned.

C. Information about Inheritance Grievances Should be Widely Disseminated in Local Languages

Many Swazi citizens, particularly widows, remain unaware of their legal rights or relevant procedures to claim inheritance, and are therefore unable to effect their

ties to "to take the necessary steps... to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant"); ICCPR, *supra* note 3, at art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...sex"); African Charter, *supra* note 3, at art. 1 (obligates States Parties to "recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them"); African Charter, *supra* note 3, at art. 18(3) (obligating State Parties to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions").

329. Interview with Nonhlanhla Zanele Dlamini, *supra* note 149.

330. Interview with Nonhlanhla Nene, *supra* note 140.

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inheritance rights.³³¹ Currently, draft bills and other laws are only published in English, in the Gazette located in Mbabane in the Government Printing Office.³³² This is grossly inadequate to educate an entire population of what is happening in terms of legal rights. The Constitution, the proposed new legislation, and procedures for pursuing inheritance claims must be massively disseminated through newspapers, pamphlets, and other means, so all individuals have the opportunity to gain knowledge of the current legal situation and the state of women's affairs. Additionally, all laws and draft bills should be translated directly into sisSwati to give all citizens an opportunity to read them. Only by engaging in a full-fledged effort to distribute the Constitution, the proposed new legislation, and procedures for pursuing inheritance claims can Swaziland ensure that its citizens are aware of women's rights.

D. Skits, Documentaries, and Cultural Activities Should be Utilized for Accessible Education about Equal Inheritance Rights

The radio and other organizations can effectively serve the educational needs of the citizens of Swaziland by broadcasting skits, documentaries, and short programs that will drive home the real meaning of women's rights. The radio is the most effective means of communication throughout Swaziland. Sibonela Mdluni, a WLSA attorney, described the radio's ability to reach every person in Swaziland by saying, "Even poor people can afford it."³³³ However, this potential of reaching every person in Swaziland has been stifled by not tailoring programs to citizens' needs, sometimes merely reading constitutional provisions over the radio.

NGOs and other community organizations also should use skits, documentaries and cultural activities to engage all individuals at the community level. Gender Coordinator Dlamini suggested a strategy for community groups by saying, "Maybe we would act out some of the things, go to the communities with drama, and just do the drama for the people to learn about the gender issues."³³⁴ By initiating this strategy of using drama to educate citizens, NGOs and other groups will effectively engage individuals to better understand the importance of the new Constitution, the proposed new legislation, and women's rights. An educational program that emphasizes drama will enable everyone to become actively involved and passionate about learning about women's rights, and create an environment where individuals enjoy learning about women's rights.

As more and more individuals, and women, become knowledgeable about women's rights, more women will be empowered to speak up when their rights are vio-

331. Interview with Thabsile Dlamini, Swazi Woman Married Under Customary Law, in Sthobela, Manzi Region, Swaziland (Mar. 7, 2007) (had never heard of new Constitution); Interview with Widow #2, *supra* note 196 (had never heard of new Constitution); Interview with Woman in a Polygamous Marriage, in Sthobela, Manzi Region, Swaziland (Mar. 7, 2007) (very limited knowledge of the new Constitution); Interview with Lildiwe Mngomezulu, *supra* 68 (had never heard of the new Constitution).

332. Interview with Ministry of Justice Official at the Ministry of Justice, in Mbabane, Swaziland (Mar. 7, 2007).

333. Interview with Sibonelo Mdluni, *supra* note 135.

334. Interview with Nonhlanhla Zanele Dlamini, *supra* note 149.

lated. MISA Director Comfort Mabuza said that by creating this type of educational program, it “would begin to speak to a woman - who you are, your rights, your power as a woman to be given, and how to fight for those rights for your voice to be heard.”³³⁵

VIII. EQAUL INHERITANCE RIGHTS HOLD KEY TO COMBATTING HIV/AIDS AND POOR ECONOMIC GROWTH

Depriving women equal inheritance rights leads to catastrophic consequences for the HIV/AIDS pandemic in Swaziland as well as the economic viability of the country. HIV/AIDS has had a profound impact on the country as a whole, remaining one of the major challenges to Swaziland’s socioeconomic development.³³⁶ Unfortunately, the epidemic has continued to spread relentlessly in all the parts of the country. In her interview, the founder of the widows’ support organization, Hope for Widows, described this reality:

Today they are dying everyday so you can easily tell. Because even with the widows we have, you can see that one is in mourning gowns, but you can tell that she is sick. You can see that she is going nowhere. You can tell that she is following. You need not ask why. The HIV and AIDS epidemic.³³⁷

A study conducted by the International Center for Research on Women (ICRW) on “Women’s Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa” made the following conclusion about the relationship between those rights and the epidemic:

There is growing evidence that suggest[s] that where women’s property and inheritance rights are upheld, women acting as heads and/or primary caregivers of HIV/AIDS-affected households are better able to manage the impact of AIDS. Additionally, preliminary evidence indicates that such rights may help prevent further spread of HIV/AIDS by promoting women’s economic security and empowerment, thereby reducing their vulnerability to domestic violence, unsafe sex, and other AIDS-related risk factors.³³⁸

Thus, remedying women’s barriers to inheritance rights is critical to curbing the spread of HIV/AIDS, increasing women and girls’ ability to cope with the crisis, and contributing to the country’s economic and social well-being.

A. Legal Gaps Curtail Equal Inheritance and Perpetuate the Spread of HIV

Women’s vulnerability to HIV/AIDS is further exacerbated, and the epidemic in general perpetuated, by unequal property and inheritance rights.³³⁹ The HIV/

335. Interview with Comfort Mabuza, *supra* note 315.

336. USAID, Health Profile: Swaziland, *available at* http://www.usaid.gov/our_work/global_health/aids/Countries/africa/swaziland_05.pdf (last visited Mar. 29, 2007). The majority of deaths occur among young people aged 15-49, the nation’s most productive population segment. *Id.*

337. Interview with Nonhlanhla Nene, *supra* note 140.

338. International Center for Research on Women (ICRW), *supra* note 11.

339. UNAIDS Fact Sheet, Women and AIDS: A Growing Challenge (Nov. 23, 2004), *available at* http://www.thebody.com/unaidswomen_challenge.html (last visited Mar. 30, 2007) [hereinaf-

AIDS epidemic has devastated families and communities throughout the country, yet cultural and legal barriers to equal rights, including equal rights to inheritance, continue to perpetuate the disease. The United Nations Population Fund specifies that inheritance laws and customs that favour the husband's relatives, for example, "may leave widows and their children impoverished."³⁴⁰ In turn, the additional financial pressure may force women and girls into "exploitative and risky sex work or relationships, further fuelling the epidemic."³⁴¹ This subsistence sex work or "transactional relationships"³⁴² tend to "preclude negotiating condom use," and thereby perpetuates the spread of HIV/AIDS.³⁴³ Women's rights to inheritance are thus imperative to ensuring their access to and control over resources that will help mitigate the impact of HIV/AIDS and prevent perpetuation of the virus.³⁴⁴

The Government of Swaziland is not ignorant or oblivious to the precarious situations into which many women and girls are forced as a result of their economic desperation, yet has not taken the action needed to address the inequality in the inheritance regime. In fact, Gender Coordinator Dlamini has acknowledged that prostitution is on the rise in Swaziland as a means for women to support themselves: "I think because of the poverty that's increasing in the country. People just want to make a living. It's really increasing, so it exposes them to HIV/AIDS."³⁴⁵ Although Swaziland now has HIV/AIDS focal points within the Ministries and there have been "training of trainers" sessions conducted with the Ministries on HIV/AIDS and gender mainstreaming,³⁴⁶ these efforts are not enough. The Human Rights Committee has declared in General Comment 28 that "States should eradicate, both through legislation and any other appropriate measures, all cultural or religious practices which jeopardize the freedom and well-being of female children."³⁴⁷ Without putting the laws in place that will elevate women and girls' inheritance rights to be equal with men and boys, women and girls will continue to be the prime subjects of poverty and HIV/AIDS, and the disease will continue to spread at dramatic rates of infection.

The "Directive Principles" in Swaziland's Constitution, while not binding, provide valuable guidance for Parliament in this area.³⁴⁸ Section 59(1) (one of the

ter UNAIDS Fact Sheet].

340. United Nations Population Fund, *State of World Population 2005*, http://www.unfpa.org/swp/2005/english/ch4/chap4_page1.htm (last visited Mar. 30, 2007) [hereinafter UNFPA *State of World Population 2005*].

341. UNFPA *State of World Population 2005*.

342. Transactional sex refers to the practice of using sex as a commodity in exchange for goods, services, money, accommodation, or other basic necessities. *See*, UNAIDS Fact Sheet.

343. UNFPA *State of World Population 2005*.

344. International Center for Research on Women (ICRW), *supra* note 11.

345. Interview with Nonhlanhla Zanele Dlamini, *supra* note 149.

346. *Id.*

347. *HRC General Comment 28*, *supra* note 30, at para. 28.

348. Although the Constitution's "Directive Principles" are not binding in any court or tribunal (*see* SWAZ. CONST. 2005 s. 56(3)), they shall "guide all organs and agencies of the State . . . in applying or interpreting th[e] Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just, free and democratic society." (SWAZ. CONST. 2005, s.

“Economic objectives”), for example, discusses generally the need for the state to take action to “secure the maximum welfare, freedom and happiness of every person in Swaziland and to provide adequate means of livelihood....”³⁴⁹ Providing women and girls with adequate inheritance rights, for one, is a necessary step in ensuring women’s welfare, freedom and happiness. Moreover, inheritance rights are vital for an adequate means of livelihood and should therefore be a priority of Parliament. Additionally, as a State Party to ICESCR, Swaziland “recognize[s] the right of everyone to an adequate standard of living....”³⁵⁰ Adequately providing for women and children through the country’s inheritance laws can therefore prevent putting women and girls in high-risk situations, such as prostitution, in efforts to get money to care for their family and/or HIV/AIDS infected relative(s).

B. Unequal Inheritance Rights Deprive Women, often the Sole Caretakers, from Means to Care for HIV-affected Relatives

Women and children must benefit from the estates of their deceased husbands and fathers to carry on their lives and support themselves and others. In the face of the extremely high HIV/AIDS rate in the country and the number of widows left behind as the result of this epidemic, the welfare of women is at great risk. Without the ability to inherit from a deceased spouse, it will be extremely difficult for a woman to care for the welfare of herself and of her children: “The loss of a husband’s income, the costs of health care for ill relatives, and additional responsibilities can plunge women and their children deeper into poverty.”³⁵¹ Through its studies in sub-Saharan Africa, ICRW has determined:

HIV/AIDS-affected households that enjoy rights to land and property are better positioned to cope, as they have a stable, secure environment in which to provide care as well as a resource base that can generate much-needed income to help compensate for lost wages of an ill person or a caregiver who forgoes a wage-earning job, and to cover various AIDS-related costs.³⁵²

Integral to this stable, secure environment and resource base is a woman’s right to inheritance. Laws that provide women and girls inheritance in accordance with the Constitution will better situate individual families, and in turn the nation as a whole, to cope with the HIV/AIDS crisis.

Individuals affected by HIV/AIDS may experience “food insecurity, shortage of clothing and inability to pay for medical care” and, as a result, their caregivers will need additional income.³⁵³ Asked whether the way HIV/AIDS is changing

56(1)).

349. SWAZ. CONST. 2005 s. 59(1).

350. ICESCR, art. 11.

351. UNFPA State of World Population 2005.

352. International Center for Research on Women (ICRW), “To Have and To Hold: Women’s Property and Inheritance Rights in the Context of HIV/AIDS in Sub-Saharan Africa” (June 2004).

353. Family Health International, Orphans and Other Children Made Vulnerable by HIV/AIDS, Executive Summary of a Consultative Meeting in Matuu, Machakos, Kenya (Dec. 16-19, 2001), available at http://www.fhi.org/en/HIVAIDS/pub/Archive/confrrpts/Orphans_HIV_Exec_

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the family unit makes it more important for women and children to realize inheritance and property rights, one WLSA legal officer answered, “If the woman is not allowed....how is she going to look after the children?”³⁵⁴ But it is not just the surviving wife who bears this burden in today’s context of widespread HIV/AIDS. Grandmothers and daughters also fill this role as caregiver:

*“Because of HIV and AIDS, we are seeing more child-headed homesteads and in most cases, it’s the girls who are heading those families. A seventeen-year-old is the head of the family. She has siblings, maybe four, who are under the age of 18. It’s a problem, it’s a challenge.”*³⁵⁵

- Sibongile Dlamini, WLSA Legal Officer

*“In the past, people were probably not taking care of grandchildren but now they feel the pinch.”*³⁵⁶

- Sibonelo Mdluli, WLSA Legal Officer

If surviving wives, daughters and even mothers are not reasonably provided for in inheritance, they will be at an even greater disadvantage in providing the food, clothing, and medical care needed for those relatives infected with HIV/AIDS.

In addition to its constitutional guarantees, the Kingdom of Swaziland—through its regional and international agreements—has an obligation to protect the family and must enact inheritance laws favorable to women’s rights if it desires to uphold this obligation. Both the ICCPR and the ICESCR, for example, provide such protection: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”³⁵⁷ The African Charter imposes the same obligation and adds another specifically on health: “The family ... shall be protected by the State which shall take care of its physical and moral health.”³⁵⁸ To uphold these obligations and provide the requisite protection of the family unit in the face of the HIV/AIDS epidemic, the Government of Swaziland must enact legislation that will create equal inheritance rights for men and women.

Moreover, with more and more child-headed households as a result of the epidemic, the need for children to be able to realize their inheritance rights has never been more severe. Marjorie B. Mavuso, an Assistant Representative of UNFPA, lamented, “[W]e see a lot again of orphans and vulnerable children as a result of HIV...”³⁵⁹ Ms. Celiwe Seyama of UNICEF more thoroughly explained the plight of children in Swaziland in these days of HIV/AIDS: “If one parent dies they might get something from the estate, but if both die, it’s much harder. It’s so common. A

Summ.htm (last visited Mar. 30, 2007).

354. Interview with WLSA Legal Officer, *supra* note 224.

355. Interview with Sibonelo Mdluli, *supra* note 135.

356. Interview with Sibongile Dlamini, WLSA Legal Officer, in Mbabane, Swaziland (Mar. 4, 2007).

357. ICCPR, *supra* note 3, at art. 23(1); *see also* ICESCR, art. 10(1) (“The States Parties to the present Covenant recognize that...[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . .”).

358. African Charter, *supra* note 3, at art. 18(1).

359. Interview with Marjorie B. Mavuso, *supra* note 98.

cousin, uncle or distance uncle will take everything and disinherit the children.”³⁶⁰ The Convention on the Rights of the Child (CRC) provides guidance for state action in these situations: “States Parties shall ensure to the maximum extent possible the survival and development of the child.”³⁶¹ The survival of a child left parentless as a result of HIV/AIDS is linked to a child’s right to inherit from the deceased parents. Unless Parliament writes into legislation laws granting women and children their rightful inheritance, as well as provisions criminalizing practices such as property grabbing, the phenomenon described by Ms. Seyama will continue and child-headed households and the children within them will be at great risk.

In an address in 2002, Kofi Annan created a vivid image of the vicious cycle that is spurred by inadequate property and inheritance rights for women in this day of HIV/AIDS:

[A]s AIDS is eroding the health of Africa’s women, it is eroding the skills, experience and networks that keep their families and communities going. Even before falling ill, a woman will often have to care for a sick husband, thereby reducing the time she can devote to planting, harvesting and marketing crops. When her husband dies, she is often deprived of credit, distribution networks or land rights. When she dies, the household will risk collapsing completely, leaving children to fend for themselves. The older ones, especially girls, will be taken out of school to work in the home or the farm. These girls, deprived of education and opportunities, will be even less able to protect themselves against AIDS.³⁶²

A WLSA Legal Officer similarly explained that

[N]ow because of the HIV/AIDS, it is the girl child who takes care of the whole family. If the father is sick, the mother may go to the hospital to look after the husband. The fact that maybe the girl is 5 and the boy child is 15, but the girl is expected to provide something so that they can eat. And the girl child maybe loses out on school because can’t do homework and everything.³⁶³

By providing a more secure inheritance system, and ensuring that the inheritance rights provided to women and children in the new Constitution are realized in practice, families—particularly the women and girls and grandmothers—will be better able to provide for relatives with HIV/AIDS.

C. Equal Inheritance Rights for Women and Girls are Critical to the Economic Vitality of Swaziland

“Study after study has shown that there is no effective development strategy in which women do not play a central role.”³⁶⁴

-Kofi Annan, former Secretary General of the United Nations

360. Interview with Celiwe Seyama, *supra* note 230.

361. CRC, *supra* note 122, art. 6(2).

362. Kofi Annan, *In Africa, AIDS Has A Woman’s Face*, N.Y. TIMES: INT’L HERALD TRIBUNE, Dec. 29, 2002, available at <http://www.un.org/News/press/docs/2002/sg-29dec-2002.htm> (last visited May 15, 2007).

363. Interview with WLSA Legal Officer, *supra* note 225.

364. Annan, *supra* note 362.

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The central role played by women in the survival of the family and the basic socioeconomic unit is of paramount importance in Swaziland, and should be protected by and promoted in Swaziland's inheritance laws. Kofi Annan, former Secretary General of the UN, has described the backbone of Africa as "the women who keep African societies going and whose work makes up the *economic foundation* of rural communities."³⁶⁵ Ensuring, therefore, that women have equal inheritance and property rights with men is imperative for the economic well-being of Swaziland.

The Directive Principles laid out in Swaziland's Constitution are indicative of the importance of social and economic matters within the country. They urge the Legislature to take actions that will ensure the economic vitality of the country and of the individual citizens. For example, Section 59(5) provides that "[t]he State shall afford equality of economic opportunity to all citizens and, in particular, the State shall take all necessary steps so as to ensure the *full integration of women into the mainstream of economic development*."³⁶⁶ Furthermore, in section 60(3), the Constitution states as a social objective that the "State shall give the highest priority to the enactment of legislation for economic empowerment of citizens."³⁶⁷ This social "Directive Principle" explicitly charges the legislature with giving the "highest priority" to the enactment of this type of legislation.³⁶⁸ These clearly stated objectives, therefore, coincide with what this report urges, and the Constitution elsewhere requires, Parliament to do – to enact legislation that eliminates discrimination against women so as to economically empower the (female) citizens of Swaziland. Again, given the prevalence of HIV/AIDS, women are left as a large part of society, and in turn, the economy ("It's usually women that are driving small industries."³⁶⁹). Yet without the ability to inherit and subsequently control land/property, women are at an obvious economic disadvantage. It is imperative that the Parliament of Swaziland enacts legislation that gets rid of the discrimination against women in the inheritance arena for women to be economically empowered.

Furthermore, rural women make up a large portion of Swazi society, and, as noted above, a large segment of the economy—if and when permitted. Swaziland has also obligated itself in this area through its ratification of CEDAW. Article 14(1) of that treaty specifically addresses the plight of rural women and a State's obligation to these women:

States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families...and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.

However, as noted above in the discussion of mourning rituals, certain practices in the inheritance system in Swaziland hinder a woman's ability to contribute to the

365. Annan (emphasis added).

366. SWAZ. CONST. 2005 s. 59(5) (emphasis added).

367. *Id.* at s. 60(3) ("The State shall give the highest priority to the enactment of legislation for economic empowerment of its citizens.").

368. *Id.* at s. 60(3).

369. Interview with Winnie Magagula, *supra* note 70.

economic survival of their families. By granting women and girls their rightful share of inheritance, the Government of Swaziland can prevent putting women and girls in high risk sexual situations, reduce their vulnerability to HIV/AIDS and the further spread of the virus in general, and promote the economic security and empowerment of women and girls as well as the economic vitality of the country as a whole.

IX. CONCLUSION

Parliament must enact legislation aimed at bringing equal inheritance rights to the women and children of Swaziland. Both the Administration of Estates Act and the Intestate Succession Act represent archaic legislation no longer embodying the needs or goals of modern Swaziland. Both statutes must be amended in order to bring inheritance rights in Swaziland into compliance with its new Constitution and international obligations. Moreover, practices such as coercion of the mourning ritual, property grabbing and forced evictions represent not only violations of women's human rights, but also violations of Swazi law and custom. Parliament should adopt legislation which will not only officially eradicate those practices, but will also provide remedies to those who are victimized.

Swaziland's legal system is influenced by two distinct worlds—one embodying traditional African culture and custom, another rooted in western thought and practice. This dichotomy, which presents a challenge for lawmakers, also exists within the every day lives of the Swazi people. Accordingly, Swazi law and custom remains a thriving form of governance passed down from generation to generation. However, without formal codification, certain aspects of customary law have come to infringe on the fundamental human rights of Swazi women and children. Further, as Swaziland struggles to cope with the staggering effects of the HIV/AIDS crisis and pervasive poverty, protection of those human rights is more important now than ever.

Over the past several years, Swaziland has made marked improvements in its recognition of human rights. On March 26, 2004, the country acceded to four principal human rights treaties after many years of having what Amnesty International has called “one of the poorest records in sub-Saharan Africa in this respect.”³⁷⁰ Among those treaties were CEDAW, ICCPR and ICESCR. The following year, Swaziland adopted its new constitution upholding many of the core human rights embodied in the international treaties just mentioned. The next step for lawmaker's in Swaziland on the path toward full recognition of fundamental human rights is implementation of much needed legislation. Only then will the promise of its new Constitution be fulfilled.

370. Amnesty International, *Swaziland: Human Rights at Risk in a Climate of Political and Legal Uncertainty*, AFR 55/004/2004 (July 28, 2004) available at <http://web.amnesty.org/library/index/engaf150042004> (Last visited on June 6, 2009).

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**APPENDIX: Annotated Version of the Inheritance (Amendment) Act, 200X,
and Related Schedules**

The following annotated reforms are modeled on existing Swazi laws related to the Administration of Estates and Intestate Succession, as well as original legislative proposals on inheritance crimes and freedom from mandatory mourning period.

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INHERITANCE (AMENDMENT) ACT, 200X

A BILL

for

An Act to Provide Equal Inheritance Rights

PART I

PRELIMINARY PROVISIONS

Short title and commencement.

1. This act must be cited as the “Inheritance Act, 200X” and must come into force on such date as the Parliament determines.

Application.

2. This act must apply in Swaziland.

Amended or Repealed Provisions.

3. The acts or sections set forth in Schedule 1 are hereby amended or repealed.

Enacted Provisions.

4. The acts or sections set forth in Schedules 2-9 are hereby enacted.

PART II

INHERITANCE

Whereas Swaziland passed, and the King assented to, a Constitution committing it to amend discriminatory laws and pass legislation granting widows and children equal inheritance rights.

Whereas Swaziland committed itself by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women which requires “State Parties...to take all appropriate measures, including legislation to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women” in Article 2(f).

Whereas Swaziland committed itself by ratifying the International Covenant on Civil and Political Rights, Article 2(2), to ensure that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

Whereas Swaziland committed itself by ratifying the African [Banjul] Charter on Human and Peoples’ Rights.

Whereas Swaziland committed itself by ratifying the Convention on the Rights of the Child, Article 3(1) to ensure that “[i]n all actions

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concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.”

Whereas inheritance laws deny widows and female children the right to inherit, depriving them of their right to equality, property, dignity, protection of the family, an adequate standard of living, and an effective remedy.

Whereas the practice of inheritance does not protect women and children but establishes a system of abuse where a family member is permitted to take property without caring for the deceased’s family with little legal remedy.

Whereas inheritance laws subject widows to economic dependency and poverty, violating their right to an adequate standard of living.

Whereas inheritance laws discriminate between men and women because only men can inherit, and only men can administer property and assume guardianship of children.

The above sections outline the violations of the following rights:

1. The Right to Inheritance is provided for in Section 34 of the Swaziland Constitution.
2. The Right to Equality is provided for in Sections 14, 20, 28 of the Swaziland Constitution, Articles 3, 14, 16, 24, 26 of the ICCPR, Article 3 of the ICESCR, Articles 2, 7 of the UDHR, Articles 1, 2, 3, 5, 13, 15, 16 of CEDAW, Article 2 of the CRC, and Articles 2, 3, 5, 7, 14, 18 of the African Charter.
3. The Right to Dignity is provided for in Sections 18, 28 of the Swaziland Constitution, Articles 1, 6, 16, 22, 23 of the UDHR, Articles 10, 13 of the ICESCR, Articles 8 and 23 of the ICCPR, the preamble and Article 16 of CEDAW, the preamble of the CRC, and the preamble and Article 5 of the African Charter.
4. The Right to Property is provided for in Sections 14, 19, 34 of the Swaziland Constitution, Article 17 of the UDHR, Articles 14, 15, 16 of CEDAW, and Article 14 of the African Charter.
5. The Right to an Adequate Standard of Living is provided for in Articles 11 of the ICESCR and 27 of the CRC.
6. The Right to Protection of the Child is provided for in Section 29 of the Swaziland Constitution, Articles 24, 25 of the UDHR, Article 10

of the ICESCR, Articles 23, 24 of the ICCPR, Articles 5 and 16 of CEDAW, Articles 3, 9, 12, 18, 24, 31 of the CRC, and Article 18 of the African Charter.

7. The Right to Life and Health is provided for in Articles 3, 5, 25 of the UDHR, Articles 6, 7, 18 of the ICCPR, Article 12 of the ICESCR, Articles 6, 14, 24, 27, 34, 36 of the CRC, and Articles 4, 5, 15 of the African Charter.

Now, therefore, be ordained and enacted as follows:

EQUAL INHERITANCE RIGHTS

SCHEDULE 1

Amended and Repealed Provisions

1. Administration of Estates Act 28 of 1902.
2. Intestate Succession Act 3 of 1953.
3. Section 29(b) of the Magistrate's Courts Act 66 of 1938.
4. Section 10(1) of the Births, Marriages and Deaths Registration Act 5 of 1983.
5. Section 15(1) of the Births, Marriages and Deaths Registration Act 5 of 1983.
6. Section 20(2) of the Births, Marriages and Deaths Registration Act 5 of 1983.
7. Section 34(2) of the Births, Marriages and Deaths Registration Act 5 of 1983.

SCHEDULE 2

ADMINISTRATION OF ESTATES (AMENDMENT) ACT, 200X

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INTRODUCTION

Introduction.

1. (1) The purposes of this act are—
 - (a) To cure gender inequalities in administration of estates by repealing the Administration of Estates Act, 1902;
 - (b) To give effect to Swaziland's obligations under international instruments binding on Swaziland.
- (2) This act applies to—
 - (a) The estate of every person who dies after the commencement date;
 - (b) Every person to whom letters of administration or guardianship are granted after the commencement date.

Subsection 1(2) restates in simplified language Section 117 of the Administration of Estates Act.

Short Title.

2. This Act may be cited as the Administration of Estates (Amendment) Act, 200X.

DEFINITIONS

The Administration of Estates Act lacks a much needed definitions section explaining the meaning of terms, words, and phrases used in the Act and the amendments outlined here. In the Report of the Commission of Enquiry into the Operations of the Office of the Master of The High Court, Swaziland's government recognized the gap stating that, "the Act does not have a definition section at the beginning, e.g., it is not defined who the Master or who his Deputy is. There is therefore a need that many of the words used in the Act should be defined like what is meant by letters of executorship, curatorship or tutorship and next of kin." COMMISSION OF ENQUIRY, REPORT OF THE COMMISSION OF ENQUIRY INTO THE OPERATIONS OF THE OFFICE OF THE MASTER OF THE HIGH COURT VOL. 1, 68 (1999).

Most such statutes, including in multiple African countries, include definitions sections in their Administration of Estates Acts, for example South Africa, Zimbabwe, Liberia, and Zambia. Administration of Estates Act 66 of 1965 s. 1 (S. Afr.), *available at* http://www.acts.co.za/ad_estate/index.htm (last visited May 15, 2007); Administration of Estates Amendment Act 6:01 of 1997 s. 2 (Zimb.), *available at* http://www.parlzim.gov.zw/cms/Acts/Title06_SUCCESSION_AND_INSOLVENCY/ADMINISTRATION_OF_

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ESTATES_ACT_6_01.pdf (last visited May 15, 2007);
Equal Rights of the Customary Marriage Law of 1998 s. 2
(Liber.); Intestate Succession Act 5 of 1989 s. 3 (Zambia).

Definitions.

3. (1) “administrator” is any individual who is appointed by the Master, Regional Administrator, or Magistrate to distribute a deceased’s estate.
- (2) “child” or “children” means any person under the age of eighteen, who is not emancipated by marriage or court decree.

The definition of the child is set at eighteen to achieve consistency with international law. Article 1 of the CRC defines a child as a person under the age of eighteen. This will allow for conformity with international standards and provide for clarity and uniformity across laws with varying definitions of “child.” Note for example, that Swazi law sets the age of majority at twenty-one. The Age of Majority Act 11 of 1853 s. 2.

First, in the absence of parents, a mature eighteen year old is the most suitable candidate to administer the deceased’s estate and assume guardianship of younger siblings because he or she is the most likely to safeguard the assets and the children. This is particularly true in light of recent changes to the family structure due to the HIV/AIDS epidemic. Swazi Senator Winnie Magagula interviewed by the Clinic in Spring 2007, explains the current situation: “with the advent of all these incurable diseases, you’ll find that there are children-headed families. Now with the children-headed families . . . you’ll find that unscrupulous people out there would grab the land from the children.”

Second, there is a documented pattern of abuse, negligence, and theft of moneys from the Guardian’s Fund. Allowing children to access their inheritance at eighteen removes control over their funds from the Master’s Office at an earlier date and ensures that children will receive a “reasonable provision” out of the estate of their parents and will enjoy an adequate standard of living, as mandated by the Constitution and international law. SWAZI. CONST. s. 29(7)(b). *See also* ICESCR art. 11(1) (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”); CRC art.

27(1) (“States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”)

In line with the international definition of “child,” many other African countries define a child as a person under the age of eighteen. Zambia, for example, defines a “minor” as “a person who has not attained the age of eighteen years.” Intestate Succession Act 5 of 1989 s. 3. Similarly, South Africa defines a “child” as “a person who is under the age of 18 years.” Children’s Act 38 of 2005 s. 1, *available at* <http://www.info.gov.za/gazette/acts/2005/a38-05.pdf> (last visited May 15, 2005).

(3) “Court” means magistrate court or High Court.

The definition of “court” includes magistrate courts. Both South Africa and Zimbabwe have decentralized to magistrates courts.

(4) “Executor” is any individual who is appointed by the deceased in a valid will, codicil, or other testamentary instrument to distribute the deceased’s estate.

(5) “Guardian” means the person who has actual physical possession of the child, or the person who administers the property of a child and looks after the child’s financial affairs, or both.

The term guardian is used to replace and encompass both “tutor” and “curator,” as used in The Administration of Estates Act, 1902.

Many other countries in Africa have disposed of these archaic terms, and now use “guardian” in their place, including South Africa and Zimbabwe. Children’s Act 38 of 2005 s. 1 (S. Afr.), *available at* <http://www.info.gov.za/gazette/acts/2005/a38-05.pdf> (last visited May 15, 2005); Children’s Act 5:06 of 2002 s. 2 (Zimb.), *available at* http://www.parlzim.gov.zw/cms/Acts/Title05_PERSONS_AND_THE_FAMILY/CHILDREN’S_ACT_5_06.pdf (last visited May 15, 2006).

(6) “Guardianship” means the capacity of a person to have actual physical possession of the child, to live with, take care of, and to assist the child in his or her daily life, or to administer the property and assets of a child, to look after the child’s financial affairs, and to contract on his or her behalf, or both.

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(7) “Master” means Master of the High Court, his deputies, Assistant Master of the High Court, regional Masters, and their deputies.

This definition incorporates the recommendations of the Report of the Commission of Enquiry into the Operations of the Office of the Master of The High Court: “The Act should give a definition of who the Master of the High Court is. By Master, it should be understood to include the Deputy Master and Assistant Master of the High Court.” REPORT OF THE COMMISSION OF ENQUIRY INTO THE OPERATIONS OF THE OFFICE OF THE MASTER OF THE HIGH COURT, VOL. 1, 55 (2001). This definition also includes regional Masters and their deputies to keep step with recent initiatives to decentralize.

(8) “Next of kin” means children, parents, brothers, sisters, aunts, uncles, and grandparents.

Next of kin is defined to achieve consistency with “the Swazi understanding” of the term. The Report of the Commission of Enquiry into the Operations of the Office of the Master of The High Court states “[i]n the Swazi context, parents of the deceased, children of the deceased, brothers and sisters of the deceased may be regarded as ‘Next of Kin.’ Members of the female spouse are not excluded from this definition.” REPORT OF THE COMMISSION OF ENQUIRY INTO THE OPERATIONS OF THE OFFICE OF THE MASTER OF THE HIGH COURT, VOL. 1, 55 (2001). The Administration of Estates Act, 1902 also includes maternal relatives in the definition of “next of kin.” Section 74(1) states, “[t]he Master shall . . . call[] on the relations of the minor, both paternal and maternal, to attend at his office at the time therein specified, to see letters of confirmation granted to such person appointed by him tutor dative of such minor.”

(9) “Property” includes, without limitation, all real, movable, immovable, land, moneys, funds, assets, personal chattels, livestock, vehicles, agricultural equipment, business entities, bank accounts, employment benefits, and monetary investments.

PART I

ESTATES OF DECEASED PERSONS

DEATH NOTICES

Death notices to Master, Regional Master, or Magistrate

4. Whenever a person dies leaving any property, the surviving spouse of the deceased (or a surviving spouse if the deceased was in a polygamous marriage with multiple surviving spouses at the time of his death) must report within fourteen days a notice of death to be framed in the form set out in Schedule “A.”
- Where the surviving spouse chooses to have someone else report the death, that is permissible so long as the individual charged with reporting provides in writing permission from the surviving spouse.

Where no surviving spouse.

5. Where there is no surviving spouse, the nearest relative or connection of the deceased must report within fourteen days a notice of death to be framed in the form set out in Schedule “A.”

Delivery.

6. The death notice must be signed by the reporting spouse, or other authorized individual, and delivered or transmitted to -
- (a) the Master, if the surviving spouse resides in Mbabane at the time the death occurred, or if the deceased’s estate is equal to or greater than E50,000 (adjustable for inflation),
 - (b) a regional master of the region in which the surviving spouse resides at time of the deceased’s death, or
 - (c) the magistrate court in the district in which the surviving spouse resides at the time of the deceased’s death.

These provisions, (4)-(6), modify § 2(1) of the current Administration of Estates Act by, among other things, adding magistrates to the list of who can receive death notices and changing the location determination to be not where the death occurs, but where the individual reporting the death resides (this is in line with the amendments’ goal to streamline and reduce the burdens of the succession process on the surviving spouse or other relative(s)). The goal is to make the process of reporting the death easier on the surviving spouse or relative, particularly those of lesser means, by creating more, and more convenient, locations for reporting the death. As noted by the Acting Deputy Master of the High Court, “[I]f they had their offices in the regions, then few people would be coming to Mbabane.”

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(Interview with Acting Deputy Master of the High Court, in Mbabane, Swaziland (Mar. 6, 2007)). Additionally, the goal is to cut down on much of the backlog at the Master of the High Court's office by spreading the matters involved with the administration of estates, including death notices, to more branches. Section 4 is modeled after Zimbabwe's Administration of Estates Act provisions on death notices - directing when to appoint to the Master, when to the Assistant Master, and when to a magistrate - since Zimbabwe, too, uses magistrates.

Duplicate.

7. The office of the Master, Regional Master, or Magistrate must create a duplicate of any death notice delivered or transmitted to its office. The master, regional master, or magistrate must authenticate the duplicate with his or her signature.

Access.

8. Only the surviving spouse, or if no surviving spouse the designated executor of the estate, may access the original documents in the file.

This provision is just a slight modification to the current Act's § (2)(2), removing the requirement to file the original notice with the Master.

Zimbabwe's Administration of Estates Act contains a provision requiring the magistrates courts to file the notice. The limited access is suggested in response to the Commission of Enquiry's extensive report on the corruption in the Master's office, misplaced checks, and fake documents.

If death notice defective executor to furnish further information.

9. In case the information in any death notice is defective or insufficient, the Master, Regional Master, or Magistrate to whom the notice has been given may call upon the executor or executrix to furnish such further information as may be required, and the executor or executrix must without delay return his or her written answers to such questions as the Master, Regional Master, or Magistrate may demand.

Penalty clause.

10. Any person who fails to comply with sections 4 through 9 is guilty of an offence and liable to a fine or to imprisonment, as set out in section 10 of the Inheritance Crimes Act.

This section revises § 3 of the current Act to include magistrate judges, with their new function.

WILLS

Deposit wills, etc., with Master.

11. (1) If a person executes a will, codicil, or testamentary instrument, he or she may deposit it with the Master. The Master will keep a register including the names, descriptions of persons, and dates of deposit of such documents.
- (2) The Master will keep the original document, as well as a duplicate, until the death of the maker unless prior to death the maker or a designated attorney requests its return. If the document is ordered to be redelivered, the maker, or the maker's attorney will sign a receipt for it.

Persons in possession of wills, etc., on testator's death bound to transmit them.

12. (1) Any person other than the Master who has in his or her possession the last will, codicil, or other testamentary instrument of any other person will deliver that document to the Master or to the Regional Master at the first opportunity following the death of the document's Maker.
- (2) If such a document is delivered to a Regional Master, delivery of a duplicate or fair and true copy certified by a notary public will also be required.
- (3) If the Regional Master to whom the document was delivered is not the Regional Master of the area in which the deceased normally lived, then a duplicate or a copy will be required to be sent to the Regional Master of the deceased's area within a reasonable amount of time as well.
- (4) Any person who fails to comply with this section will be guilty of an offence, and upon conviction, be liable to a fine of [X] emalangeni (adjusted annually for inflation). Upon default of payment, people convicted of such an offense may be imprisoned for a period not exceeding [X] years.

Penalty for theft, destruction or concealment of wills, etc.

13. (1) Any person who steals or willfully destroys or conceals any will, codicil, or other testamentary instrument, will be guilty of an offense and upon conviction be liable to either a fine of [X] emalangeni (adjusted annually for inflation), or to imprisonment for a period not to exceed [X] years, or to both.
- (2) It shall not be necessary to allege that such will, codicil, or other instrument is the property of any person or is of any value in any indictment.

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(3) Nothing in this section will abridge or prevent any civil remedy which may be taken against a person who steals, willfully destroys or conceals any will, codicil, or other testamentary instrument. Civil conviction or acquittal of these offenses cannot be used as evidence against him or her.

Warrants to search for stolen or concealed wills, etc.

14. Upon information that there is reason to suspect that a will, codicil, or other testamentary instrument is concealed in a particular jurisdiction, the Chief Justice and every other judge of the High Court, and every Magistrate or justice of the peace in that jurisdiction, may issue a warrant causing that place to be searched.

Applications by Master to the court where persons refuse to give up wills.

15. If after the death of a testator, a person who is reasonably believed to be in possession of, or to have under their control, any will, codicil, or other testamentary instrument, after the death of the testator, refuses or fails to deliver or transmit the document as required by Section 10, the Master will apply to a magistrate, or to the High Court for an order directing its delivery.

Registration of wills, etc., at testator's death.

16. The Master will open every sealed document deposited or transmitted pursuant to Section 10 and register them in the register of estates.
Notwithstanding any such registration, all questions as to the validity and legal effect of every document will be reserved for decision by a magistrate, or a High Court judge; and
Provided that where such a document has been deposited with the Master prior to the death of the maker, the Master will cause the duplicate or copy deposited with the document to be examined and compared to the original. If necessary, the copy or duplicate will be corrected and will be authenticated with the Master's signature and transmitted to the Regional Administrator of the deceased's region at the time of death.

INVENTORIES

Inventory of estates.

17. Upon the death of a person either testate or intestate all of the property making up the estate, or the remainder of the estate if the deceased was married, will be inventoried. The inventory will be conducted by an available person, regardless of gender, in the following order of preference:
- (a) Surviving spouse regardless of type of marriage
 - (b) Child of the deceased over the age of majority

- (c) Next of kin of the deceased
- (d) Individual with chief charge of the house in the deceased's absence

Where there is more than one surviving spouse, where they live in separate houses, each surviving spouse will make or cause to be made an inventory of the house he or she lives in and of that household's chattels at the time of the deceased's death. Where there is more than one surviving spouse living in the same house, they will make or cause to be made an inventory of the house and the household chattels together.

Upon default or absence of all of the above, the Master or Regional Master will appoint a person to take the inventory. Every inventory will be signed by the surviving spouse, the witnesses, and the heirs and legatees present in accordance with Schedule "C".

The inventory will take place in the presence of two impartial witnesses of good credit and repute, and any persons with an interest in the distribution of the estate as an heir or legatee of the deceased.

This provision clarifies that the surviving spouse of a deceased person is the automatic executor of the estate under this amended Act. As such, the surviving spouse oversees the inventory of the estate prior to its administration. This step is essential to protect a widow's interests from family members attempting to appropriate property belonging to the widow during the administration process. This change is required by sections 14 and 22 of the Swaziland Constitution. SWAZ. CONST. 2005 ss. 14(1)(c), 22(1)(b). Specifically, women have the right to "protection of the privacy of the home" and the right to be free from arbitrary "entry by others on the premises of that person." SWAZ. CONST. 2005 s. 22(1)(b). This provision also takes into account that under the proposed amendments to the Intestate Succession Act a surviving spouse will be automatically entitled to the marital home and household chattels. For that reason, those items, in addition to any debts paid to creditors of the estate, will not be included in the inventory. What is left to be inventoried is the "remainder" of the estate as defined in the Intestate Succession Act. A schedule form for inventories is to be made available to make the process easier for widows. Also, in accordance with the purpose of the Inheritance Crimes Act, all persons should be able to inventory their property and the property of their spouse and have a notarized copy filed with the police department in order to provide proof of missing items in the case of property grabbing.

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Transmission of inventory to Master or Regional Master.

18. Every person required to make or to cause an inventory under this Act, will deliver or transmit it as soon as it has been made to:

- (a) the Master;
- (b) a Regional Master;
- (c) a Magistrate;
- (d) the High Court

whichever is closer. Upon delivery or transmission of an inventory to a Regional Master, a duplicate or copy of the inventory will be examined, authenticated and filed there. The original copy of the inventory will be transmitted to the Master.

Inventory by High Court or Master.

19. Notwithstanding anything in this Act, the High Court or Master may order that an inventory of any property belonging to a deceased, or to the joint estate of a deceased and the surviving spouse, be taken by any person named in such an order.

Particulars required as to immovable property.

20. Every person who is required by sections 17 and 19 to make any inventory will include a specified list of all immovable property to which, in his or her knowledge, the deceased had an interest in at the date of his or her death. If possible, such a person will make reference to the title under which the deceased held such an interest and the date of such title.

Penalties on omission of inventory by a surviving spouse.

21. (1) A surviving spouse who willfully or fraudulently fails to cause an inventory of the remainder of a deceased's estate in the manner and within the time period provided in Section 15, or who knowingly omits to enter into such inventory any article of property, forfeits all rights to that property and to anything which may accrue to the estate after the death of the predeceasing spouse.
- (2) Every loss which has been caused by the destruction or deterioration of any property omitted from the inventory, or which has accrued to the deceased's estate after death by the loss or deterioration, will fall upon the surviving spouse.
- (3) The burden will be on the complaining party to show clear and convincing evidence of an omission beyond a reasonable doubt.
- (4) Nothing contained in this section will exempt any person from penalty or punishment who knowingly caused a false inventory of an estate.

Penalty for failure to inventory.

22. Any person failing to comply with Sections 17 and 18 will be guilty of an offence and on conviction liable to a fine not exceeding [X]

emalangeni (adjusted annually for inflation), or, upon default of payment, to imprisonment for any period not exceeding [X] months.

Penalty for false inventory.

23. Any person required to make an inventory under Sections 17 and 19 who willfully makes a false inventory shall be guilty of an offense and liable on conviction to either a fine not exceeding [X] emalangeni (adjusted annually for inflation), imprisonment for a period not exceeding [X] years, or to both.

CUSTODY OF ESTATE PENDING ISSUES OF LETTERS OF ADMINISTRATION

Custody of estate prior to administration.

24. (1) When one of two spouses dies, the remainder of the estate will remain in the custody of the surviving spouse until the estate is settled and distributed, regardless of the type of marriage entered into by the parties.
- (2) If there is more than one surviving spouse, where they live in separate houses, each surviving spouse shall take custody of the house she lived in at the time of the deceased's death, together with all the household chattels in that house. Where they live together in one house at the time of the deceased's death, they shall take joint custody of the house and the household chattels. All surviving spouses shall take joint custody of any remainder of the estate until final settlement of said estate.
- (3) Upon the death of an unmarried person, custody of the estate prior to administration will belong to the first available party, regardless of gender, in the following order of preference:
- (a) a child of the deceased who has reached the age of majority;
 - (b) next of kin; or
 - (c) the person in charge of the house in, or the place at which the death occurred.

If for some reason none of these parties is available, or has been determined to be an unfit custodian, the Master or Regional Master may appoint a person to act as custodian until the administration of the estate.

This section grants a surviving spouse automatic custodianship of the marital home and household chattels until final settlement of the estate. In contrast, the previous law granted custodianship only until the letters of administration were issued. This change also provides for polygamous marriages where there is more than one surviving spouse. Each wife in a polygamous union is granted custodianship over her own home and household chattels. This change is required by the Constitution section 19(1), which provides that women "have

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a right to own property either alone or in association with others.” SWAZ. CONST. 2005 s. 19(1). Section 19(2) further declares that “[a] person shall not be compulsorily deprived of property of any interest in or right over property of any description,” except in limited circumstances. SWAZ. CONST. 2005 s. 19(2). Denying women the right to assume custody over their home and property pending distribution of the estate would make them vulnerable to “property grabbing” by family members and operate to deny them of their right to property as guaranteed under Swaziland’s Constitution, thereby infringing on rights to inheritance.

Appointment of a temporary guardian until issuance of letters of administration.

25. (1) The Master or Regional Master may appoint a temporary guardian to take custody of any estate until letters of administration are granted to executors for due administration and distribution. Every temporary guardian will be authorized by the Master or Regional Master as to which debt to collect and which perishable property belonging to the estate to sell or dispose of.
- (2) Every appointment made by the Master or Regional Master of any temporary guardian will be confirmed or set aside by the High Court upon application from any person having an interest in the estate. If an appointment of a temporary guardian is set aside under this provision, the High Court may appoint some other fit and proper person to fill that position.

LETTERS OF ADMINISTRATION

Letters of administration.

26. The estates of all persons dying either testate or intestate will be administered and distributed under letters of administration granted in the form contained in Schedule “B”. Letters of administration will be granted by the Master or Regional Master to the testamentary executors duly appointed by the deceased, or to a default testamentary executor appointed under this Act.

Letters of administration to executor appointed by will.

27. (1) If a deceased person has by will or codicil duly appointed any person to be executor, upon written application by such executor the Master or Regional Master will grant letters of administration as soon as such will or codicil has been registered in the office of the Master.
- If it appears to the Master that a will or codicil naming an individual as the executor of an estate is not sufficient to warrant and support such a claim, letters of administration may be refused until one of the following events occurs:
- (a) the validity and legal effect of the will or codicil has been

determined by a competent court;

(b) a letter asserting the claim of insufficiency is withdrawn; or

(c) the person named has had sufficient time to apply to such court for an order restraining the issue of letters of administration.

(2) Provided further that letters of administration will not be granted to any executor who at the time of making such written application lives outside Swaziland, and that, if the Master has reason to believe that such executor, although he or she may at the time of making such application be within Swaziland, will not remain in Swaziland until the estate to be administered is finally settled, the Master may refuse to grant letters of administration to such a person until there is sufficient security for the due and faithful administration of the estate.

Proceedings on failure of appointment of executors, death, etc.

28. (1) When a married person dies without appointing an executor, or is predeceased by the appointed executor, the surviving spouse is automatically granted letters of administration as the executor of the estate.

(2) Where there is more than one surviving spouse, the spouse with the longest marriage shall automatically be appointed executor unless that spouse is found incompetent for the appointment. Where the most senior spouse is found to be incompetent for appointment under this subsection, then the status of executor shall pass according to seniority of spouses as determined by the length of the marriage to the deceased.

(3) If there is no surviving spouse, then the next of kin is appointed the executor. If the person appointed as executor refuses to act as such, becomes incapacitated, or fails to obtain letters of administration within a reasonable amount of time, the Master will call all next of kin to a meeting by publishing notice in the Gazette and in such other manners as are deemed fit. At that time the letters of administration will be granted to whomever the Master sees fit and proper, unless it appears to be necessary to postpone and call another meeting.

Should it appear to the Master that such deceased person's estate is manifestly insolvent, it will not be necessary to take any proceeding for the appointment of an executor.

This provision reflects the necessary change to make the surviving spouse of a deceased the automatic executor in cases where no executor has been designated by will. It also provides for the case of a polygamous marriage where the husband dies without a will. Without this provision, family members of the deceased - not necessarily attuned to the widow's best interests - will deprive the widow of her own

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property and of her fair share in the estate. Additionally, without the automatic executor right, many widows will be victims of property grabbing and forced evictions at the hands of their husband's relatives.

Assumption of executors under power contained in will.

29. (1) Nothing in this Act shall prevent any executor named in a will from adding any other person(s) as executor(s) if he or she is empowered to do so in a will or codicil provided that no person shall be entitled or qualified to act as an added executor unless they received letters of administration during the lifetime of the executor named in the will by the Master who grants them at the time of production of the document in which the addition of this executor is authorised and of the document by which the named executor has added such other person as executor.
- (2) This Act, and every other law applicable, related to, or affecting executors, will be deemed to apply to every such executor assumed.

Proceedings in case of death, etc., of testamentary or assumed executors.

30. If an executor by will, or an added executor who has been granted letters of administration, dies, becomes incapacitated, or has been removed from office by a competent court, and there is either no executor, or too many executors (either testamentary or additional) then a quorum of executors is required. In the case of an appointed executor who has died, become incapacitated, or been removed as described above, proceedings to appoint a new executor will be taken by the Master as was provided for in section 24.

Revocation of letters of administration by decree of court or Master.

31. Letters of administration granted to an executor named in a will may be revoked by decree of the High Court upon a showing of proof to the court's satisfaction that the will or codicil with respect to which the letters were granted is null or has been revoked, either in its entirety or in so far as it relates to the nomination of the executor. Letters of administration granted to a temporary executor may be revoked and annulled by the Master upon production of any will or codicil in which any other person consenting to act as executor who is legally capable and qualified has been named testamentary executor provided that if the non-production of such will or codicil, prior to the granting of letters of administration to the named executor, was due to the fault or negligence of the person nominated, such person will be personally liable for, and may be compelled by the Master, or any person interested, to pay back all expenses which have been incurred to the estate in respect of appointing the temporary executor.

Security for due administration.

32. Before being permitted to start administering an estate, every executor named by will, added executor, or temporary guardian must pay a security in an amount reasonable under the circumstances for the due and faithful administration of the estate.

Appointment by Master of executors to estates under EX.

33. If the estate of a deceased is unrepresented and appears to the Master to be under the value of [X] emalangenji, the Master may cause the estate to be administered and distributed in accordance with the provisions of sections 64 and 65 by an executor named by will, to be appointed for that purpose.

FOREIGN LETTERS OF ADMINISTRATION

Letters granted in other country or territory may be sealed and signed for use in Swaziland.

34. When a person granted letters of administration in a country other than Swaziland, or a duly authorised attorney, produces those letters and a copy to the Master, they may be signed by the Master and sealed with his or her seal of office. From that point on, those letters will have be equivalent to letters granted by the Master provided however, that:

- (a) the Master will not sign and seal the letters if they are in respect to an estate situated in Swaziland to which letters of administration have already been granted by the Master;
- (b) before letters are signed and sealed, a certificate of death, a duly certified copy of the will (if any) of the deceased, and an inventory of all property within Swaziland known to belong to the deceased shall be lodged with the Master. The same stamp fees of office, duties and security will be paid as would be required if the letters had been granted by the Master;
- (c) if the Master refuses to sign and seal the letters, the person empowered by the letters may apply to the High Court for relief. The court will then make an order;
- (d) the person empowered by the letters may publish an advertisement in the Gazette and in a newspaper calling for all creditors and interested parties to lodge their claims and objections with the Master to the signing and sealing of such letters within three weeks. If within the said period no claims or objections are lodged, or if claims have been paid, proof of which was submitted to the Master, and it further appears that there are no minor residents in Swaziland with interests in the estate, then such letters may be signed and sealed by the Master without observance of the usual and customary forms, and also without his the required security; but if the Master refuses to sign and seal such letters, the provision of paragraph (c) will apply;

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(e) the Master will notify the proper officer of the court granting such letters of administration that he has signed and sealed them without security being given, and will forward a certified copy of the inventory required with that notification.

Evidence by copy of letters certified by Master, etc.

35. (1) A copy, certified by the Master, as the copy of any letters of administration deposited with him under the provisions of section 30 of this Act, will be admitted into evidence in all legal proceedings in Swaziland as if they were the original letters.
- (2) A certificate from the Master that, in accordance with the previously stated provisions, letters of administration authorizing and empowering any person to act have been signed and sealed, will be admitted in all legal proceedings in Swaziland as *prima facie* proof of the legal right and title of such person to administer so much of the estate of the deceased person named in the certificate as is situated in Swaziland.

DUTIES OF ADMINISTRATORS/EXECUTORS

Management of property.

36. Immediately after receiving the Letters of Administration, and where the value of the estate exceeds [X] emalangeni [to be adjusted annually for inflation], the executor must open an Estate Account with a bank and deposit all funds collected in connection with the administration of the deceased's estate.

To ensure that estate funds are properly accounted for, this provision obligates executors to deposit all funds into an Estate Account with a bank if the estate exceeds [X] emalangeni. Smaller estates are exempt from this requirement because poorer widows, who would be executors under this Act, would be overburdened by being forced to deposit all funds with a bank and smaller estates would earn minimal interest. This provision attempts to minimize mismanagement or theft of estate funds. This provision is based on South Africa's Administration of Estates Act, the Administration of Estates Act 66 of 1965 s. 28, which requires executors to deposit all funds of estates exceeding a certain amount into a bank.

Employer, life insurance providers, etc.

37. (1) All employers, life insurance providers, and other entities that owe death benefits must directly pay the executor all proceeds of the policy.

This provision ensures that all employment, pension, or life insurance policies are accounted for in the inventory of the estate and distributed accordingly to the proper beneficiaries. Therefore, it addresses the current problem in Swaziland where heirs oftentimes never receive these benefits.

(2) The executor must deposit all such funds in the Estate Account pursuant to Section 36 of this Act.

By paying the funds directly to the executor who will deposit them in the Estate Account pursuant to Section 36, this provision minimizes corruption and ensures that all funds are accounted for. This provision, therefore, addresses the current problem in the Master's Office where funds disappear or are unaccounted for.

(3) If any individual gives the Master, Regional Administrator, or Magistrate any estate funds, the Master, Regional Administrator, or Magistrate must transfer them directly to the executor.

This provision explicitly requires the Master, Regional Administrator, or Magistrate to pay all funds sent to him or her directly to the executor; thus minimizing the opportunity for corruption or mismanagement. Additionally, throughout all the new provisions, the Regional Administrator and Magistrate have been given the same powers as the Master.

(4) The Government is civilly liable for all estate funds that the Master, Regional Administrator, Magistrate, or personnel in their respective offices lost, stole, or misplaced.

By making the Government civilly liable for all funds that the Master, Regional Administrator, Magistrate, or their respective personnel loses, steals, or misplaces, this provision ensures that the Government will effectively oversee the management of the Master's, Regional Administrator's, and Magistrate's positions and offices, and the Government will be held accountable for all misplaced funds.

Family-owned businesses.

38. The executor must supervise the operation of any family-owned businesses until they are either sold or distributed.

This provision gives the executor full authority over all family-owned businesses. This will protect widows who are named the executor under this Act because they will no longer have to go to the Master, Regional Administrator, or Magistrate,

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who may in their discretion refuse to grant them permission to oversee family-owned businesses.

Records.

39. The executor must maintain detailed records of all transactions.

This provision ensures that all transactions dealing with the estate are recorded. For the administration of estates, keeping a detailed written record is essential to keep track of all property and transactions. Additionally, it provides a written record if there are any disputes. This provision addresses possible corruption, lack of record-keeping, or lack of accountability for estate property by the executor.

Inventories.

40. Within 30 days after receiving the letters of administration, the executor must file an inventory in the form contained in Schedule “C” with the Master, Regional Administrator, or Magistrate showing the value of all property belonging to the estate. If, after filing this original inventory, the executor receives additional property, he or she must file an additional inventory with the Master, Regional Administrator, or Magistrate showing the value of any additional property.

This provision details a specific time period within which the executor must file the inventory with the Master, Regional Administrator, or Magistrate to prevent delay in reporting, and accounting for, all property of the estate. It also provides a Schedule to make it easier for the executor to know how to file the inventory. This section replaces Section 37 of the Original Act. It eliminates the need for security under Section 37(3) of the Original Act to both simplify the process and protect poor widows from having to obtain security.

Penalty for false inventory.

41. If any executor fraudulently files a false inventory under Section 40, he or she commits a criminal offense punishable for a period not exceeding [X] years, or to a fine not exceeding [X] emalangi [to be adjusted annually for inflation], or both.

By making it a criminal offense to “fraudulently” file a false inventory, this provision helps to prevent fraud, particularly if someone other than a widow is the executor. This section replaces Section 38 of the Original Act.

Master, Regional Administrator, or Magistrate may appoint appraiser to value assets.

42. (1) The Master, Regional Administrator, or Magistrate may appoint an independent appraiser, to be paid from the estate, in the following circumstances:
- (a) the executor does not appraise a portion of, or all of, the estate;
 - (b) the Master, Regional Administrator, or Magistrate reasonably contests the executor's valuation of a portion of, or all of, the estate.

This provision ensures that the executor appraises all property and, if the executor fails to adequately do so, it provides a mechanism where the Master, Regional Administrator, or Magistrate can appoint an independent appraiser to do so. It therefore ensures that all property is properly appraised before distribution of the estate. The idea of appointing an appraiser is modeled after the South Africa Administration of Estates Act, Administration of Estates Act, No. 66 of 1965 s. 6.

- (2) The Master, Regional Administrator, or Magistrate must inform the executor in writing if an independent appraiser has been appointed.

This provision ensures that the Master, Regional Administrator, or Magistrate notifies the executor if an independent appraiser is appointed so that the executor is made aware that his or her valuations are in dispute.

- (3) If the independent appraiser's value of the property differs from the executor's appraised value, the Master, Regional Administrator, or Magistrate must file both appraisals with the High Court for a determination of the true value of the property.

If the Master, Regional Administrator, or Magistrate appoints an independent appraiser and the independent appraiser's valuation differs from the executor's valuation, this provision provides a safety mechanism for the executor by having a neutral court decide which valuation is most accurate. This entire section replaces Section 39 of the Original Act.

Liability for debts and legacies.

43. (1) A person is civilly liable to pay all creditors and legatees for all debts exceeding the solvency of the estate in the following circumstances:
- (a) if the person is not the executor and disposes of any portion

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of the estate, except in so far as may be absolutely necessary for the person to pay for reasonable funeral expenses for the deceased; or

(b) if the executor fraudulently disposes of any property of the estate or fails to list such property in the inventory filed under Section X.

This provision deters non-executors from distributing any portion of the estate by making them civilly liable to all creditors. It also makes executors liable to all creditors if the executor fraudulently disposes of any property; thus protecting against fraud, particularly if the executor is not the surviving spouse. This section replaces Section 40 of the Original Act.

Duty of person in possession of property of the estate.

44. If a person who is not the executor of the estate knowingly possesses any property belonging to the estate, he or she must give all such property directly to the executor. If he or she fails to do so, he or she is personally liable for the value of the property and is guilty of a criminal offense punishable by imprisonment for a period not exceeding [X] years, or a fine not exceeding [X] emalangen [to be adjusted annually for inflation], or both.

By making it a criminal offense for anyone other than the executor to possess property of an estate, this provision helps to deter anyone other than the executor from interfering with the property of the estate. Thus, this provision addresses concerns involving property grabbing or others intermeddling with the administration of the estate. This section replaces Section 41 of the Original Act.

Published notice of estate for creditors.

45. Within 30 days of receiving the letters of administration, an executor must publish notices in both the Gazette and a newspaper located in the region in which the deceased resided requiring all creditors to file a claim with the executor within 60 days of the date of publication of the notice.

By specifying time periods for both the executor and creditors, this provision removes any uncertainty or discretion and provides clear deadlines for both the executor and creditors. Additionally, by publishing in both the Gazette and the local newspaper in the region where the deceased resided, the executor can help ensure that all creditors are aware of the need to file claims on the estate. This section replaces Section 42 of the Original Act.

Suspension of execution of judgments against deceased until expiry of notice.

46. Any person who has obtained a judgment against any deceased person, or his or her executor, cannot execute such judgment until the expiration of the 60-day period after publication of the notice provided for in Section 45.

This provision prevents anyone from executing any judgment on the estate until after the 60-day period that allows creditors to file claims on the estate. The purpose is to ensure that all creditors have an opportunity to file their claims against the estate before other persons are paid judgments from the estate. This section replaces Section 43 of the Original Act.

Insolvent deceased estates.

47. (1) On the expiry of the sixty (60) -day notice to creditors in Section 45, the executor must determine if the estate is solvent. If the estate is insolvent, the executor must report the insolvency to the Master, Regional Administrator, or Magistrate.

The purpose of this provision is to determine the solvency of the estate to begin distribution. If the estate is insolvent, this provision ensures that the Master, Regional Administrator, or Magistrate are notified of the insolvency status.

(2) After the Master, Regional Administrator, or Magistrate determines that the estate is insolvent, the executor must provide written notification to all creditors who responded to the 60-day notice of a time and place by which the creditors will convene to decide on the process under Section 45. If a creditor cannot attend the meeting and cannot send a representative in his or her place, the creditor must send a notification to the executor within 30-days detailing the value of his or her claim and his or her desired process under Section 45.

This provision ensures that all creditors are notified, in writing, of the estate's insolvency and the time and location of the meeting that will decide how to proceed with the insolvent estate.

(3) Upon receipt of the executor's notification, each creditor has thirty (30) days to respond with either his or her intent to attend the meeting or a written notification outlined in Section 45 if the creditor is unable to attend. Any creditor who does not respond remits his or her claim on the estate.

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This provision ensures that all creditors notify the executor of their intention to attend the meeting about the estate within 30 days or otherwise remit their claims. This provision ensures that creditors will participate in the process of deciding how to proceed with insolvent estates. By giving a 30-day deadline or otherwise remit the claim, this provision prevents creditors from delaying coming forward, but later trying to claim part of the estate.

- (4) The executor must hold a meeting of all creditors, and creditors, through a majority vote both in number of creditors and value of claims, choose from the following options:
 - (a) creditors consent to receive a dividend in full satisfaction of their claims;
 - (b) creditors agree to proceed under the Insolvency Act No. 81 of 1955.

This provision simplifies the process for creditors, and allows creditors a choice of how to proceed. This entire section replaces Section 44 of the Original Act.

Preference on estate for funeral expenses.

48. Any person who incurs reasonable expenses for the funeral of the deceased must be paid before the payment of any other claims on the estate.

This provision ensures that anyone who pays expenses for the deceased's funeral will be reimbursed from the estate before any other claims are paid. Absent such explicit preference, many individuals who pay for funeral expenses might not be reimbursed if the estate became insolvent, thus disincentivizing anyone from providing funding for the deceased's funeral. This section replaces Section 45 of the Original Act.

Executor may require affidavit in support of claim.

49. (1) An executor may require a creditor to give an affidavit detailing the creditor's claim before any such claim is paid;

By requiring creditors to give a sworn affidavit, this provision helps to prevent fraudulent claims by creditors.

- (2) If a creditor fails to provide an executor with a full and complete affidavit and later contests the executor's non-payment in court, the creditor will be responsible for all court costs arising out of the contested claim.

This provision encourages creditors to ensure the legitimacy of their claims or otherwise bear the litigation expenses of contesting the claims. This entire section replaces Section 46 of the Original Act.

Executors to pay money devolving upon child, etc.

50. The executor must pay any property devolving upon a child, in the following manner:

(a) If the child is under the guardianship of a surviving parent, the executor must pay the property to the surviving parent;

(b) If there is a will, the executor must pay the property to the person or institution named in the will to act as the guardian of the child's property;

(c) If the child is under the guardianship of a person appointed by the Master or a court, the executor must pay the property to the Guardian's Fund, to be credited to the trust account of the child. Where the property is immovable property, the executor must give it to the guardian of the child's property and report the property's particulars to the Master or the court within thirty (30) days of giving it over.

(d) If the child does not have a guardian, the executor must pay the property to the Guardian's Fund, to be credited to the child's trust account. If the child does not have a trust account, the executor must pay the property to the Guardian's Fund Council.

This section restates in simplified language Section 49 and 50 of The Administration of Estates Act, 1902 and explicitly specifies to whom the child's property must be given.

Administration of Accounts.

51. (1) An administrator must administer the estate according to the provisions set forth in this Act.

(2) An executor must administer the estate according to the provisions of any valid will, codicil or other testamentary instrument relating to such estate. The provisions of this Act supercede any contrary provisions of a will, codicil, or other testamentary instrument.

Subsections (1) and (2) distinguish between an administrator, who is appointed by the Master, Regional Administrator, or Magistrate, and an executor, who is named by the deceased's will. Subsection (2) ensures that this Act supercedes any contrary provisions of a will or other instrument. Thus, subsection (2) does not allow an individual to "contract around" this Act.

(3) Within 6 months of receiving the letters of administration, an executor must file with the Master, Regional Administrator, or

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Magistrate a detailed and accurate report, supplemented by affidavits and other evidence, of the distribution of the estate. The Master, Regional Administrator, or Magistrate may grant the executor an extension of the 6-month deadline upon showing of sufficient cause.

This provision ensures that the executor provides a full and accurate report to the Master, Regional Administrator, or Magistrate of the distribution of the estate. This will ensure that estates are wound up within 6 months, since many estates have currently been open for years. Additionally, this provision allows an executor an extension in case the executor has had difficulties in administering the estate.

(4) If such account reflects property that has not been distributed or debts either due to the estate or still outstanding, the executor must provide a detailed explanation, in writing, as to why the estate has not been fully distributed.

By requiring the executor to provide a written explanation as to why a portion of the estate has not been fully administered, it creates a written record for others to view and holds the executor accountable for any part of the estate that has not been fully administered.

(5) If the Master, Regional Administrator, or Magistrate receives notice that the executor is not performing his or her duties, the Master, Regional Administrator, or Magistrate may require the executor to submit periodic reports detailing the administration of the estate. If the executor fails to provide such periodic reports, the Master, Regional Administrator, or Magistrate may summon the executor to show cause before the High Court as to why such report has not been made.

By allowing the Master, Regional Administrator, or Magistrate to summon the executor if he or she is not fulfilling his or her duties, this provision provides an oversight mechanism for instances when the executor is not fulfilling his or her duties. It also allows for oversight and better communication between the parties in cases where there are unforeseen circumstances that prevent an executor from fulfilling his or her role. This entire section replaces Section 51 of the Original Act.

Advertising accounts and objections.

52. (1) After the executor reports the account under Section 50 and the Master, Regional Administrator, or Magistrate approves it, the

Master, Regional Administrator, or Magistrate must make the report available to the public for thirty (30) days at the Master's Office, Regional Administrator's Office or the Magistrate's Court in the region where the deceased resided.

This provision provides a specific 30-day time period to remove any uncertainty, rather than the original time period in section 51bis "for not less than twenty-one days". By making the report available to the public, this provision creates transparency in the process and provides the public with knowledge as to how particular estates have been administered.

(2) The Master, Regional Administrator, or Magistrate with who the account is reported must advertize in both the Gazette and a newspaper circulating in the region where the deceased resided that the report is available to the public in the appropriate office.

The purpose of this provision is to ensure that all interested parties are aware of the availability of the report so that they have an opportunity to view it.

(3) The Master, Regional Administrator, or Magistrate must provide a list in his or her office of all reports available to the public and the dates each report will continue to be available to the public. After the 30-day period expires, the Master, Regional Administrator, or Magistrate must certify that each account was made available to the public for the requisite 30-day period.

By ensuring that all reports are available to the public for 30-days and ensuring that the Master, Regional Administrator, or Magistrate provides lists of all available reports, this provision creates transparency in the process and allows the public to view all available reports.

(4) Any person may file an objection to the executor's report with the Master, Regional Administrator, or Magistrate before the expiry of the 30-day period. The Master, Regional Administrator, or Magistrate must deliver to the executor a copy of such objection, along with copies of all documents such person may have submitted in support of such objection.

This provision allows any member of the public to file a formal objection to an executor's report; thus providing an oversight mechanism the public can use to protect against inaccuracies or mistakes in an executor's reports.

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(5) Within 14 days of receiving the objection, the executor must file a written response with the Master, Regional Administrator, or Magistrate.

This provision allows the executor to explain any deficiencies in the report or dispute the objection; thus democratizing the process and enabling all parties to be heard.

(6) After considering both the objection and the executor's response, the Master, Regional Administrator, or Magistrate must provide a written decision and explanation within 30 days on whether to dismiss the objection or require the executor to amend the account.

This provision gives the Master, Regional Administrator, or Magistrate an opportunity to review both the objection and the executor's response to decide on whether to amend the account. By having the Master, Regional Administrator, or Magistrate provide a written decision, this provision gives the executor, the objector, and the public a reasoned response as to whether or not to amend the account. Hence, it also creates precedent so the public and other executors can review disputes and issues to gain a better understanding of how the process works and how issues involving the administration of an estate are resolved.

(7) Any person aggrieved by the Master's, Regional Administrator's, or Magistrate's decision under subsection (6) may appeal within 30 days of the decision to the High Court for redress.

By providing a mechanism for appeal, this provision protects against a Master's, Regional Administrator's, or Magistrate's incorrect or arbitrary decision.

(8) If any decision affects the interests of a person who has not filed an objection, the Master, Regional Administrator, or Magistrate must repeat the procedures in subsections (1)-(3) to give any interested party an opportunity to object under subsection (4).

Once a decision has been reached that affects the interests of a third party, this provision ensures that all the steps are taken to notify the public, create transparency, and give an opportunity for objections of the amended report.

(9) After the requirements of subsections (1)-(8) have been met, the executor must pay all creditors and distribute the estate according to the report. The executor must also give the Master, Regional Administrator, or Magistrate all receipts and other documents that

demonstrate how the estate was distributed.

This provision ensures that the estate is distributed according to the executor's filed report. It also ensures accuracy by giving all receipts and relevant documents to the Master, Regional Administrator, or Magistrate; thus minimizing the chance of corruption. This section replaces Section 51 of the Original Act.

Summons if the executor has not reported to the Master, Regional Administrator, or Magistrate within 6 months.

53. If an executor fails to report the distribution of the estate to the Master, Regional Administrator, or Magistrate within six (6) months of receiving the letters of administration, and has not received an extension, the Master, Regional Administrator, Magistrate, or other interested person may summon the executor to show cause in the High Court.

This provision provides an oversight mechanism to ensure that executors file the report within 6 months, receive an extension, or otherwise be summoned to court. It addresses the current problem where estates have been open for years and property tied up and undistributed to heirs.

Provided that the Master, Regional Administrator, Magistrate, or other interested person, before summoning, notify in writing the executor in default and give such executor one month to report the distribution of the estate before executing the summons.

This provision gives the executor one last opportunity to distribute the estate before being summoned. By putting the executor on notice of default, this provision ensures that the executor is aware of missing the 6-month deadline and gives him/her an opportunity to remedy the situation before being summoned to court.

Provided further, that any executor receiving such notice can show sufficient cause for an extension with the Master, Regional Administrator, or Magistrate. If the Master, Regional Administrator, or Magistrate grants an extension, any person can challenge the extension before the High Court. If the Master, Regional Administrator, or Magistrate does not grant an extension, the executor in default can apply to the High Court for an extension.

This provision allows the executor to apply for an extension and explain his or her reasons for not administering the estate. Therefore, this provision improves communication between

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the executor and the Master, Regional Administrator, or Magistrate. Because the extension occurs after a party has notified the executor of a summons, this provision allows a third party to challenge the extension before the High Court and also provides protection for the executor to appeal to the High Court should the Master, Regional Administrator, or Magistrate reject his or her request for an extension. This entire section replaces Section 52 of the Original Act.

Remuneration of executors.

54. Every executor is entitled to fair and reasonable remuneration from the estate, subject to review by the Magistrate's Court or High Court. This remuneration must be paid before any other claims, except for payments made for funeral expenses for the deceased.

By ensuring that executors are compensated before creditors, this provision will ensure that executors are paid for their services even if the estate is insolvent.

If an executor fails to comply with Section X and has not received an extension, he or she is not entitled to such remuneration.

By ensuring that an executor files a report before receiving payment, this provision prevents an executor who never files a report from receiving compensation, thus making executors accountable. This entire section replaces Section 54 of the Original Act.

Registration of immovable property from deceased estate.

55. (1) The executor must register all immovable property in respective heirs' names with the Deed's Registry Office.
(2) The conditions of all usufructuries or other limited interests in immovable property must be endorsed against the title deeds of the property and detailed in the report submitted to the Master, Regional Administrator, or Magistrate.

This provision ensures that all usufructuries or other limited interests are detailed in the executor's report.

(3) If any heir is unable to pay the costs involved in registering immovable property without experiencing substantial hardship, the Master, Regional Administrator, or Magistrate, may authorize the executor to note that the property had been bequeathed or inherited, to be endorsed against the title deeds of the property.

This entire section simplifies the language of Section 56 of the Original Act and ensures that all property is properly distributed.

Penalty for refusing to deliver required documents to executor.

56. (1) Any person who refuses to deliver or unreasonably delays the delivery of any document required by an executor to fulfill his or her duties as executor of the estate is guilty of a criminal offense punishable for a period not exceeding [X] years, or to a fine not exceeding [X] emalangenji [to be adjusted annually for inflation], or both. The person is also liable for any expenses incurred by the executor in attempting to obtain such document.

By creating both criminal and civil penalties for anyone who fails to deliver a required document to an executor, this provision incentivizes individuals to turn over all documents to the executor as quickly as possible, thus making the executor's job easier, faster, and the process more efficient.

- (2) As soon as such document is no longer required by the executor, the executor must return the document to the person he or she requested it from.

This provision ensures that all documents are returned to their rightful owners. This entire section replaces Section 57 of the Original Act.

Master, Regional Administrator, or Magistrate to furnish Registrar of Deeds with certain returns.

57. (1) The Master, Regional Administrator, or Magistrate must give the Registrar of Deeds the name of every person married in community of property with regard to whom, or to whose estate, an inventory has been filed showing that such person at the time of his or her death had an interest in any immovable property registered in the name of his or her surviving spouse.

This provision ensures that the deceased's interests will be registered with the Registrar of Deeds. Specifically, it protects widows who were married in community of property because the Master, Regional Administrator, or Magistrate will subsequently notify the Registrar of Deeds that she had an interest in the immovable property, even if her name does not appear on the deed.

- (2) Such return must contain all material information regarding such property, and the interest of the deceased which is contained in the inventory reported to the Master, Regional Administrator, or Magistrate.

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This provision ensures all interests of the deceased are detailed and reported to the Registrar of Deeds. This entire section replaces Section 62 of the Original Act.

PART II

ESTATES OF CHILDREN, MENTALLY INCOMPETENT AND ABSENT PERSONS

Part II is divided into four subparts—A, B, C and D, altering the original structure of The Administration of Estates Act, 1902. This Act restructures the old Act to achieve several policy objectives.

First, the Constitution and international laws make clear that surviving parents and their children are entitled to special protection by the state. Swaziland's Constitution states that "[t]he family is the natural and fundamental unit of society and is entitled to protection by the state." SWAZ. CONST. s. 27(3). This protection is reiterated in international human rights conventions, which recognize the family as "the natural and fundamental group unit of society." ICCPR art. 23(1); ICESCR art. 10(1); African Charter art. 18.

Imposing burdensome procedural and fitness requirements on surviving parents runs counter to these principles.

Second, constitutional and international laws entitling surviving spouses to special protection by the state are based on the presumption that residence with a surviving parent is always in the child's best interests, except in limited circumstances. This presumption, however, does not extend to guardians appointed by a will or by the Master of a court. In fact, current Swazi laws that connect children to inheritance seriously undermine the presumption that a child's guardian always has the child's best interests at heart.

Third, this Act distinguishes between guardians appointed by will and those appointed by the Master or a court. Guardians appointed by will are subject to less rigorous procedural requirements for two reasons: (1) a will sets forth the guardian's duties and powers such that these do not need to be statutorily defined; (2) this Act gives deference to a surviving parent's choice of guardian because, as discussed above, the surviving parent is presumed to act in the child's best interests at all times.

The final subpart sets forth the Guardian's Fund.

A. SURVIVING PARENT'S AND CHILDREN'S RIGHTS

Surviving parent's and children's rights.

58. (1) Upon the death of either parent, the surviving parent is the automatic guardian of the child and the child's property, unless:

- (a) The surviving parent is mentally incompetent;
 - (b) The surviving parent has abandoned the child for [X] years;
 - (c) The surviving parent has been convicted of domestic violence, child abuse, or neglect;
 - (d) The surviving parent has a serious drug or alcohol abuse problem;
 - (e) The surviving parent has failed to pay child support on a consistent basis for [X] years.
- (2) A party disputing automatic guardianship must show by clear and convincing evidence that the surviving parent falls into one of the categories set forth in subsection (1). Only the Master or a court may make such a determination. In the event that the contesting party meets the burden of proof, the Master or a court must appoint a guardian from the remaining next of kin in the order set forth in section 64.

This section revises Sections 69 of the Administration of Estates Act, 1902, which allowed the father, but not the mother, the power to usurp the mother's guardianship rights by will. Because the Administration of Estates (Amendment) Act would explicitly govern customary estates, this section also address customary laws that deny women guardianship rights over their children and their children's property, delegating the responsibility to the deceased's heir or to one of the deceased's brothers, if she agrees to be inherited by him.

Existing Swazi civil and customary guardianship laws violate women's equal guardianship rights under constitutional and international law. Swaziland's Constitution obligates Parliament to "enact laws necessary to ensure that parents undertake their natural right and obligation of care, maintenance and proper upbringing of children." SWAZ. CONST. s. 29(7)(c). CEDAW obligates states parties to pass legislation ensuring that men and women have "[t]he same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children" and "with regard to guardianship ... of children" both "during marriage and at its dissolution." CEDAW art. 16(1)(c), (d), (f). The Human Rights Committee (HRC), overseeing the ICCPR, has recognized that "[i]f the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection and, so far as is possible, to guarantee personal relations with both parents." Human Rights Committee, *General*

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Comment No. 17: Rights of the child (Article 24) (35th Sess., 1989), para. 6, available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

These laws not only recognize that parents have equal guardianship rights over the child, but also the child's property. CEDAW requires states to provide "[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property." CEDAW art. 16(1)(h). See also CEDAW art. 15(2) ("States Parties shall . . . give women equal rights to . . . administer property"). The HRC has similarly stated:

"To fulfill their obligations under article 23, paragraph 4, States Parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the custody and care of children, the children's religious and moral education, the capacity to transmit to children the parent's nationality, and the ownership or administration of property, whether common property or property in the sole ownership of either spouse. States Parties should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property, where necessary." Human Rights Committee, General Comment No. 28, Equality of rights between men and women (article 3), (68th Sess., 2000), para. 25, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000) available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

Moreover, the revised section recognizes that children have a corresponding right to reside with their parents. Swazi laws that treat children as belonging to the father and remove them from the guardianship of their mother if she remarries or the father wills to the contrary violate children's constitutional "right to be properly cared for and brought up by parents." Swaz. Const. s. 29(3). The Constitution explicitly requires Parliament to "enact laws necessary to ensure that a child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents." Swaz. Const. s. 29(3). Under the Convention on the Rights of the Child States Parties must "ensure that a child shall not be separated from his or her parents against their will," and "use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child." CRC art. 18(1).

By including narrowly tailored exceptions to the general rule, this section balances the concerns expressed by a number of interviewees that the widow will be tricked into remarriage and the new husband will loot the children's inheritance with international laws that prohibit laws based on gender stereotypes. In an interview with the Clinic in Spring 2007, Nonhlanhla Zanele Dlamini, the Gender Coordinator in the Ministry of Home Affairs summarizes many interviewees concerns: "[Widows] are vulnerable and they are tricked into these things by their next spouse. Because in most cases, the next spouse will come in for what she has . . . Sometimes they are blinded by love . . . It's not normal, but there are cases where women have just forgotten about the goodness of their children and the proper upkeep of their children."

The concerns of many interviewees, however, are based on overbroad generalizations about the capacities of women to manage property and children, rooted in customary laws that regard women as minors. This practice perpetuates the inferior status of widows in Swazi society, places social, economic and legal constraints on widows that are not placed on widowers, and violates international law. The HRC remarks: "States Parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights." HRC, General Comment 28, para. 5.

Moreover, only an estimated two percent of widows neglect their children. Nonhlanhla Zanele Dlamini, Gender Coordinator, Ministry of Home Affairs, in Mbabane, Swaziland (Mar. 5, 2007). In fact, all of the widows interviewed for purposes of this Act faced great hardships and made enormous sacrifices to care for and maintain numerous children. As one widow explains, "I use . . . sweat to give them food, go to school, [and] clothing to wear." Agnes Mndzebele, Widow, in Ezulwini, Swaziland (Mar. 8, 2007).

Subsections (a)-(e) respond to situations where the parent is not a suitable guardian for a child by drawing on constitutional and international law mandates. The Constitution requires Parliament to "enact laws necessary to ensure that . . . children receive special protection against exposure to physical and moral hazards within and outside the family." SWAZ. CONST. s. 29(7)(d). Under the CRC, "States Parties shall take all appropriate legislative, administrative, social

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and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” CRC art. 19(1). The HRC has recognized that “in cases where the parents and the family seriously fail in their duties, ill-treat or neglect the child, the State should intervene to restrict parental authority and the child may be separated from his family when circumstances so require.” HRC, General Comment 17, para. 6.

Although subsection (2) allows for complaints to be lodged by anyone concerned that the child’s parent is not serving the child’s best interests, it places a high burden of proof on the moving party to discourage frivolous actions by family members where the parent is clearly capable. It also provides that a child cannot be removed from a guardian’s custody without a court determination. These exceptions balance the dual policy objectives of achieving equal guardianship rights for women and safeguarding the child and his or her property.

Penalties.

59. Any person who—
- (a) interferes with a surviving parent’s grant of guardianship by harassing, intimidating, assaulting, kidnapping, vandalizing, stealing, threatening to harm any person or property, or evicting any surviving parent, appointed guardian, or child, commits an offense and on conviction is liable for a [X] emalageni fine or a [X] year term of imprisonment or both.
 - (b) takes a child or a child’s property from his or her surviving parent without a court order is guilty of the crime of child stealing or property stealing, as the case may be, and on conviction is liable for a [X] emalageni fine or a [X] year term of imprisonment or both.

This section was modeled after Liberia’s Equal Rights of the Customary Marriage Law of 1996. Liberia automatically grants the surviving spouse guardianship rights and explicitly prohibits the separation of mother and child, providing that “[u]pon the death of either spouses (husband or wife), said children, if minors, shall remain with spouse living as of right; no member of the deceased family shall deprive the living spouse of the right to custody of said minor children, taking into consideration the best interests of the child.” Equal Rights of the Customary Marriage Law of 1996 s. 3.7 (Liber.).

This section was added to deter family members from interfering with women's and children's right to reside together as a family and from severing the link between children and inheritance. Laws that interfere with a widow's relationship with her children violate her right to family. SWAZ. CONST. s. 27(3). Swaziland's Constitution states that "[t]he family is the natural and fundamental unit of society and is entitled to protection by the state." SWAZ. CONST. s. 27(3). This protection is reiterated in international human rights conventions, which recognize the family as "the natural and fundamental group unit of society." ICCPR art. 23(1); ICESCR art. 10(1); African Charter art. 18. According to the HRC, "The right to found a family implies, in principle, the possibility to . . . live together." Human Rights Committee, *General Comment No. 19: Protection of the family (Art. 23)* (39th Sess., 1990), para. 5, U.N.Doc. HRI\GEN\1\Rev. 6 at 149 (1994), available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

Children also have a corresponding right to reside with their parents. Swazi laws that treat children as belonging to the father and remove them from the guardianship of their mother if she remarries or the father wills to the contrary violate children's constitutional "right to be properly cared for and brought up by parents." SWAZ. CONST. s. 29(3). The Constitution explicitly requires Parliament to "enact laws necessary to ensure that a child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents." *Id.* Under the Convention on the Rights of the Child States Parties must "ensure that a child shall not be separated from his or her parents against their will," and "use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child." CRC art. 18(1).

Inventories, accounts and bonds.

60. Where the value of the child's aggregate property exceeds [x] emalangeni, the surviving parent must submit inventories and accounts as required under section 70.

This section balances the dual policy concerns that surviving parents will squander their children's property and the reality that many Swazi estates comprise only the house, household chattel, and livestock.

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Right to Remarry.

- 6i. (1) Every surviving parent and guardian has the right to remarry. No court, person, or traditional body must remove a child from the surviving parent's or guardian's care because of remarriage.
- (2) No widow or guardian must be inherited or otherwise coerced to remarry.
- (3) A person is guilty of coercing a widow or guardian to remarry if such marriage was brought about without the free and full consent of the widow. Persons guilty of coercing a widow to remarry are punishable by [X] years in prison and [X] emalangen in fines.

This section is modeled after Liberia's Equal Rights of the Customary Marriage Law of 1996 criminalizing wife inheritance. The law prohibits any "family member of the deceased husband [from] . . . compel[ing] the widow or widow to remain within the family, or marry a kin of her/their late husband." Equal Rights of the Customary Marriage Law of 1996 s. 3.4.

Subsection (1) revises Section 89 of The Administration of Estates Act, which bars widows from remarrying unless they seek court approval to do so and pay a bond or relinquish their guardianship rights to their children's property. Since The Administration of Estates (Amendment) Act would be applicable to customary estates, this section also addresses customary laws which require a widow to forfeit her right to reside at her late husband's homestead and parental rights if she "remarr[ies] or court[s]" outside the clan. WOMEN AND LAW IN SOUTHERN AFRICA, RESEARCH AND EDUCATIONAL TRUST, INHERITANCE IN SWAZILAND: LAW AND PRACTICE (1994). Subsection (2) also revises customary laws treat women "as objects to be given, together with the property of the deceased husband, to his family." HRC, General Comment 28, para. 19.

Laws obstructing a widow's right to remarriage violate her right to family and dignity as provided under the Constitution and international law. *See* SWAZ. CONST. s. 27(3) ("[t]he dignity of every person is inviolable" and "[a] person shall not be subjected to . . . inhuman or degrading treatment."); ICCPR art. 1 ("Recognizing that these rights derive from the inherent dignity of the human person . . ."); ICESCR Preamble ("[The] Charter of the United Nations reaffirms faith in the fundamental human rights, in the dignity and worth of the human person and in equal rights of men and women."); African Charter art. 5 ("Every individual shall have the right to respect of the dignity of inherent

in a human being and to recognition of his legal status.”). The CEDAW Committee recognized this link between “[a] woman’s right to choose a spouse and enter freely into marriage,” and dignity explaining:

“A woman’s right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. An examination of States Parties’ reports discloses that there are countries which, on the basis of custom, religious beliefs or the ethnic origins of particular groups of people, permit forced marriages or remarriages . . . [A] woman’s right to choose when, if, and whom she will marry must be protected and enforced at law.” Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21, Equality in Marriage and Family Relations* (13th Sess. 1994), para. 16, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

For the avoidance of doubt.

62. For the avoidance of doubt, subparts B, C and D do not apply to surviving parents.

B. GUARDIANS APPOINTED BY WILL

Guardians appointed by will.

63. (1) The last surviving parent may appoint by will a guardian of the child, or the child’s property, or both, unless such parent is disqualified under section 57(1).
(2) Any person, other than the parents of a child, who bequeaths property to a child, may appoint by will any person to act as guardian of the child’s property.
(3) A party disputing the will’s appointment, including a child who is fourteen years old himself or herself, must show by clear and convincing evidence that the appointment is not in the child’s or his or her best interests as set forth in section
(4) Unless a will provides otherwise, the Master or a court may appoint a guardian ad litem or temporary guardian as set forth in section 65.

This section retains and revises parts of section 69 of the Administration of Estates Act, 1902. As discussed above, it repeals language allowing the father, but not the mother, the power to usurp the mother’s guardianship rights by will because it violates Swaziland’s Constitution and international law obligations mandating equal guardianship rights. This section retains the Act’s original language that

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allows any person, other than the parents of a child, who bequeaths property to a child, to appoint by will any person to act as guardian of the child's property.

Duties and powers of guardians appointed by will.

64. (1) Guardians appointed by will must apply for letters of guardianship in the manner set forth in section 68.
(2) The guardian must obey any direction in the will, unless doing so constitutes a crime or is not in the best interests of the child as set forth in section 64.

Section 64 simplifies the language in Section 88(4) of The Administration of Estates Act.

(3) Guardianship automatically terminates at the time specified in the will or, if not contrary to the will, for any of the reasons set forth in section 71.

C. GUARDIANS APPOINTED BY THE MASTER OR COURT

Guardians appointed by the Master or court.

65. (1) If the child has no guardian, the Master or a court must appoint a guardian from the child's next of kin.
(2) If the child has no next of kin, the Master or a court must appoint a public guardian from the Ministry of Health and Social Welfare.

The Ministry of Health and Social Welfare routinely deals with women's and children's issues and thus is the most appropriate body to deal with guardianship issues. Swaziland Government, Ministry of Health and Welfare, Social Welfare Department, <http://www.gov.sz/home.asp?pid=95> (last visited May 13, 2007).

(3) The Master or a court must determine what is in the child's best interest and appoint a guardian based on that determination.

This section is included to address the concerns of many interviewees, including those of UNICEF Worker, Celiwe Seyama: "If one parent dies they might get something from the estate, but if both die, it's much harder. It's so common. A cousin, uncle or distance uncle will take everything and disinherit the children." This problem is particularly pressing in the context of HIV/AIDS, which has rendered many children parentless. As Marjorie B. Mavuso, Assistant Representative, UNFPA states: "we see a lot again of orphans and vulnerable children as a result of HIV and other things."

Subsection (3) revises section 74 of The Administration of Estates Act, 1902 that grants the Master, and customary laws that grant family councils, discretionary powers of appointment and creates a system for appointing a new guardian. Under the new section, guardians are appointed based on the best interests of the child standard as mandated under Article 16(1)(d) of CEDAW and Article 3(1) of the CRC. The HRC has stated that “[i]f the marriage is dissolved, steps should be taken, keeping in view the paramount interest of the children, to give them necessary protection . . .” and the CEDAW Committee elaborates, “[t]he principle that ‘the best interests of the child must be the paramount consideration’ . . . seems now to be universally accepted.” HRC, General Comment 17, para. 6; CEDAW, General Recommendation 21, para. 19.

Moreover, a number of African countries include the child’s best interests standard in national legislation. South Africa’s Children’s Bill provides that “[a]ll proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfill . . . the best interests of the child standard.” Children’s Act 38 of 2005 s. 6(2)(a), *available at* <http://www.info.gov.za/gazette/acts/2005/a38-05.pdf> (last visited May 15, 2005). Zimbabwe’s Children’s Act requires courts to take the into consideration “the best interests of the minor” in adoption proceedings. Children’s Act 5:06 of 2002 s. 65(3), *available at* http://www.parlzim.gov.zw/cms/Acts/Title05_PERSONS_AND_THE_FAMILY/CHILDREN’S_ACT_5_06.pdf (last visited May 15, 2006).

(a) The child’s “best interests” refers to the fostering of the child’s physical, mental, spiritual, moral, psychological and social development;

This subsection implements section 6(2) of the CRC, which obligates states parties to “ensure to the maximum extent possible the survival and development of the child.” The CRC Committee “expects States to interpret “development” in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological and social development.” Committee on the Rights of the Child, *General Comment No. 5: General measures of implementation of the Convention on the Rights of the Child* (34th Sess., 2003), para 12, *available at* <http://www2.ohchr.org/english/bodies/crc/comments.htm>.

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(b) The Master or a court must consider a child's opinion as to what he or she considers is in his or her best interests;

This subsection implements Article 12 of the CRC, which provides:

“States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child . . . For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

(c) The Master or a court must also consider what environment must protect and foster the child's rights as identified in this Act, as well as in the United Nations Convention on the Rights of the Child.

(d) A social worker from the Ministry of Health and Social Welfare must thoroughly investigate a child's circumstances and report back to the Master or a court about what it considers to be in the child's best interests. The Master will give preference to this report when appointing a guardian from the next of kin.

The Ministry of Health and Social Welfare routinely deals with children's issues and thus is the most appropriate body to deal with guardianship issues. Swaziland Government, Ministry of Health and Welfare, Social Welfare Department, <http://www.gov.sz/home.asp?pid=95> (last visited May 13, 2007). This section is based on South Africa's Children's Act.

(4) The Master or a court must take the following factors into consideration when appointing a guardian from the next of kin:

- (a) The child's wishes as to his or her guardian;
- (b) The nature of the child's previous interaction and interrelationship with his or her potential guardian;
- (c) The potential guardian's level of participation in the child's life prior to the last surviving parent's or guardian's death;
- (d) The potential guardian's mental and physical health;
- (e) The potential guardian's ability to provide the child with an adequate diet, clothing, a secure home, education, guidance, immunization, and medical attention;

This provision identifies the rights of the child that are expected to be protected by guardians. These duties to the child are consistent with the child's right to education, as provided by Section 29(6) of the Constitution, Article 13 of the ICESCR, Article 28 of the CRC, and Article 17(1) of the African Charter, health, as provided by Article 12 of the ICESCR, Article 24 of the CRC, Article 16(1) of the African Charter provided, and "nutrition, clothing, and housing," under Article 11 of the ICESCR and Article 27 of the CRC.

- (f) The potential guardian's ability to preserve continuity in the child's life;
- (g) The opportunity to keep siblings together;

This subsection implements section 27(3) of the Constitution which provides that "[t]he family is the natural and fundamental unit of society and is entitled to protection by the State." SWAZ. CONST. s. 27. Laws separating siblings are contrary to this mandate.

- (h) The opportunity to allow a child to maintain meaningful contact with both maternal and paternal relatives;
- (i) The likelihood of abuse, neglect, or abandonment;
- (j) The harm or risk of harm to the child. This includes any impairment to the child's health or development as a result of witnessing the ill treatment of another person, or as a result of the guardian's preferential treatment of his or her own children.

Subsections (i) and (j) implement section 29(2) of the Constitution which provides that "[a] child shall not be subjected to abuse or torture or other cruel inhuman and degrading treatment." SWAZ. CONST. s. 29(2).

Subsection (4) is based largely on South Africa's Children's Act and Namibia's Children's Bill, which provide a list of factors on which the court must base guardianship decisions. See *e.g.*, Children's Act 5:06 of 2002 (S. Afr.), available at http://www.parlzim.gov.zw/cms/Acts/Title05_PERSONS_AND_THE_FAMILY/CHILDREN'S_ACT_5_06.pdf (last visited May 15, 2006); Children's Status Bill 23 of 2003 (Namibia).

- (5) The Master or a court may appoint more than one person to act as the child's guardian where it determines that doing so is in the child's best interests.

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(6) A person disputing the Master's or a court's appointment must show by clear and convincing evidence that the appointment is not in the child's best interests. Only the Master or a court may make such a determination. In the event that the contesting party meets the burden of proof, the Master or a court must appoint a new guardian from the remaining next of kin in the manner set forth in subsection (3).

Appointment of guardian ad litem or temporary guardian by Master or a court.

66. (1) The Master or a court may appoint a guardian ad litem to bring actions on behalf of any child or defend any child against any actions brought against any child.
- (2) The Master or a court may appoint a temporary guardian in the manner set forth in section 64 when:
- (a) An emergency requires a guardian;
 - (b) No guardian has been appointed;
 - (c) The child's welfare requires immediate action;
 - (d) The child's property is in danger of immediate or irreparable harm;
 - (e) No person appears to have the authority to act.
- (3) NGO groups have the right to advocate on behalf of children as set forth in the Legal Practitioners' (Amendment) Act, 200X.
- (4) Where the guardian is convicted of a crime against the child or the child's property, the appointed guardian is personally liable for the child's litigation costs.

Section 66 updates the language of Section 80 of The Administration of Estates Act, 1902, limits the Master's discretionary powers to appoint a temporary guardian "whenever necessary or expedient," and explicitly grants NGO groups the right to advocate on behalf of children.

Provisions granting the Master's Office discretionary powers of appointment invite abuse and operate to deny children their equal inheritance rights under the Constitution and international law. The Commission Report documents a pattern of abuse on the part of the Master and his Deputies with regard to appointments of temporary guardians. Specifically, the Commission noted that the Master exercised his discretionary powers to appoint the same attorney as temporary guardian to a number of estates and stated "[o]ne hardly knows the amount of estate money presently in the hands of this Attorney." COMMISSION OF ENQUIRY, REPORT OF THE COMMISSION OF ENQUIRY INTO THE OPERATIONS OF THE OFFICE OF THE MASTER OF THE HIGH COURT VOL. 1, 7.

Disqualification of certain persons from the office of guardian.

67. (1) The following persons may not act as guardians:

- (a) Children under the age of eighteen;
- (b) Mentally incompetent persons;
- (c) Master, Magistrate, or High Court judge in his or her official capacity;

This subsection modernizes the language of Section 110 of The Administration of Estates Act, 1902.

- (d) Persons who have no demonstrable history of caring for the child;
- (e) Persons who have a demonstrable history of fraudulent conduct, convicted felons, bankrupt or insolvent persons;

Subsection (d) and (e) sever the link between children and inheritance by preventing persons who are likely to squander the child's inheritance from obtaining guardianship of the child or the child's property.

One widow explains, "[M]y mother-in-law took the child away from his mother when he was still a baby because my mother-in-law is that kind of woman who is really after money and so greedy." Acting Deputy Master of the High Court, in Mbabane, Swaziland (Mar. 6, 2007).

These subsections also safeguard children's property, ensuring children's constitutional rights to "reasonable provision[s]" out of their parent's estates and an adequate standard of living, as mandated by Articles 11 and 27 of the ICESCR and CRC, respectively.

Subsection (e) also modernizes and simplifies Section 83 of The Administration of Estates Act, 1902, which prohibits insolvent persons from acting as guardians.

- (f) Persons with a history of serious drug or alcohol abuse or gambling problem;
 - (g) Non-residents;
 - (h) Residents who are likely to leave Swaziland after the estate's final distribution, unless such persons post security of [x] percent of the property under his or her guardianship.
- (2) Any guardian disqualified under subsection (1) may dispute the Master or the court's decision. The person disqualified must show by clear and convincing evidence the he or she is qualified to act as a guardian under subsection (1). Only the Master or a court may make such a determination. In the event that the contesting party meets the burden of proof, the Master or a court must, in the case of a person appointed by will, reinstate such person's appointment, or,

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in the case of a person appointed by the Master or a court, appoint such person guardian if it determines that doing so is in the child's best interests in the manner set forth in section 64.

Petition and notice.

68. (1) Any person may petition the Master or a court for letters of guardianship. In the event that no one petitions the court within thirty days of the deceased's death, the Master or a court must publish a call for guardians in the Gazette and by radio.
- (2) The Master or a court must notify a child age fourteen years or older and his or her next of kin of the hearing's time and place within thirty days after a petition is filed or a call for guardians is published or broadcast.

This section retains the next of kin meeting provided under section 74 of The Administration of Estates Act, 1902, but updates and expands on the language by allowing any person to petition the Master or a court for letters of guardianship, and requiring the Master to broadcast a call for guardians within thirty days of the deceased's death. As Comfort Mabuza, the National Director of the Media Institute of South Africa explains: "Radio is ninety-five percent powerful. Newspapers, yes. Powerful. But only [for] the educated elite because we do not have ... SiSwati newspapers ... All the rest have got their radios. So radio ... is the most important media." Comfort Mabuza, National Director of the Media Institute of South Africa, in Mbabane Swaziland (March 9, 2007).

Subsection (2) also implements Article 12(1) of the CRC which requires States to "assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

Letters of guardianship.

69. (1) Every guardian must file an acceptance of guardianship with the Master or court before his or her appointment is confirmed.
- (2) Unless the guardian is disqualified under section 68(3), the Master or a court must order him or her confirmed as guardian and issue letters of guardianship in the form set forth in Schedule "B."
- (3) The Master or a court must notify any guardian who fails to apply for letters of guardianship of this requirement in writing. If a guardian fails to apply for letters of guardianship within thirty days after notification, the Master or a court must appoint a new guardian from the child's remaining next of kin in the manner set forth in

section 64.

(4) Any guardian who assumes guardianship over a child or a child's property before letters of guardianship have been granted to him or her commits an offense and on conviction is liable for a [x] emalageni fine or a [x] year term of imprisonment or both.

This section consolidates Sections 70(2), 71, and 72 of the Administration of Estates Act into one section, updates their language, and introduces penalties for compliance failures.

Duties and powers of children's guardians.

70. (1) A child's guardian has the powers and responsibilities of a parent regarding the child's support, care and education.
- (2) In particular and without qualifying the provisions of subsection (1), a guardian must—
- (a) Take custody of the child and establish the child's place of residence;
 - (b) Become or remain personally acquainted with the child and maintain sufficient contact with the child to know of the child's capacities, limitations, needs, opportunities, and physical and mental health;
 - (c) Make decisions regarding the child's care, support, maintenance, and education;
 - (d) Use the child's property to pay for the child's support, care, and education;
 - (e) Institute proceedings, including administrative proceedings, or take other appropriate action to compel the performance by any person of a duty to support the minor or to pay sums for the welfare of the minor;
 - (f) Give any necessary consent or approval to enable the minor to receive medical or other professional care, counsel, treatment, or service;
 - (g) If reasonable under all of the circumstances, delegate to the minor certain responsibilities for decisions affecting the minor's well-being;
- (3) A social worker from the Ministry of Health and Social Welfare must conduct a yearly investigation into the child's general welfare. The social worker must submit this report to the Master or a court on or before February fifteenth of each year under penalty of perjury as set forth in the Penal Code.

Section 70 expands on Section 88 of The Administration of Estates Act, 1902, setting forth a non-exhaustive list of the duties of children's guardians. Article 5 of the CRC specifically requires States Parties to provide legal guardians with "appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

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Duties and powers of guardians of children's property.

71. (1) Inventories and accounts—
- (a) Every guardian must—
 - (i) Submit a list of the child's property under his or her guardianship in the form set out in Schedule "C" to the Master or a court within thirty days of the grant of letters of guardianship;
 - (ii) Submit a supplemental list in the form set out in Schedule "C" to the Master or a court within thirty days of discovering or acquiring new property;
 - (iii) Submit a final list in the form set out in Schedule "C" to the Master or a court within thirty days of termination of guardianship;
 - (iv) Submit an annual account of the administration of the child's property under his or her guardianship to the Master or a court on or before February fifteenth of each year;
 - (v) Hire a licensed, impartial appraiser where the value of the property is unknown.
 - (b) The Master or a court must notify any guardian who fails to file a list, supplemental list, final list, annual account or appraisal of this requirement in writing. If a guardian fails to file a list, supplemental list, final list, annual account, or appraisal within thirty days after notification, the Master or a court may—
 - (i) Order the guardian to file a list, supplemental list, final list, annual account, or appraisal;
 - (ii) Fine the guardian [x] emalengeni;
 - (iii) Suspend or remove the guardian of the child's property and appoint a temporary or new guardian from the child's remaining next of kin in the manner set forth in section 64;
 - (c) Any guardian who knowingly submits a false list, supplemental list, final list, annual account, or appraisal is guilty of a criminal offence and on conviction must be—
 - (i) Removed from his or her duties as guardian of the child's property and a new guardian appointed in the manner set forth in section 64;
 - (ii) Fined [x] emalengeni or imprisoned for a term of [x] years or both;
 - (iii) Ordered to make compensation for or restore any property fraudulently concealed or squandered.

Subsection (1) simplifies and consolidates Sections 85, 86, 87, 93, 94, 118, and 119 of The Administration of Estates Act, 1902 and updates and expands on the penalties provided under these sections.

- (2) Immovable property—
- (a) A guardian of a child's property has the powers and responsibilities of a fiduciary regarding the child's property. Guardians may not—
 - (i) Use the child's property for personal means;
 - (ii) Waste or mismanage the property.
 - (b) In particular and without qualifying the provisions of subsection (1), a guardian must—
 - (i) Take custody of the child's property;
 - (ii) Manage the property prudently and prevent the property's waste or destruction;
 - (iii) Keep the property safe, maintained, and repaired;
 - (iv) Commence protective proceedings if necessary to protect the child's property;
 - (v) Conserve any excess property for the child's future needs.
 - (c) Every guardian may—
 - (i) Sell or mortgage property with the Master's or a court's approval;

Subsection (a) simplifies the language in Section 90 of The Administration of Estates Act, 1902.

- (ii) Rent or lease property to another for the period of the guardianship for fair market value.

(d) Within thirty days of discovering or acquiring new property belonging to a child under his or her guardianship, the guardian must report the particulars of it to the Master or a court. This subsection is applicable to every curator bonis appointed under the provisions of the Mental Health Order, No. 20 of 1978, or the Leprosy Act, No. 23 of 1904.

This is based closely on the language in Section 91 of The Administration of Estates Act, 1902.

- (e) The Master or a court may require any guardian to post a bond of [x] percent of the property under his or her guardianship for the due and faithful administration of such property.

This section simply updates the language of Section 73 of The Administration of Estates Act, 1902 and allows the Master or a court to suspend or remove a guardian who fails to post bond.

- (3) Moneys—
- (a) Within thirty days of receipt, the guardian must pay any moneys belonging to the child in his or her possession directly into the Guardian's Fund to be credited to the child's trust

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account.

This provision directs the guardian to pay any moneys in his custody directly into the Guardian's Fund. This provision was added to cure a documented pattern of abuse in the Master's Office of officials or other persons misappropriating Guardian's Fund moneys.

(b) This subsection is applicable to every *curator bonis* appointed under the provisions of the Mental Health Order, No. 20 of 1978, or the Leprosy Act, No. 23 of 1904.

Subsection (b) is based closely on the language in Section 91 of The Administration of Estates Act, 1902.

(4) Penalties—

- (a) If any guardian fails to report or pay over any property, as required under section 70(2)(d) and section 70(3)(a), respectively, the Master or a court may—
- (i) Order the guardian to turn over the property;
 - (ii) Require the guardian to pay interest on the property improperly retained for the child's benefit;
 - (iii) Suspend the guardian from his or her duties until he or she reports or turns over the property, or pays the interest or both;
 - (iv) Institute an action against the guardian in order to recover the property or the interest;
 - (v) Remove the guardian and appoint a new guardian as set forth under section 64.

Section 71 is divided into four subsections for several reasons. First, subsection (1) clarifies that the duties of filing inventories and accounts are only applicable to guardians of children's property. The old Act did not specify whether this duty also applied to the child's guardian. It is unnecessary for both the guardian of the child and the child's property to submit inventories and accounts.

Subsection (2) and (3) distinguish between immovable property and moneys. Because guardians appointed by the Master must pay any moneys under their guardianship into the Guardian's Fund, only immovable property remains under the custody of the guardian. Thus, the guardian's duties depend on the type of property. For example, if any moneys are in the guardian's custody, those moneys must be paid into the child's trust account in the Guardian's Fund. If title deed land belonging to a child is in the guardian's custody,

the guardian has a duty to maintain that property in good repair.

Subsection (4) simply updates and simplifies the language in Section 91 of The Administration of Estates Act, 1902.

Termination of guardianship.

72. (1) Guardianship automatically terminates when—
- (a) The child attains the age of eighteen;
 - (b) The child marries, is emancipated by court order, is adopted, or dies;
 - (c) The guardian dies;
 - (d) The guardian renounces, resigns, or is removed by the Masters or court order;
 - (e) The guardian has been convicted of a felony.
- (2) Guardianship of a child's property automatically terminates for the reasons listed in subsection (1) and when—
- (a) The guardian becomes insolvent;

Subsection (a) modernizes and simplifies the language in Section 83 of The Administration of Estates Act, 1902, which prohibits insolvent persons from acting as guardians.

- (b) The child's property is exhausted.
- (3) Any person concerned with the child's welfare or the child's property, including the child himself or herself, may file a complaint with the Master or a court if—
- (a) The guardian is not performing orders of the Master or the court;
 - (b) The guardian has abused, neglected, or abandoned the child;

Subsection (b), in conjunction with subsection (5) below, implements section 19(1) of the CRC which requires state parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury, or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child."

- (c) The guardian has become mentally disabled;
 - (d) The guardian is wasting, mismanaging, or misappropriating the child's property;
 - (e) The guardian is not acting in the best interests of the child as set forth in section 64.
- (4) The burden is on the moving party to show by clear and

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convincing evidence that the guardian falls into one of the categories set forth in subsection (2).

(5) If guardianship automatically terminates or if the guardian falls into one of the categories set forth in subsection (2), the Master or a court must remove the guardian and appoint a new guardian in the manner set forth in section 64. The Master or a court may also—

(a) Order the guardian to make compensation for or restore any property fraudulently concealed or squandered;

(b) Assess interest against the guardian if the guardian is convicted of mismanaging or misappropriating the child's property;

(c) Fine or imprison the guardian for abusing, neglecting, abandoning the child, or committing fraud, mismanaging, or misappropriating the child's property, as set forth in the Penal Code, or both.

(6) Upon termination of guardianship, the guardian must relinquish custody of the child or the child's property or both, as the case may be, to the appropriate person as directed by the Master or the court.

(7) Resignation or removal of the guardian does not effect the guardian's liability for acts committed during the appointment.

Section 72 updates the language in Sections 77, 84, and 88(2) of The Administration of Estates Act, 1902, and limits the discretion of the Master to suspend or remove a guardian by crafting explicit exceptions and sets forth the process for appointing a new guardian.

This section is modeled after Section 150 of the South African Children's Act.

Compensation of guardians.

73. (1) Guardians are entitled to receive reasonable compensation annually for guardianship of the child or the child's property. The Master or a court must consider and base its decision on the following factors when determining what is "reasonable":

(a) Time and labor required;

(b) Novelty and difficulty of the appointment;

(c) Requisite skill to perform the service;

(d) Likelihood the duties preclude the guardian from other employment;

(e) Fee customarily charged in the community for similar services;

(f) Financial amount involved and results obtained;

(g) Time limitations and experience;

(h) Reputation and ability of the guardian.

(2) Payments are limited to [x] percent of the value of the child's property to all guardians.

(3) Guardians forfeit their compensation when they are removed from their duties for failing to obey orders of the Master or a court abusing, neglecting, or abandoning the child; or fraud, mismanagement, waste, or misappropriation of the child's property, under his or her guardianship.

This section simplifies the language of Section 95 of The Administration of Estates Act, 1902 and limits the Master's discretion to overcompensate guardians by setting forth a list of factors and a ceiling, safeguarding children's rights to inheritance and an adequate standard of living mandated under Swaziland's Constitution, the ICCPR, CEDAW, ICESCR and CRC.

Mentally incompetent and absent persons.

74. Subparts A-D apply equally to mentally incompetent and absent persons, where such person does not have a legal representative in Swaziland.

D. GUARDIAN'S FUND

This section proposes several changes to the current system. First, it establishes a Guardian's Fund Council. This Council is responsible for the management and accounting of the Guardian's Fund. Second, this subpart requires that the Guardian's Fund be transferred to a banking institution regulated by state or international banking laws. The objective of this revised section is to safeguard children's interests in light of the documented record of theft and abuse in the Master's Office. Some of the incidences noted by the Commission Report include: "[h]undreds of cheques worth in excess of E4 million were found lying on the floor and on tables at the conference room," "cheque[s] in excess of 20,000 Emalangeni issued by the Royal Swazi Insurance Company and sent to the Master's Office," that had been misappropriated by an accounts officer and that "the Accounts Officer does not know how to calculate interest." COMMISSION OF ENQUIRY, REPORT OF THE COMMISSION OF ENQUIRY INTO THE OPERATIONS OF THE OFFICE OF THE MASTER OF THE HIGH COURT VOL. 1, pp. 6-7, 31, 33 (1999) [hereinafter COMMISSION REPORT].

By removing moneys from the Master's Office, placing them in an interest bearing account in a banking institution regulated by law and the competitive marketplace, and creating a council with the mandate of keeping proper books and records, Swaziland will ensure that children are properly

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cared for and maintained, complying with international best interests standards.

Moreover, Swaziland will keep step with modern times. The Administration of Estates Act, 1902 is an outdated piece of legislation enacted before the creation of regulated financial institutions. This subpart is modeled after Zimbabwe's Estates Administrator Act, 27:20 (2002) which establishes a Council of Estate Administrators. The Council provides for the registration of estate administrators and sets up trust accounts at a regulated banking institution.

For the avoidance of any doubt.

75. On the commencement date—
- (a) All executors and guardians must pay any moneys devolving upon a child directly into the child's trust account in the Guardian's Fund.
 - (b) If a child does not have a trust account, the executor or guardian must notify the Guardian's Fund of this fact. When notified, the Guardian's Fund must open a trust account in the name of the child, or, if unknown, in the name of the deceased's estate, within seven days of notification.
 - (c) If the child has a trust account and the executor or guardian pays the moneys directly to the Guardian's Fund Council, he or she will be personally liable in the event that the moneys are lost or stolen.
 - (d) All executors and guardians must report the particulars of any moneys paid into the trust account to the Guardian's Fund Council to be recorded in the Registrar.
 - (e) No other moneys must be kept in the Guardian's Fund except moneys devolving upon a child. All estate moneys must be kept in an Estate Account as set forth under this Act.

This section makes clear that all moneys are to be paid directly into the child's trust account, and not to be sent to the Master's Office. Compliance is assured by making the executor personally liable for any funds sent to the Master's Office in contravention of this section that are subsequently lost or stolen.

Guardian's Fund established under The Administration of Estates Act.

76. (1) All moneys in the Guardian's Fund on the date of commencement must be paid to a Bank to be kept in a fund called the "Guardian's Fund."
- (2) The Bank will open a trust account in the name of each child and credit interest to such account as set forth according to state or international banking regulations.

This section provides for the transfer of funds from the current Guardian's Fund to the new Fund established in a regulated banking institution.

Establishment of Guardian's Fund Council.

77. There is hereby established a council, to be known as the Guardian's Fund Council, which must be a body corporate capable of suing and being sued in its corporate name and, subject to this Act, of doing anything that bodies corporate may do by law.

Functions and powers of Council.

78. Subject to this Act, the functions of the Council are—
- (a) To maintain a Register;
 - (b) To consider and determine applications for maintenance;
 - (c) To issue maintenance certificates to guardians, where necessary or appropriate, to cancel or suspend such certificates;
 - (d) To administer the Guardian's Fund.

Membership of Council.

79. The Council must consist of—
- (a) A chairman, who must be a registered legal practitioner of not less than seven years' standing;
 - (b) An accountant, who must be a registered accountant of not less than seven years' standing;
 - (c) A social worker, who must be a registered social worker of not less than seven years' standing.

This section sets out specific educational and work experience requirements. This section was added to address the problems in the Master's Office with appointments of unqualified, untrained personnel. Notably, the Commission Report discovered that the head of accounts did not know how to calculate interest.

Register of Council.

80. (1) The Council must establish a register, to be known as Guardian's Fund Register.
- (2) The Council must be responsible for maintaining the Register and ensuring that entries are made in the Register recording—
- (a) The child's name;
 - (b) The child's property and its value;
 - (c) The names of guardians;
 - (d) The details of the child's trust account;
 - (e) Maintenance orders.

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Sections 76-80 of this act create a Guardian's Fund Council.
The Council is charged with maintaining proper books and records and determining maintenance requests.

Guardian's Fund Accounts.

81. The Council must—
- (a) open and keep a trust account at a bank registered in terms of the Banking Act in which it must, within six days of receiving them, deposit all moneys held, or received by it on account of any person.
 - (b) keep proper books of account containing particulars and information as to moneys received, held or paid by it for or on account of any person and as to any interest earned by moneys in an account referred to in the proviso to paragraph (a) which are payable to any such person.

Audit of trust accounts.

82. Trust accounts and books of that account must be examined by an auditor who is registered in terms of the Public Accountants and Auditors Act annually.

Application for maintenance.

83. (1) The Council must determine maintenance payments according to the following formula:
- (a) Subtract the age of the youngest child from eighteen;
 - (b) Divide one by the result in subsection (a);
 - (c) Divide result in subsection (b) by twelve.
- (2) The result in subsection (c) must be the amount paid out of the trust fund to the child's guardian on the first of every month.
- (3) The Council must issue a maintenance certificate to the child's guardian who must present it at the bank for payment.

Maintenance payments.

84. (1) The bank must pay the child's guardian as stipulated in the maintenance certificate.
- (2) When guardianship terminates, the Master must notify the Bank within seven days to terminate payments. The child's guardian is personally liable for any moneys issued by the Bank to him or her after guardianship terminates.
- (3) If guardianship terminates because the child reaches the age of eighteen, the Bank must immediately issue to the child in one lump sum any moneys remaining in his or her account.
- (4) In medical emergencies, the Bank may issue the guardian a line of credit secured by the child's moneys. The guardian is personally liable for such moneys where the guardian fails to present documentation of the medical emergency to the Council within

thirty days of such emergency.

Sections 83 and 84 propose a streamlined system for maintenance payments, based on objective criteria, relieving the burden on the Master's Office and on guardians and stemming corruption.

List of unclaimed moneys to be published annually.

85. (1) On the first day of April of each year, the Bank must—
- (a) Publish in the Gazette a list of accounts of unknown or absent persons who do not have any known legal representative in Swaziland;
 - (b) Submit the list to the Attorney General who must publish it in any country to whom the unknown or absent person is believed to reside.
- (2) The Bank may publish and submit accounts that are less than [x] emalengani more than twice, but he/she/it is not legally obligated to do so.

This section simplifies and updates the language in section 102 of The Administration of Estates Act, 1902.

Unclaimed moneys.

86. Unclaimed moneys in the Guardian's Fund must escheat to the State forty years from the date the account was opened.

This section simplifies and updates the language in section 103 of The Administration of Estates Act, 1902.

PART III

GENERAL

Appeals.

87. (1) Any person who is aggrieved by the Master or a court's decision, or has an interest in the proceeding may appeal any decision relating to executorship or guardianship to a Magistrate court or High Court.
- (2) Magistrate courts and the High Court have original and appellate jurisdiction to hear matters relating to executorship and guardianship.
- (3) The High Court has final jurisdiction and may—
- (a) Reverse the Master's or a lower court's ruling and remand the case back to the Master or the lower court;
 - (b) Make a new appointment and remand to the Master or a lower court only for the purpose of issuing an order conforming to the High Court's decision;

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- (c) Render the order or judgment it believes should have been entered by the Master or the lower court.

This section provides widows and children with an effective remedy, as mandated under the Constitution and international law.

This section also updates and expands on Section 75 of The Administration of Estates Act, 1902. The language of this section is modeled on Section 5 of the High Court Act and includes the best interests standard set forth in Article 3(1) of the CRC (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”).

Invalidity of appointment of Master as executor or guardian.

88. No person may appoint the Master or any judicial official, in their official capacity, to be the executor of an estate or the guardian of any minor child. In such a case, proceedings will take place for the appointment of an executor or guardian as the case may be.

Registers of names and bonds.

89. The Master or a court must keep a register of the names, and the details, of any security posted by every executor and guardian.

This section simplifies the language in Section 110 of The Administration of Estates Act, 1902.

Proceedings on insolvency of administrators and guardians appointed by the Master or a court.

90. (1) When the Master or a court receives an order for sequestration under the Insolvency Act, No. 81 of 1955, the Master or a court must take the following actions—
- (a) If the insolvent is the executor of the estate, the Master or a court must notify any and all persons entitled to inherit under a will or the Intestate Succession (Amendment) Act of this fact;
 - (b) If the insolvent is a guardian appointed by the Master or a court, the Master or a court must appoint a new guardian in the manner set forth in section 64;
 - (c) If the insolvent is a guarantor for a guardian appointed by the Master or a court, the Master or a court must require such guardian to post a bond equal to x percent of the child’s property.
- (2) If a guardian fails to post bond as required under subsection (1) (c), the Master or a court must remove the guardian and appoint a new guardian in the manner set forth in section 64. The removal of

the guardian does not release him or her from liability where he or she has misappropriated property. The Master or a court may retain a guardian's bond under this subsection until the Master or a court determines that the guardian has not misappropriated any property. Upon making this determination, the Master or a court must release the bond to the guardian within thirty days.

This section simplifies the language in Section 112 of The Administration of Estates Act, 1902.

Records of Master or a court's office, etc.

91. The Master, regional master, or magistrate must keep in his office all original wills, testatmentary instruments, death notices, inventories, liquidation, and any distribution accounts lodged with him under the provisions of this Act. Only the executor will be able, upon request, to inspect the original document. Any other person may obtain only a copy of such document to inspect.

This provision simplifies the language of section 113 of the current Administration of Estates Act, updates the language to include the decentralization plan, and limits the access to documents held by the Master, regional master, and magistrate. The limited access is a safety measure put in place in response to the Commission of Enquiry's extensive report on the corruption in Master's office, misplaced checks, and fake documents. For example, the Commission found "[h]undreds of cheques worth in excess of E4 million were found lying on the floor and on tables at the conference room." COMMISSION OF ENQUIRY, REPORT OF THE COMMISSION OF ENQUIRY INTO THE OPERATIONS OF THE OFFICE OF THE MASTER OF THE HIGH COURT VOL. 1, pp. 6-7 (1999)

Liability of Master or a court official for costs of actions.

92. If the Master or a court official is a party in any action in his official capacity, the Government must cover the costs of the action. If the Master or a court official is found liable or guilty, the Master or court official is personally liable for repayment of such litigation costs to the Government.

This section revises Section 115 of The Administration of Estates Act, 1902, which provides that "when the Master is the plaintiff or defendant in any action instituted by him or against him in his official capacity . . . the Master may draw the amount of such [litigation] costs and pay them out of the credit balance of the Guardian's Fund." Given the documented record of abuse, theft, fraud, mismanagement,

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and negligence by Master's Office officials and the failure of the government to effectively address these issues, the burden should fall on the government to cover the costs of litigation and not the persons from whom such funds are misappropriated. In addition, taking moneys out of the Guardian's Fund to cover the Master's litigation costs violates children's rights to inheritance and an adequate standard of living guaranteed under Swaziland's Constitution and international law.

Master's fees.

93. The Master may collect fees for actions taken by the Master or his or her office. All such fees are specified in the tariff contained in Schedule "D," and will contain stamps to be attached to the relevant documents.
The Master will waive all fees for actions taken in respect to estates valued at less than [X] emalngeni (adjusted annually for inflation).

These fees are to cover the costs of actions taken by the Master's office on behalf of the administration of an estate. There is a schedule provided to make this process easier. Estates valued at a certain amount or lower should not be subject to fees in order to preserve as much money as possible for the beneficiaries of that estate.

No legitimate portion claimable as of right.

94. No legitimate portion will be claimable as of right by anyone out of the estate of any person.

Minister for Finance may make regulations.

95. (1) By notice in the Gazette, the Minister for Finance may make rules and regulations that advance the purpose and provisions of this Act, safeguard the Master's or court's records, securities or valuable effects, ensure the payment of money into and out of the Guardian's Fund, and encourage the Master's office or courtroom's efficient management.
(2) The Minister for Finance may also repeal rules and regulations that prohibit the actions listed under subsection (1).

This section simplifies the language in Section 122 of The Administration of Estates Act, 1902.

Power of appointment.

96. (1) An executor or guardian may not appoint another person to act in his or her place.
(2) Subsection (1) does not prevent—

- (a) An executor from enlisting the help of an attorney in the administration and distribution of the estate or hiring an appraiser.
- (b) A guardian from allowing others to care for the child as long as the guardian continues to supervise the care, seeking financial and investment advice from a reputable financial advisor, or hiring an appraiser.
- (3) Executors and guardians are liable for the acts and omissions of agents performing their duties.
- (4) Only a will, the Master, or a court may appoint an executor or guardian under this Act.

This section simplifies and expands on the language in Section 128 of The Administration of Estates Act.

Statement of unclaimed moneys to be published by banks, etc.

97. (1) Every banking company, firm, partnership or person trading or carrying on business within Swaziland must publish in the Gazette a detailed statement of all moneys in its, or any of its branches or agents in Swaziland, possession. The statement must include a list of moneys which—
- (a) Are not the property of such company, firm, partnership or individual;
 - (b) Do not have a valid lien; and
 - (c) From the date of publication, have remained unclaimed by the respective owners for a period of five years or more.
- (2) The statement must be published annually in January, and include moneys up to December thirty-first of the year preceding.
- (3) If possible, the statement must set forth the full names and last known addresses of the respective owners.
- (4) The person publishing the statement must sign an affidavit in the form contained in Schedule “F” and submit it to the Master or a court by the date of publication. If the person fails to do so, the statement’s publication is void.
- (5) Three months after the date of publication, all moneys still unclaimed must be deposited in the Guardian’s Fund, to be administered by the Master or a court as set forth under this Act.

Penalty on failure to publish statement.

98. (1) If any of the following persons fails to publish the return or pay moneys into the Guardian’s Fund as required under section 95, then he or she is guilty of an offence and on conviction liable to a fine of [x] emalangeni, or in default, to a term of [x] years imprisonment—
- (a) In the case of a company, its secretary, directors, and its agents and officers in the custody or control of such unclaimed moneys;
 - (b) In the case of a firm or partnership, its members in

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Swaziland, and its agents and officers in the custody and control of such unclaimed moneys;

(c) In the case of an individual, such individual.

(2) Anyone convicted under subsection (1) must publish the return or make payment as required under section 95. If such person fails to do so, he or she will be imprisoned until the statement is published, or the moneys are paid.

Sections 97 and 98 restate in simplified language Sections 129 and 130 of The Administration of Estates Act, 1902.

**ADMINISTRATION OF ESTATES (AMENDMENT) ACT, 200X -
SCHEDULES**

The schedules below are based on existing schedules contained in the original, currently in force Administration of Estates Act of 1902.

**SCHEDULE "A"
DEATH NOTICE**

PURSUANT TO THE PROVISIONS CONTAINED IN THE ADMINISTRATION OF ESTATES
ACT

1. Name of the deceased person who died: [First:] [Middle:] [Last:]
2. Birthplace and nationality of person who died:
3. Names and addresses of the parents of the deceased: [Mother] [Father]
4. Age of the deceased years months
5. Occupation in life of the deceased
6. Married or unmarried, widower or widow
 - (a) Name of surviving spouse or spouses (if any), and whether married in community of property or not;
 - (b) Name or names and approximate date of death, of any predeceased spouse or spouses
 - (c) Place of last marriage
7. The day of the death:
8. Where the person died: [Town or place] [Region] [House]
9. Names of children of deceased, and whether majors or minors
State separately the children born of different marriages, and give the date of birth of each minor. Names must be written out in full. If there are no children, and either or both parents be dead, then give the names and addresses of the brothers and sisters of deceased.
10. Has the deceased left any movable property?
11. Has the deceased left any immovable property?
12. Is it estimated that the estate exceeds ~~E200~~ E50,000 [adjusted for inflation] in value?

This amount reflects the recommendation by the Commission of Enquiry for the decentralization plan for the Master's office - indicating which estates should be handled by the headquarters in Mbabane. The E50,000 amount is based on South Africa's distinction between those matters handled by the Master and those handled by a regional master or magistrate.

13. Has the deceased left a will?
If yes, date: _____, 20____
[State in what capacity.]

Changes to Schedule "A" from the current Administration of Estates Act, 1902 are indicated with strike-through (for deletions) and underlines (for insertions).

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SCHEDULE "B"

FORM OF LETTERS OF ADMINISTRATION/GUARDIANSHIP

These are to certify that _____, has been duly appointed executor/guardian, and is hereby authorised as such to administer the property which constitutes the Remainder of the estate of _____.

Signature:

Master of the High Court, Regional Master, or Magistrate Judge

_____, this _____ day of _____, 20____.
Region

Schedule "B" is based on the existing such schedule in the current Administration of Estates Act, 1902. It was changed by simplifying its archaic language, adding "guardianship" to the form, and ensuring that only the remainder of the estate is handled by the executor or guardian (per Schedule "C" below).

SCHEDULE "C"

INVENTORY FORM FOR REMAINDER OF PROPERTY IN AN
ESTATE

The estate of _____ has been inventoried and the contents are listed below with the exception of any marital home(s), household chattels belonging to a surviving spouse, and funds due to creditors. This inventory was completed by _____, executor of the estate. If the deceased is survived by minor children, the guardian for those children was present for this inventory.

Signature:

Executor

Witness 2

Witness 1

Guardian

Heir/Legatee Present (Optional)

Heir/Legatee Present (Optional)

_____, this _____ day of _____, 20 _____.

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SCHEDULE “D”
TARIFF OF FEES

	E.c.
For registering any death notice	0 25
For registering any will, codicil, or testamentary writing	1 00
Inspection of any document, each estate.....	0 50
Copy of any document of 100 words or less	0 50
For every additional 100 words or portion thereof.....	0 25
For letters of administration as executor, testamentary, assumed or dative, or certificates of appointment as <i>curator bonis</i> each:	
Where the value of the estate does not exceed E200.....	1 00
Where the value of the estate exceeds E200	2 00
For letters of confirmation of the appointment of tutors, testamentary, assumed or dative, or curators nominate, assumed or dative, each	1 00
For every notice in the Gazette, including cost of publication	2 00
Attending meeting of next of kin, or creditors, before Master or Regional Administrator	1 00
Approving of sureties given by executors, tutors, and curators.....	0 50
Registering accounts of executors, tutors, and curators, each.....	0 50
Registering any inventory act, repudiating an inheritance, deed of assumption, or any other deed, each.....	0 50
Registering an Order of Court.....	0 50
Registering any bond securing minor’s portions	0 50
For every report at the discretion of the Master, subject to taxation, before the Court or a Judge thereof, not less than	1 00
For every certificate under the hand of the Master	0 50
For taxing the remuneration of executors, tutors, curators, or appraisers, on every lilangeni or fraction of a lilangeni of the taxed amount	0 10

Schedule “D” remains unchanged from the current Administration of Estates Act, 1902. However the tariff of fees should be reviewed periodically to adjust for inflation and to ensure indigent claimants can adequately access the rights and services provided under the act.

SCHEDULE “F”
UNCLAIMED MONIES

I, _____ of [state capacity of deponent] make oath and say that the return of unclaimed moneys in the hands of _____, subscribed by me and published under the provisions of the Administration of Estates Act, 1902, in the Gazette of the _____, is to the best of my knowledge and belief a true and complete return as required by the said Act; and that during the year ending the thirty-first day of December now last past no unclaimed moneys have been transferred by or on behalf of the said... _____, from Swaziland to any other country or placed to any suspense or other account with a view to evading the provisions of the Act and that all amounts which ought to be included in the said return are duly included therein.

Schedule “F” remains unchanged from the current Administration of Estates Act, 1902.

**SCHEDULE 3
INTESTATE SUCCESSION (AMENDMENT) ACT, 200X**

Preamble

Whereas the Intestate Succession Law, 1953, fails to embody the rights and values set out in the Constitution; reinforces past divisions and discrimination; and requires revision as a matter of the utmost urgency;

Whereas the Constitution demands a succession scheme that allocates a “reasonable provision” of a deceased’s estate to the surviving spouse(s) and surviving children;

Whereas international human rights law requires equal rights to inheritance;

Whereas comparative law demonstrates that African systems are enacting uniform succession laws in line with regional and international human rights standards;

Definitions

“Intestate” means a deceased person who did not dispose of all property by a valid testamentary disposition, i.e., a will.

“Estate” includes any and all property of the deceased in which the deceased had an ownership interest, to the extent of that interest, including but not limited to, personal chattels, livestock, agricultural land, nonagricultural land, clan land, family land, vehicles, agricultural equipment, business entities, bank accounts, employment benefits, and monetary investments.

“Matrimonial home” means the principal residence or residences of the spouses in which one or both of them has or have a proprietary interest.

“Household chattels” includes jewelry, clothes, furniture and furnishings, refrigerator, television, other electrical and electronic appliances, kitchen and laundry equipment, simple agricultural equipment, books, and household livestock.

“Remainder” includes everything under the definition of the “estate” minus the matrimonial home(s) (as defined above) and household chattels (as defined above), and after the settling of claims to creditors.

“Child,” “children,” “issue,” and “lineal descendant” mean the offspring of the deceased regardless of the age of the offspring and includes children naturally born or adopted within or outside of marriage.

“Grandchild” means a child of the deceased’s child.

“Minor” means any person who has not reached the age of eighteen (18).

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“Polygamous marriage” means a marriage in which a man is married to more than one wife at the same time.

“Spouse” means a person who, at the time of the deceased’s death, was

- (i) validly married to the deceased, including under:
 - (a) the Civil Marriage Act;
 - (b) Swazi Law & Custom; or
 - (c) the foreign law under which the marriage was celebrated; or
- (ii) proved to be living together with the deceased for five years or more, in such circumstances as to have acquired the reputation of being husband and wife.

Under Swaziland’s Constitution “common law husband and wife” are eligible, as legally married spouses, to conjugal inheritance rights. *See* SWAZ. CONST. s. 34(2). By defining “spouse” in this provision, spouses, including common law spouses, will receive their inheritance share. This definition is based on discussions with attorneys at Swaziland-based NGOs, Women and Law in Southern Africa Research and Educational Trust (WLSA), and the Council of Churches, which based on extensive direct and policy legal services determined that a five-year cohabitation period should qualify a couple as “common law spouses.” This definition is also modeled after Tanzania’s presumption of marriage provision in its Marriage Act. *See* The Law of the Marriage Act of 2002 s. 160 (Tanz.) (“Where it is proved that a man and woman have lived together for two years or more years, in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.”)

General

- i. On the commencement of this Act, the estate of any person who dies intestate must pass in accordance with this Act.

This section replaces sections 2(i) and 4 of the current Intestate Succession Act, which call for two different succession regimes - one for non-Africans and one for Africans. This section applies to “any person” who dies intestate - treating all persons equal, as required by section 20 of the Swazi Constitution, as well as international treaties to which Swaziland has obliged itself. For example, the ICCPR’s non-discrimination provision in article 26, which provides: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

Furthermore, a number of other African countries provide for one uniform intestate succession regime. For example,

Intestate Succession Law, 1985 (Ghana) (providing a uniform succession law applicable throughout the country, irrespective of marriage type); Equal Rights of the Customary Marriage (Liberia) (giving equal inheritance rights for both customary and civil marriage types). Additionally seminal court cases across the continent have extended civil protections for heirs, regardless of gender and age. E.g., the South African Constitutional Court in *Bhe v. Khayelitsha* (2004) applied South Africa's Intestate Succession Act to customary marriages.

2. (1) A person is deemed to have died intestate under this Act if at the time of his or her death he or she had not made a will disposing of his or her estate.

(2) Any person who dies leaving a will disposing of part of his or her estate will be deemed to have died intestate under this Act in respect to that part of his or her estate which is not disposed of in the will, and accordingly the provisions of this Act shall apply to such part of his or her estate.

The existing Intestate Succession Act fails to provide any explanation of what it means to die intestate. This explanatory language is modeled after Ghana's intestate succession statute. *See* Intestate Succession, 1985 (Ghana).

(3) Where the deceased has left a will, if the estate is above [X amount] (adjustable for inflation), the portion of the estate below that amount must be distributed in accordance with the provisions of this Act, leaving only the portion above that amount to be distributed in accordance with the deceased's will.

Swaziland's Constitution contains language explicitly requiring compulsory shares for a surviving spouse: "[a] surviving spouse is entitled to a reasonable provision out of the estate of the other spouse *whether the other spouse died having made a valid will or not* . . ." Swaz. Const. 2005 s. 34(1) (emphasis added).

Furthermore, a number of countries around the world provide for a "forced share," thereby limiting the scope of an individual's right to make wills which dispossess certain dependants and close relations. Among countries that provide for compulsory inheritance shares are Albania, Argentina, Austria, Bahrain, Belgium, Brazil, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, Guyana, Hungary, Iceland, Ireland, Israel, Liechtenstein, Poland, Portugal, Sweden, Taiwan, Turkey, Venezuela, and Zimbabwe. *See* INTERNATIONAL

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SUCCESSION 7 (Louis Garb ed., 2004). Examples include: Wills and Inheritance Act, No. 25 of 1967 (Malawi) (prohibiting individuals from disinherit their spouses); Civil Code of the Republic of Albania (1981) art. 361 (“In any event the spouse receives one-half of the inheritance.”); Bahrain Law 23.264 of 1985 and Law 23.515 of 1987 on Civil Marriage (banning disinheritance of spouses and children); Finland Code of Inheritance, *available at* <http://www.finlex.fi/en/laki/kaannokset/1965/en19650040.pdf>.

3. For the avoidance of doubt, all children of the deceased – including out-of-wedlock and adopted – inherit equally under this Act.

Sections 29(4) and 31 of the Swazi Constitution eliminate the distinction between so-called “legitimate” and “illegitimate” children, and explicitly state that children—regardless of the marital status of their parents—shall inherit equally. Additionally, intestate succession laws from around the world explicitly state that there is to be no distinction between children on the basis of their birth status and all shall inherit equally. *See, e.g.*, The Women’s Act, art. 31 (Congo); Law of Succession of the People’s Republic of China, art. 10; Civil Law of Guyana Act, Ch. 6:01.

4. Where spouses die in circumstances –
 - (a) in which it appears that their deaths were simultaneous; or
 - (b) rendering it uncertain which of them survived the other,all children—of each spouse—inherit in equal shares from the joint estate.
5. Where a child of the deceased has predeceased him or her, the deceased child’s issue is entitled to the whole or a portion of the estate which would otherwise have passed to his or her parent (a child of the deceased) if that parent had not predeceased the intestate.

Matrimonial home

6. Where the deceased is survived by a spouse, the spouse is entitled to the matrimonial home and all household chattels of the deceased to the full extent of the deceased’s ownership rights. This right is effective immediately upon the death of the decedent.

This provision fills a gap in the current Intestate Succession Act which is silent on the right to the matrimonial home/household chattels. A surviving spouse’s right to the matrimonial home (and household chattels) is supported by the practice and laws in numerous countries around the

world, including on the African continent. *See, e.g.*, Deceased Estates Succession Act 1997 (Zimbabwe), available at <http://www.parlzim.gov.zw/inside.aspx?mpgid=14&spid=49> (“The surviving spouse . . . shall be entitled to receive . . . (a) the house . . . in which the spouses or the surviving spouse . . . lived in immediately before the person’s death; and (b) the household goods and effects which, immediately before the person’s death were used in relation to the house or domestic premises”); Mauritius, Issue 10 (Oct. 2006), *cited in* International Succession Laws (Tottel Publishing 2001) (“In addition to a share of the succession . . . the surviving spouse has a lifetime usufruct in respect of the matrimonial home . . . its furniture and the rights attached thereto . . . [the] usufruct rights accruing to the surviving spouse cannot be reduced or revoked by the deceased, either freely or by testamentary disposition.”); Law No. 22/99 (Rwanda); available at <http://www.grandslacs.net/doc/2740.pdf> (last visited May 14, 2007) (“The surviving spouse remains the usufructuary of the conjugal house as well as of the movable furniture where they are the only property in the succession or are part of the inheritance property.”). *See also* Austria, *cited in* INTERNATIONAL SUCCESSION (Louis Garb ed., 2004) at 38 (“The widow/widower is entitled to the use of the family home, irrespective of his/her needs & may therefore use it even after remarriage.”); Brazil, *id.* at 83 (“Maintenance is provided to the surviving spouse . . . by means of the right to live in the house destined to be the home of the family if it is the only property of that type in the estate.”); Greece, *id.* At 258 (“[T]he surviving spouse . . . will receive in addition to his hereditary share upon intestacy the furnishings, implements, clothing and other similar household objects which were used either by him alone or the couple.”); New Zealand, *id.* at 448 (“The spouse of the intestate gets the personal chattels,” plus a monetary amount, in addition to its share in the balance of the estate.).

International human rights law, including treaties ratified by Swaziland, reinforce the spouse’s right to the house. In its *General Recommendation 21*, the CEDAW Committee recognizes that as a result of discriminatory practices, “women may receive a smaller share of the husband’s or father’s inheritance than would widowers or sons.” Thus, inheritance rights for widows often do not reflect the principles of equal ownership and property acquired during marriage. In Swaziland one example of such unequal treatment is that at the death of a woman, there is no question that the man stays in and continues to own the marital home. The women

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in Swazi society do not have such assurance. As CEDAW makes clear, “Such provisions contravene the Convention and should be abolished.” CEDAW, General Rec. 21, at para. 35. By giving the surviving spouse the home outright, this provision ensures equal inheritance rights in accordance with CEDAW and the Swazi Constitution.

7. Where the deceased is not survived by a spouse but is survived by a child or children, the child is entitled to the matrimonial home to the full extent of the deceased’s ownership rights. In the case of more than one child, the children will share the home equally.

As a State Party to ICESCR, Swaziland “recognize[s] the right of everyone to an adequate standard of living” ICESCR, art. 11. By allowing the surviving spouse and/or children to stay in the house and possess the house to the full extent of the deceased’s ownership rights, Swaziland would work to fulfill this obligation under ICESCR. Furthermore, granting the house to the children in the absence of parents is crucial. With increasing numbers of child-headed households as a result of the severe HIV/AIDS epidemic in Swaziland, children must be guaranteed their inheritance rights. Marjorie B. Mavuso, an Assistant Representative of UNFPA in Swaziland, lamented: “we see a lot again of orphans and vulnerable children as a result of HIV...” Interview with Marjorie B. Mavuso, Assistant Representative of UNFPA, in Mbabane , Swaziland (Mar. 5, 2007). Ms. Celiwe Seyama of UNICEF elaborated on the plight of “AIDS orphans” in Swaziland: “If one parent dies they might get something from the estate, but if both die, it’s much harder. It’s so common. A cousin, uncle or distance uncle will take everything and disinherit the children. Interview with Celiwe Seyama, UNICEF Worker, in Mbabane , Swaziland (Mar. 6, 2007).

8. Where the estate of the deceased includes more than one house, the surviving spouse, or the surviving child or children, will choose which of those houses the spouse (or children) wishes to pass upon such spouse (or children). The other house(s) will become part of the remainder of the estate and pass accordingly.
9. All children living at the deceased’s home at the time of the death may continue living in the home.

This provision is inspired by the law from neighboring Zimbabwe which provides that both spouse(s) and children retain the right to remain on land possessed by or allocated

to the deceased and to remain in the home. Deceased Persons Family Act of 1997 s. 10(1) (Zimb.), available at <http://www.parlzim.gov.zw/inside.aspx?mpgid=14&spid=49> (last visited May 15, 2007).

Polygamous marriages

10. Where the intestate is a man in a polygamous marriage, and is survived by more than one wife, each surviving wife is entitled to her own home and household chattels to the full extent of the deceased's ownership rights.

1. Where the deceased left fewer houses than he did wives but had his own dwelling/home at the time of his death, each wife will inherit the home in which she lives at the time of his death and the wife without her own home shall inherit the deceased's dwelling.

2. Where the deceased husband left fewer houses than he did wives and did not have his own dwelling/home at the time of his death, then the house-less wife will receive an additional share of the inheritance. For example, if a man dies leaving three wives and two houses, the "remainder" of the estate will pass in the following manner:

(a) The one-half that is typically divided equally among the wives, will be divided by a number that is equal to the number of wives plus one (for example, where there are three wives, the spousal half is divided by four); the house-less wife then gets two wife shares, with the other wives getting just one each.

3. Where at the time of his death each of his wives lived in her own, separate home and the deceased also left a house/dwelling of his own, the home of the deceased shall be added to the "remainder" of the estate and pass accordingly.

4. Where at the time of his death all surviving wives are sharing a home, they may continue sharing until remarriage, or may sell the home and share equally the proceeds.

To attempt to protect the rights of wives in polygamous unions - which by their very nature treat women unequally- this provision allocates each such wife her own household.

For examples from African laws, see Intestate Succession Act of 1995 (Zambia) (providing that the surviving spouse receives a "life interest in the house and, in the case of polygamy, all wives receive absolute homestead rights and equal shares"); The Deceased Estates Succession Act of 1997 (Zimb.), available at <http://www.parlzim.gov.zw/inside.aspx?mpgid=14&spid=49> (last visited May 15, 2007).

The ideas underlying this section are also based on extensive discussion with WLSA. See e.g., Telephone interview with Lomcebo Dlamini, Director of Women and Law in Southern Africa (May 2, 2007).

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11. Where the intestate is a woman in a polygamous marriage, and is survived by a child or children, her child or children are entitled to her home and household chattels to the full extent of the deceased's ownership rights.
 1. In the event that the deceased's husband survives her and he does not have his own home/dwelling, the surviving husband and the deceased's surviving children will share equally the matrimonial home and household chattels of the deceased to the full extent of the deceased's ownership rights. (For example, if there are three children, each child and the surviving husband will inherit one-fourth share in the home.)

According to CEDAW's *General Recommendation 21*, a polygamous marriage "contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited." CEDAW, General Rec. 21, para 14. By granting each woman outright the house she lives in, yet restricting the polygamous husband's share in each house, these provisions attempt to equalize the inheritance of men and women in polygamous marriages.

Remainder of the estate

12. Where the deceased is survived by a spouse but no children, the spouse shall inherit the entire estate.
13. Where the intestate is survived by a child (or children) but no spouse, the surviving child or children shall inherit the entire estate in equal shares.

These two provisions are based on South Africa's Intestate Succession Act, 1987.

14. Where the intestate is survived by a spouse and one child, the remainder of the estate will pass in the following manner:
 1. two-thirds to the surviving spouse;
 2. one-third to the child.
15. Where the intestate is survived by a spouse and more than one child, the remainder of the estate will pass in the following manner:
 1. one-half to the spouse;
 2. one-half to the children, to be shared equally among them.

Swaziland's Constitution requires that Parliament enact laws necessary to ensure that "a child is entitled to reasonable provision out of the estate of its parents." Swaz. Const. s. 29(7)(b). The Constitution also grants a surviving spouse an inheritance right, which entitles him or her to a "reasonable provision out of the estate of the other spouse." Swaz. Const. s. 34(1). This division is an attempt to provide the requisite "reasonable share" to surviving spouses and children. These provisions also reflect the views of many of those interviewed by the Clinic in Swaziland in March 2007 about what is a "reasonable share." Although many acknowledged that it is a subjective determination, they tended to find this breakdown of 50-50 to be "fair" and/or "reasonable" when asked. *E.g.*, Interview with Swazi widower, in Mbabane, Swaziland (Mar. 9, 2007) (When asked who should get money or assets [basically the remainder of the estate, he replied, "The surviving spouse and children." Asked subsequently how it should be split, he answered, "Depending on the age of the children, the surviving spouse should get ... half, and the other half should be divided amongst the children."); Interview with Musa Ndlangamandla, Chief Editor, The Swazi Observer, in Mbabane, Swaziland (Mar. 6, 2007) ("I'm thinking the wife must get 50% of the estate, then the remainder must go to the children. Immediately, that's what I think."); Interview with Lildiwe Mngomezulu, Swazi widow, in Manzini, Swaziland (Mar. 5, 2007) (Q: "The new Constitution says that each wife is entitled to a reasonable share ... How much should each wife get?" A: "The wife should get half." Q: "What should happen to the other half?" A: "It must go to the kids or to the other wife."); Interview with Sihlengiwe Dlamini, Law Student, in Mbabane, Swaziland (Mar. 8, 2007) (Q: "We're thinking that reasonable might mean giving the wife the house and then all of the furniture and things in the house. And then in addition to the house, fifty percent of the rest of the property, whatever's remaining Does that seem reasonable to you, or do you think it seems like too much? A: "Well, to me, it would seem reasonable because when the other spouse dies, obviously you would need to have means to continue living, so you definitely need the house and its contents, and other means of generating money, so that you can be able to live. So I think we are...I would think that is reasonable.").

16. Where any or all of the surviving children are of the age of minority, the surviving spouse or, in the event of no surviving spouse, the minor children's guardian, will manage the entire "child's share" (one-half of the estate) in accordance with the Administration of Estates Act

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until all children of the deceased reach the age of majority. At that time, the guardian must distribute the remaining portion of the “child’s share” in equal shares.

17. Where the intestate leaves neither a spouse nor child, the intestate’s estate shall be shared equally, regardless of sex, by the following parties in order of priority:
 1. grandchildren of the deceased, or if none survive:
 2. great-grandchildren of the deceased, or if none survive:
 3. parents of the deceased, or if none survive:
 4. siblings of the deceased, or if none survive:
 5. nieces and nephews of the deceased, or if none survive:
 6. cousins of the deceased, or if non survive:
 7. the State.
18. If the value of the entire estate is less than [X] amount, the surviving spouse will receive the entire estate.

Remainder of the estate in polygamous marriages

19. Where the intestate is a man in a polygamous marriage and is survived by children and multiple wives, one-half of the remainder of the estate shall be divided equally among the children, and one-half of the remainder of the estate shall be divided equally among the surviving wives.
20. When the intestate is a woman in a polygamous marriage, the surviving husband shall receive a fraction of the typical spousal share, depending on the number of wives in the polygamous marriage. The surviving polygamous man will receive the equivalent of $1 / \text{total number of wives}$.

This section attempts to equalize the inherently unequal position of women and men in polygamous unions—a polygamous man stands to inherit from multiple wives, while each wife in such a marriage may inherit only small fraction of the sole husband’s estate to be divided with the other wives and their children. The section calls for the following division: for example, a man who is married to three wives, will inherit $1/3$ of the typical spousal share—which would be $1/2$ of the deceased’s estate. Therefore, the polygamous husband would receive $1/3$ of $1/2$, or roughly 16.7% of the deceased’s estate. Similarly, a man who is married to four wives will inherit $1/4$ of the typical spousal share. Therefore, the polygamous husband would receive $1/4$ of $1/2$, or 12.5% of the deceased’s estate.

This breakdown also ensures the equality of men and women in inheritance, as demanded by the various international

treaties to which Swaziland is a party (including ICCPR, CEDAW, and the African Charter). Furthermore, the Human Rights Committee has stated, “Women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses.” HRC, General Comment 28, para. 26. These two provisions prevent inequality in the inheritance scheme by proportioning the polygamous husband’s share so that in the end, he inherits a total of one spousal share—just as each wife will.

Penalty clause

21. Any person will be punished in accordance with section 3 of The Inheritance Crimes Act who -
1. unlawfully ejects a surviving spouse or child from the matrimonial home contrary to sections 6-7 of this Act;
 2. unlawfully deprives any person of his or her right to use the estate or any property to which he or she is entitled; or
 3. removes, destroys, or otherwise unlawfully interferes with the property of the deceased person.

This section is modeled after Ghana’s Intestate Succession Law, sections 16A and 17 (as amended). This section also follows the Swazi Constitution’s rights and protection of the family section—which states that “Society and the State have the duty to preserve and sustain the harmonious development, cohesion and respect for the family” SWAZ. CONST. s. 27(5).

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SCHEDULE 4

INHERITANCE CRIMES ACT, 200X

An Act to provide for the protection of property inherited by spouses and children, and to prevent the violence often associated with such deprivations.

This Act criminalizes actions intended to deprive surviving spouses and children of their legal rights to inheritance. Under section 34(1) of the Constitution of Swaziland a surviving spouse is entitled to a “reasonable provision” from the estate of his or her deceased spouse regardless of whether the spouse died testate or intestate, or whether the couple was married under civil or customary law. SWAZ. CONST. 2005 s. 34(1). Additionally, section 34(2) of the Constitution states that Parliament shall enact legislation to this effect “as soon as practicable.” SWAZ. CONST. 2005 s. 34(2). In terms of the rights of children, section 29(7)(b) of the Constitution states that Parliament shall enact laws to ensure a child is also entitled to a “reasonable provision” from its parents estate. SWAZ. CONST. 2005 s. 29(7)(b). CEDAW states that countries who are States Parties must “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.” CEDAW, art. 2(f). *See also* ICCPR, art. 2(2) (“[E]ach State Party to the present Covenant undertakes to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”); CRC, art. 4 (“State Parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention); African Charter, art. 1 (“[P]arties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.”); Protocol to African Charter, art. 20(a) (“States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions: that widows are not subject to inhuman, humiliating or degrading treatment...”).

Preamble

Whereas Swaziland passed, and the King assented to, a Constitution committing itself to “enact[ing] legislation regulating the property rights of spouses.”

Whereas Swaziland passed, and the King assented to, a Constitution stating affirmatively that “[a] woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.”

Whereas Swaziland committed itself by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women, which requires States Parties “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”

Short title.

1. This Act may be cited as the Inheritance Crimes Act, 200X.

Definitions.

2. In this Act, unless the context otherwise requires—

“Harassment” means violence, a credible threat of violence or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, harasses, or pressures the person. For purposes of this act, harassment will also include behavior that forces a person to either leave their home, or to part with their property against their will.

This definition is based on California’s code which provides for temporary restraining orders and permanent injunctions for “harassment”. CAL. CODE CIV. PROC. § 527.6 (West 2002).

Unlawful to deprive a surviving spouse or child of property.

3. Any person commits an offense who -
 - (a) unlawfully ejects a surviving spouse or child from the matrimonial home contrary to section 6 of the Intestate Succession (Amendment) Act, 200X;
 - (b) unlawfully deprives any person of his or her right to use the estate or any property to which he or she is entitled; or
 - (c) removes, destroys or otherwise unlawfully interferes with the property of the deceased person.

Individuals convicted of one or more of these offenses will be subject to a minimum fine of [X] emalangeni, to a minimum term of imprisonment of [X] years, or to both. The Magistrates Court shall make all other orders as it

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considers necessary for the re-instatement of, or reimbursement to, the person ejected or deprived.

This section is modeled after Ghana's intestate succession statute. Intestate Succession (Amended) Law of 1991 (Ghana), s. 17. *See also* Intestate Succession Act of 1989 (Zambia). Currently in Swaziland there are no criminal repercussions for causing deprivation of inheritance in this manner. Without the threat of heavy fines or jail time, potential perpetrators have no deterrent to their actions, and law enforcement has few options to aid in prevention of these crimes. This provision includes both criminal and civil penalties. Victims will be able to claim monetary compensation for their loss and punitive damages. Perpetrators may be sent to jail or have heavy fines levied upon them. Additionally, it is essential to include criminal penalties for *both* acts of property grabbing and forced evictions. Women married under customary law currently have no right to inherit property from their deceased spouse. They do, however, have the right to remain in their marital home. Therefore, it is essential to include forced evictions separately in this statute as a criminal offense of its own.

These remedies are supported by Swaziland's Constitution and by international law. In addition to protection of gender equality and non-discrimination, the Constitution states in article 18 that "[t]he dignity of every person is inviolable" and that "[a] person shall not be subjugated to ... inhuman or degrading treatment ..." SWAZ. CONST. 2005, sec. 18. Article 16(1)(h) of CEDAW requires "States parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure ... the same rights for both spouses in respect to ownership, acquisition ... [and] enjoyment of property ..." CEDAW, art. 16(1)(h). In regards to that section the CEDAW Committee stated, "[o]ften inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished." CEDAW, General Recommendation 21, para. 35. Further, according to the Convention on Economic, Social and Cultural Rights General Comment 16, when you combine ICESCR article 3, calling for equal rights of men and women, with article 10, which provides for protection of the family, States parties are required to "ensure that women have equal rights to ... inheritance upon their husband's death." Committee on Economic, Social and Cultural

Rights, *General Comment 16*: The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), (34th Sess. 2005), para. 27, available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

These provisions are in harmony with Swaziland's Constitution. Lastly, in accord with Swazi Law and custom, article 21 of the African Protocol on the Rights of Women explicitly states that a "widow shall have the right to continue to live in the matrimonial house." Protocol to the African Charter, art. 21(1).

Civil Injunctions

4. (1) A person who has suffered harassment may seek a temporary restraining order and an injunction with a magistrate or the High Court prohibiting such behavior against any person who engages in harassment either himself, herself, or through others.
- (2) A person who files for an injunction under this section may first obtain a temporary restraining order without notice to the Defendant. A hearing must be held in a magistrate's court or the High Court on the petition for an injunction within 15 days from the date of issuance of the temporary restraining order. If the magistrate or High Court Judge determines that it is probable that the defendant has engaged in harassment, the magistrate or High Court judge must issue an injunction prohibiting such harassment for a period of time to be determined by the magistrate, but not less than two years.
- (3) When filing for a temporary restraining order or an injunction, a person may attach an inventory of their possessions to the petition, along with a sworn statement as to the inventory's accuracy. This inventory will be filed with the police and may serve as an official list of the petitioner's possessions in order to prove deprivation of inheritance at a later date.

Women who are threatened with violence that has the effect of either forcing them from their homes or forcing them to part with property must have a constructive remedy to end the victimization. Therefore, it is essential that police officers enforce orders which would bar potential violent offenders from perpetrating these crimes against women. This is based on the California code. CAL. CODE CIV. PROC. § 527.6 (West 2002).

If a woman itemizes her property and swears to that list's accuracy, she may use that inventory later in an effort to show that she has been the victim of property grabbing. Police officers may use that list in order to help her recover

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items that are missing from her home. A form for inventories is available in Schedule “C” at the end of the Administration of Estates (Amendment) Act, 200X.

5. (1) If a magistrate or High Court judge finds that any person has willfully disobeyed a temporary restraining order or an injunction issued in his or her name, the magistrate or High Court judge must hold that person in contempt and subject him or her to a minimum fine of [X] emalangenani, to a minimum term of imprisonment of [X] years, or to both.
- (2) If police are alerted to a situation involving willful disobedience on the part of any defendant against whom a temporary restraining order or an injunction was issued, a report will be filed by the police immediately. Existence of such a report will serve as rebuttable proof that the defendant was in contempt of the temporary restraining order or the injunction issued against him or her for the court to consider.
6. Nothing in this Act will preclude a petitioner’s right to use other civil remedies against a person in whose name they have a temporary restraining order or injunction issued against.

Unlawful to disburse funds from an estate to anyone but the estate’s executor.

7. Any person or institution that disburses funds or compensation of any kind belonging to the estate of a deceased person to anyone other than the proper executor of that estate will be guilty of an offense.

Individuals convicted of one or more of these offenses will be subject to a minimum fine of [X] emalangenani, to a minimum term of imprisonment of [X] years, or to both.

If an institution is found to have committed this offense, the institution will be subject to a minimum fine of [X] emalangenani. The individual or individuals within the institution found to have committed this offense will be subject to a minimum fine of [X] emalangenani, to a minimum term of imprisonment of [X] years, or to both.

This provision is intended to prevent the theft of funds or compensation which should properly be included in the deceased’s estate under the Administration of Estates (Amendment) Act. This form of property grabbing is common in Swaziland. Often times, the relatives of the deceased will improperly claim death benefits, employment benefits, or the like, from a bank, an administrative office or an employer. These funds are part of the deceased’s estate and must be inventoried and distributed properly by the estate’s executor along with the rest of the remainder of the property.

Increased penalty for property grabbing during the mourning period.

8. Any person who commits the offense of property grabbing against a surviving spouse who is at that time observing the mourning ritual will be subject to the following increased fines and terms of imprisonment: a minimum fine of [X] emalangeni, a minimum term of imprisonment of [X] years, or to both.

The act of property grabbing perpetrated against a woman who is in mourning is particularly egregious since as part of the mourning ritual she may choose not to leave her house for up to one month. Therefore, it is necessary to provide extra protection both for widows who want to participate in the ritual without fear of making themselves more vulnerable, as well as widows who are forced to observe the practice against their will.

Because the restrictions on women in mourning are more restrictive than those placed on men, property grabbing during this period would exacerbate gender inequality in violation of Swaziland's Constitution and International law. Further, the Human Rights Committee has said that "[w]omen should ... have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses." HRC, General Comment 28, para. 26.

Unlawful to coerce participation in the mourning ritual.

9. Any person commits an offense who forces or coerces a surviving spouse to participate in behavior associated with or representing a mourning ritual against his or her will in any way including, but not limited to -
- (a) making threatening comments;
 - (b) using force or violence;
 - (c) stigmatizing in any way;
 - (d) withholding necessities of life;
 - (e) ostracizing.

Individuals convicted of one or more of these offenses will be subject to a minimum fine of [X] emalangeni, to a minimum term of imprisonment of [X] years, or to both.

This type of coercion is particularly harmful to widows. It makes them more susceptible to victimization in the forms of property grabbing and forced eviction. Moreover, coercing a woman into participating in the mourning ritual expressly contravenes section 28(3) of the Constitution of Swaziland which states that a woman will "not be

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compelled to undergo or uphold any custom to which she is in conscience opposed.” SWAZ. CONST. 2005 s. 28(3). Further, because women are coerced more frequently than men, allowing the coercion would perpetuate inequality and gender discrimination in violation of the Constitution and international law. *See* Swaz. Const. 2005 ss. 20(1), 20(2); CEDAW, arts. 1, 15(1); ICCPR, art. 26; ICESCR, art. 2(2); African Charter arts. 2, 3, 18(3).

Additionally, because this type of coercion runs the gamut from ostracizing comments on the street to infliction of bodily harm, it is important to cover the entire spectrum of possibilities in this statute. Many women fear the social pressure associated with participation in the mourning ritual and do not want to be considered outcasts in their communities for not participating. They therefore participate in order to conform, but in doing so, potentially put themselves in a position of vulnerability.

Unlawful to violate the Administration of Estates (Amendment) Act.

10. Any person who fails to comply with sections 4 through 9 of the Administration of Estates (Amendment) Act is guilty of an offence and liable to a minimum fine of [X] emalangeni, to a minimum term of imprisonment of [X] years, or to both.
11.
 - (1) Any person other than the Master who has in his or her possession the last will, codicil, or other testamentary instrument of any other person will deliver that document to the Master or to the Regional Master at the first opportunity following the death of the document’s Maker.
 - (2) If such a document is delivered to a Regional Master, delivery of a duplicate or fair and true copy certified by a notary public will also be required.
 - (3) If the Regional Master to whom the document was delivered is not the Regional Master of the area in which the deceased normally lived, then a duplicate or a copy will be required to be sent to the Regional Master of the deceased’s area as well.
 - (4) Any person who fails to comply with this section will be guilty of an offence, and upon conviction, be liable to a fine of [X] emalangeni. Upon default of payment, people convicted of such an offense may be imprisoned for a period not exceeding [X] years.
12.
 - (1) Any person who steals or willfully destroys or conceals any will, codicil, or other testamentary instrument, will be guilty of an offense and upon conviction be liable to either a fine of [X] emalangeni, to imprisonment for a period not to exceed [X] years, or to both.
 - (2) It shall not be necessary to allege that such will, codicil, or other

instrument is the property of any person or is of any value in any indictment.

(3) Nothing in this section will abridge or prevent any civil remedy which may be taken against a person who steals, willfully destroys or conceals any will, codicil, or other testamentary instrument. Nor can acquittal of such offences be used against an individual in a civil action.

13. Every person who fails to comply with Sections 17 and 18 of the Administration of Estates (Amendment) Act will be guilty of an offence and on conviction liable to a fine not exceeding [X] emalangeni, or upon default of payment, to imprisonment for any period not exceeding [X] months.
14. Any person required to make an inventory under Sections 17 and 19 of the Administration of Estates (Amendment) Act who willfully makes a false inventory shall be guilty of an offence and liable on conviction to either a fine not exceeding [X] emalangeni, imprisonment for a period not exceeding [X] years, or both.
15. If any executor fraudulently files a false inventory under Section 40 of the Administration of Estates (Amendment) Act, he or she commits a criminal offense punishable by imprisonment for a period not exceeding [X] years, a fine not exceeding [X] emalangeni, or both.
16. If a person who is not the executor of the estate knowingly possesses any property belonging to the estate, he or she must give such property directly to the executor. If he or she fails to do so, he or she is personally liable for the value of the property and is guilty of a criminal offense punishable by imprisonment for a period not exceeding [X] years, a fine not exceeding [X] emalangeni, or both.
17. Any person who refuses to deliver or unreasonably delays the delivery of any document required by an executor to fulfill his/her duties as executor of the estate is guilty of a criminal offense punishable by imprisonment for a period not exceeding [X] years, a fine not exceeding [X] Emalangeni, or both. The person is also liable for any expenses incurred by the executor in attempting to obtain such document.

This section includes all of the provisions from the Administration of Estates (Amendment) Act that have penalties. By including these in the Inheritance Crimes Act, law enforcement officials will only have to look in one place to find all of the crimes against inheritance.

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Education of law enforcement officials.

18. [X] emalangeneni will be set aside annually to provide for the continued training of police officers in the areas of family law and gender sensitivity.

The addition of new training procedures for police will cost money. Instructors will have to be trained and facilities utilized in order to make this possible. It is essential to make sure that enough money is allotted for these programs so that they are as effective as possible.

19. Police officers shall be required to finish -
(a) training in enforcement of the offenses contained in this Act;
(b) a course during Police Academy training in gender sensitivity and the rights of women under the new laws (enacted under the Constitution and international law) as a prerequisite to graduation;
(c) retraining in the current state of family law and gender sensitivity every 5 years that an officer remains on active duty.

According to interviews conducted with both ordinary citizens of Swaziland, and with NGO activists, there is a sense of reluctance by women to report crimes against them to the police. Traditionally, issues of family are dealt with privately in Swaziland. This situation, however, has led to increased violence against women, and widespread deprivation of inheritance. Therefore, education of police officers is an essential step in creating a system which protects the rights of women and children to inherit equally with men, and also to be free from domestic violence. Further, The Committee on the Elimination of Discrimination against Women specifically states: "Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention . . ." CEDAW General Recommendation 19, para. 24. The new laws implemented through this proposal would need to be incorporated into the police officer curriculum.

20. Failure of police officers to comply with sections 18 and 19 of this Act shall be grounds for discipline under the Police Regulations.

Currently the Police Regulations set out how a police officer shall be disciplined when necessary.

Compliance of law enforcement officials.

21. Failure of police officers to take action in response to matters dealing with women, children or domestic law issues in compliance with the law will be grounds for discipline under the Police Regulations.

Failure on the part of the police to get involved with issues related to the family has been cited time and time again as a reason why property grabbing, forced evictions, and coercion of mourning rituals is never punished. This is for two reasons - many police officers aren't up to date on the law, and many officers do not feel it is their place to get involved with issues traditionally dealt with privately. For those reasons it is essential that police officers be properly trained in this area of the law, and be made comfortable dealing with family, or traditionally private, issues. Additionally, there must be a punishment for officers who do not comply with the requirement to deal with these issues. Otherwise, there will be no deterrent to maintaining the status quo. Lastly, because many women live on their husband's parental homestead, they need to feel comfortable going to police officers who may be more familiar with their husband's family than with the woman herself. It is imperative that officers deal with issues of property grabbing as professionals, and not as partisan members of the community. For all of those reasons, increased education in this area and enforcement of the requirement that the police deal with these issues is necessary to successfully eradicate these pervasive inheritance problems.

Fines.

22. All numerical designations of emalangeni proscribed in this Act shall be subject to an annual adjustment according to the Consumer Price Index of the Government's Central Statistical Office within the first month of each year.

In order to remain effective, numerical designations of money should be kept current with any increases in inflation.

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SCHEDULE 5

FREEDOM FROM MOURNING PERIOD ACT, 200X

Preamble

Whereas Swaziland passed a new Constitution guaranteeing women equal treatment under the law, freedom of movement, and the right to not participate in customs to which they are opposed;

Whereas Swaziland ratified the Convention on the Elimination of All Forms of Discrimination Against Women, agreeing to modify prejudicial cultural practices and guaranteeing women equal rights and equal protection of the law, the right to political and public participation, the right to freedom of movement, and the right to work;

Whereas Swaziland ratified the International Covenant on Civil and Political Rights, guaranteeing the freedom of movement, the right to participate in public affairs, and the right to equal protection of the law;

Whereas Swaziland ratified the International Covenant on Economic, Social, and Cultural Rights, guaranteeing the right to work;

Whereas it is necessary to protect and protect the fundamental rights and freedoms of widows who are coerced into observing the mourning period;

Whereas it is necessary to give widows a meaningful choice over their own well-being.

Short Title

1. This Act may be cited as the Freedom from the Mourning Period Act, 200X.

Freedom to not observe..

2. Any widow or widower may freely decide to not observe the mourning period.

This provision gives widows and widowers a choice over how to mourn. Currently, many widows feel forced to participate in the mourning period. This provision protects these widows by creating legislation that upholds their rights to choose whether or not to mourn. The Swazi Constitution states that “A woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed.” SWAZ. CONST. 2005 s. 28(3). Additionally, CEDAW obligates States Parties to “take all appropriate measures to modify the social and cultural patterns of conduct of men and women,

with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.” *CEDAW* art. 5(a); *see also CEDAW* art. 2(e); *ICCPR* arts. 2(2), 26; *African Charter* arts. 1, 18(3). Additionally, the mourning rituals greatly restrict a widow’s movement by confining her in her father-in-law’s home for 30 days and dictating where and how she walks for two years. This provision, therefore, ensures that a widow’s fundamental right to freedom of movement is protected. *See SWAZ. CONST. 2005* s. 26(1); *CEDAW* art. 15(4); *ICCPR* art. 12(1); *African Charter* art. 12(1). By allowing widows to forego the mourning period, this provision upholds their fundamental rights under Swaziland’s Constitution and international law.

3. For the avoidance of any doubt, a widow or widower is completely free to:
- (1) Interact with the Office of the Master of the High Court, the Regional Administrator’s Office, or the Magistrate’s Court to administer the estate;

In Swaziland, many widows in mourning are precluded from administering the estate. Under current custom, a widow is unable to leave the homestead for 30 days and, therefore, cannot register the death with the Master’s Office within 14 days, as required by the Administration of Estates Act. Administration of Estates Act, 1902 s. 2. Widows, unlike many widowers who are not forced to participate in mourning rituals, cannot administer the estate and, therefore, do not receive equal protection of the law or the same rights as widowers at the dissolution of marriage. *See SWAZ. CONST. 2005* ss. 14(a), 20(1), 20(2); *CEDAW* arts. 15(2), 16(1); *ICCPR* arts. 23(4), 26; *African Charter* art. 3. Because widows cannot adequately administer the estate, they are highly vulnerable to property grabbing. To fully empower widows and ensure their rights to administer their deceased husband’s estate, this provision emphasizes the importance of a widow being able to register the death with the appropriate office and administer the estate. This provision emphasizes the importance of giving a widow control over her deceased husband’s estate and her inheritance rights; thus allowing her to protect herself and her children from others who dispossess her of her property.

- (2) Seek information or advice, legal or otherwise, in claiming or administering her inheritance rights;

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This provision stresses the importance of being able to obtain information or advice to secure inheritance rights. NGOs and other organizations are instrumental in providing inheritance advice to widows. As such, this provision emphasizes the importance of giving widows the opportunity to be fully informed of their rights.

(3) Go to the bank to access bank accounts;

This provision addresses the current problem in Swaziland where bank tellers will not allow a widow to access her deceased husband's account if the widow is wearing mourning gowns. As such, this provision emphasizes the importance of widows being completely free to go to the bank without wearing the mourning gowns.

(4) Pursue employment.

This provision emphasizes the importance of a widow being able to pursue meaningful employment without others being afraid of her or seeing her as bad luck because she is wearing mourning gowns. As such, widows will be able to engage in employment without being discriminated against because of their mourning gowns. See SWAZ. CONST. 2005 s. 32(4) (b). International law also guarantees a woman's right to be gainfully employed. The ICESCR encourages States Parties to "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right." ICESCR art. 6(1). CEDAW obligates state parties to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise." CEDAW art. 2(3). CEDAW also recognizes the right to work as an "inalienable right of all human beings." CEDAW art. 11(1)(1). Under these international obligations, Swaziland must ensure that widows do not face discrimination in work and give them complete freedom over whether or not to observe the mourning period.

Criminal Penalties for threatening, coercing, or harming a widow.

4. Any person who threatens, coerces, or in any way harms a widow for not observing the mourning rituals must be punished by a fine of [X] Emalangenani, imprisonment for a term not less than [X] years, or both.

This provision provides for criminal penalties for anyone coercing a widow into observing the mourning period. Since

the mourning period is culturally imposed, this provision is important because it provides for punishments for any member of society who attempts to impose the mourning period upon a widow. CEDAW obligates State Parties to “take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.” *CEDAW* art. 2(e). CEDAW also requires States Parties to “adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women.” *CEDAW* art. 2(b). As such, Swaziland is obligated to punish any individual who perpetuates discrimination against widows by forcing them to observe the mourning rituals.

Civil Injunctions.

5. (1) A person who has been threatened, coerced, or in any way harmed because she or he did not want to observe the mourning period, may seek a temporary restraining order and an injunction prohibiting harassment.
(2) A person who files for an injunction under this section must first obtain a temporary restraining order. A hearing will be held in a magistrate’s court on the petition for an injunction within 15 days from the date of issuance of the temporary restraining order. If the magistrate determines by clear and convincing evidence that unlawful harassment exists, an injunction will be issued prohibiting such harassment for a period of time to be determined by the magistrate.

Women who are threatened with violence that has the effect of either forcing them from their homes or forcing them to part with property must have a constructive remedy to end the victimization. Therefore, it is essential that have civil protection orders that bar potential violent offenders from perpetrating these crimes against women. This is based on the California code. (CAL. CODE CIV. PROC. § 527.6 (West 2002)).

6. (1) Persons who willfully disobey a temporary restraining order or injunction issued to them will be held in contempt and subject to a minimum fine of [X] Emalangeni, a minimum term of imprisonment of [X] years, or to both.
(2) If police are alerted to a situation involving willful disobedience on the part of any person who has a temporary restraining order or injunction issued in their name, a report will be filed by the police immediately. Existence of such a report will serve as a reputable proof that the person was in contempt of the temporary restraining order or the injunction issued against them.

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7. Nothing in this Act will preclude a petitioner's right to use other civil remedies against a person to whom they have had a temporary restraining order or injunction issued against.

By providing victims with relief through the penal system, we don't want to also take away their right to achieve a civil remedy. This is based on the District of Columbia's D.C. Code § 16-1002 (2001) which states: "The institution of criminal charges by the United States Attorney shall be in addition to, and shall not affect the rights of the complainant to seek any other relief under this subchapter." See D.C. Code § 16-1002 (2001); see also Cal. Code Civ. Proc. § 527.6 (West 2002).

**SCHEDULE 6
THE BIRTHS, MARRIAGES, AND DEATHS REGISTRATION ACT
(AMENDMENT), 200X**

1. Section 10(1) of the Births, Deaths, and Marriages Registration Act, 1983 is hereby repealed.

It is replaced with:

“A person who is the father of a child born out of wedlock is required under this Act to sign the birth certificate of such child.”

This provision repeals Section 10(1) of the Births, Deaths, and Marriages Registration Act, which states that “A person who is the father of a child born out of wedlock shall not be required to give information under this Act concerning the birth of such child.” In amending this provision, fathers of children born out of wedlock will have to report the birth and that they are the fathers. As such, it will place responsibility on fathers to sign birth certificates and help a widow to prove that a deceased man was the father of her child who was born out of wedlock. As such, it will address Swaziland’s current problem where many fathers do not sign birth certificates.

2. Section 15(1) of the Births, Deaths, and Marriages Registration Act, 1983 is hereby repealed.

It is replaced with:

“In the case of any children, whether born alive or still-born the mother or father of the child and, in the event of the death or absence or other inability of both parents, any person present at the birth, or the occupier of the dwelling in which the child is born and, in the event of the death or absence or other inability of such occupier, the person having charge of such child, shall within sixty days after its birth give the prescribed notice thereof to a registration officer or a chief of the area of his induna or a registration information officer nominated or appointed for this purpose.”

This provision repeals Section 15(1) of the Births, Deaths, and Marriages Registration Act, 1983, which states that “In the case of any children whether born alive or still-born the mother or father of the child, and in the event of the death or absence or other inability of both parents, any person present at the birth, or the occupier of the dwelling in which

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the child is born and, in the event of the death or absence or other inability of such occupier, the person having charge of such child, shall within sixty days after its birth give the prescribed notice thereof to a registration officer or a chief of the area of his induna or a registration information officer nominated or appointed for this purpose.”

The only change is to allow the mother, in addition to the father, to register the death of a child. The original version discriminated on the basis of sex and violated a woman’s right to receive equal treatment under the law. *See* SWAZ. CONST. 2005 ss. 14(a), 20(1), 20(2); CEDAW art. 15(2); ICCPR art. 26; *African Charter* art. 3.

3. Section 20(2) of the Births, Deaths, and Marriages Registration Act, 1983 is hereby repealed.

It is replaced with:

“Every hospital birth registration must, in the case of a birth, show the date of the birth and the names and addresses of both the mother and father if known at the time of birth, and, in the case of a death, the date and the name and address of the deceased. If the father is not present at birth, the mother can register the father’s name. Any individual contesting parenthood bears the burden of proving otherwise within 60 days of registration.”

This provision repeals Section 20(2) of the Births, Deaths, and Marriages Registration Act, 1983, which states that “Such return [hospital registration] shall in case of a birth show the date thereof and the name and address of the mother, and in case of a death, the date and the name and address of the deceased.” Because it only requires a mother’s registration with the hospital, it discriminates on the basis of sex and violates the right to equal treatment under the law. *See* SWAZ. CONST. 2005 ss. 14(a), 20(1), 20(2); CEDAW art. 15(2); ICCPR art. 26; *African Charter* art. 3. This provision additionally places the burden of proof on the father to contest paternity and sets a deadline by which he needs to do so.

4. Section 34(2) of the Births, Deaths, and Marriages Registration Act, 1983 is hereby repealed.

It is replaced with:

“Any person found guilty of an offence under subsection (1) or under sections 30, 31, 32 or 33 shall be liable on conviction of a fine not exceeding 5000 Emalangenani or in, default of payment thereof, imprisonment not exceeding three months.

This provision repeals Section 34(2) of the Births, Deaths, and Marriages Registration Act, 1983, which states “Any person found guilty of an offence under subsection (1) or under sections 30, 31, 32 or 33 shall be liable on conviction of a fine not exceeding fifty Emalangeni or in default of payment thereof imprisonment not exceeding three months.” Because certificates are often essential to claim one’s inheritance, it is important that the law provides strict punishments for any fraud. In Swaziland, there is incentive to procure fraudulent documentation in order to misappropriate shares of an estate. This provision attempts to prevent such fraud. Therefore, the amount of Emalangeni fined for this offense must be increased according to the rate of inflation to ensure a strict penalty.

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**SCHEDULE 7
THE LEGAL PRACTITIONERS (AMENDMENT) ACT, 200X**

Short Title

1. This Act may be cited as the Legal Practitioners (Amendment) Act, 200X.
2. A new Part XII, titled “Legal Aid,” containing sections 47-53, is inserted into the Legal Practitioners Act, No. 15 of 1964, as follows:

**PART XII
LEGAL AID**

Ability of NGO attorneys to represent clients in court.

47. An attorney working for any non-governmental organization (NGO), including legal services and advocacy organizations, who meets all the requirements to be an admitted attorney under the Legal Practitioner’s Act, 1964, may represent any person who cannot afford to pay for legal services before any court in Swaziland.

This provision addresses the current practice in Swaziland of not allowing attorneys working in non-governmental organizations to practice in court. Because legal aid is largely non-existent in Swaziland, many widows are left unrepresented because NGO attorneys are not allowed to represent them. This provision, therefore, would allow NGO attorneys to represent poor widows in court and provide a much-needed legal aid service. Swaziland, therefore, would be fulfilling its international obligations to take appropriate measures to eliminate discrimination against women and provide these widows with an effective remedy. *See CEDAW arts. 2(c), 2(e); ICCPR arts. 2(2), 26; African Charter arts. 1, 18(3).* Other African nations have supported the idea of allowing NGO workers to practice in court. Republic of South Africa Legal Practice Bill, 2000 s. 11.

48. All provisions of the Legal Practitioner’s Act, 1964, shall be construed to permit qualified NGO attorneys to represent any person who cannot afford to pay for legal services before any court in Swaziland.

The purpose of this provision is to eliminate ambiguity. If a provision in the Legal Practitioner’s Act, 1964, could restrict an NGO attorney from practicing in court, this provision ensures that all such provisions are construed in the most favorable light to allow NGO attorneys to represent poor widows in court.

49. The Swazi Law Society may reasonably regulate all NGO attorneys.

The purpose of this provision is to provide an oversight regulatory mechanism on NGO attorneys. This provision, therefore, alleviates the fear that NGO attorneys will not fall under the purview of the Swazi Law Society and will be unregulated. To adequately address this concern, this provision allows the Swazi Law Society to reasonably regulate NGO attorneys.

Ability of law students participating in legal aid clinics to represent clients in court.

50. A law student who is participating in a legal aid clinic under the supervision of an admitted attorney who has met the requirements of the Legal Practitioner's Act, 1964, may represent any person who cannot afford to pay for legal services before any court in Swaziland.

The purpose of this provision is to allow law students, under the supervision of qualified attorneys, to practice in court. This provision would enable law students to receive courtroom experience and also provide legal aid service to countless widows because law students could represent them in court.

51. The Swazi Law Society may reasonably regulate all legal aid clinics.

The purpose of this provision is to provide an oversight regulatory mechanism on legal aid clinics. This provision, by allowing the Swazi Law Society to reasonably regulate legal aid clinics, ensures that legal aid clinics will abide by regulations set forth by the Swazi Law Society.

Service of articles in a legal aid clinic and ability to represent clients in court.

52. Any individual who meets the requirements under the Legal Practitioner's Act, 1964, to serve articles may serve such articles under the supervision of an admitted attorney under the Legal Practitioner's Act, 1964, by supervising law students in a legal aid clinic. Such individuals can also represent any person who cannot afford to pay for legal services before any court in Swaziland.

The purpose of this provision is to allow law school graduates to serve their articles in a legal aid clinic and represent clients in court. By doing so, Swaziland would increase the number of people providing legal aid to poor widows. This provision is modeled after South Africa, which allows law graduates to pursue their articles in a law clinic. *See* University of Witwatersrand Law School, Wits Law Clinic, <http://www.law.wits.ac.za/clinic/clinicindex.htm> (last visited

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May 15, 2007). In doing so, Swaziland would ensure the representation of many more widows. South African law clinics, for example, handle 25,000 cases a year. *See* David McQuoid-Mason, Legal Aid Services and Human Rights in South Africa, *available at* <http://www.pili.org/en/content/view/155/26/>.

Swazi Law Society by-laws.

53. Swazi Law Society by-laws may not restrict or prohibit anything provided for in this Amendment.

This provision addresses the current concern that the Swazi Law Society's by-laws prohibit NGO attorneys from practicing in court. Therefore, this provision prevents the Swazi Law Society from having, or creating, by-laws that restrict anything provided for in this Amendment.

SCHEDULE 8
AN ACT TO DECENTRALIZE THE OFFICE OF THE MASTER OF THE
HIGH COURT, 200X

Jurisdiction

1. The Office of the Master of the High Court will share its functions with the regional offices and the nineteen magistrate courts throughout the country.

Following the Report by the Commission of Enquiry into the Operations of the Office of the Master of the High Court, the country has already begun implementation of a decentralisation program. By 2007, four regional offices have been set up (the Commission Report suggested seven.) Yet, based on multiple interviews in Swaziland and lengthy discussions with attorneys at WLSA, it is clear that the decentralisation to date is insufficient to deal with the backlog and other problems within the Master's Office. With 19 magistrates courts in Swaziland, and 4 current regional offices, there will be 24 locations in Swaziland (including the headquarters - which will remain in Mbabane) to handle inheritance matters dealing specifically with the administration of estates. This decentralisation plan is designed to make the functions of the Master's Office more convenient and generally accessible to the people of Swaziland, by whom countless stories have been told of excessive inconvenience and cost in dealing with the Master's Office in Mbabane. This proposal is further supported by programs implemented in other neighboring southern African countries. Both South Africa and Zimbabwe use magistrate offices as service points for the Master. Use of the magistrates went into effect in South Africa as recently as December 2002. *See* Master of the High Court of South Africa, online, http://www.doj.gov.za/master/m_deceased/deceased_report.html (last visited May 10, 2007); Zimbabwe's Widows and Orphans Trust (ZWOT), http://www.zwot.com/inheritance_laws.htm#administration (last visited May 10, 2007) ("After someone has died . . . the estate has to be reported to the Master's Office in [the capital] or to the nearest magistrate's court.") As a result, deaths and estates can be reported to the magistrate courts, and the magistrates fill the role of the Master.

2. The Headquarters in Mbabane will be responsible for larger, more complex estates, and for estates of a deceased who resided in Mbabane at the time of death:
 - a. Estates outside of Mbabane estimated below E50,000

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(adjustable for inflation) will be handled by one of the regional offices or one of the Magistrates courts.

b. If a death is reported to a regional office or magistrate court and the estimated value of the estate is greater than E50,000 (adjustable for inflation), the regional office or magistrate court will refer that estate to the headquarters.

This section embraces the Commission of Enquiry's recommendations regarding the decentralisation of the Master's Office and putting the headquarters in charge of the larger/more complex estates. See COMMISSION REPORT at 36. This section aims to reduce the number of those traveling to the headquarters in Mbabane - both for purposes of saving on convenience and cost for those who may not have the funds for such travel and also to reserve the more complex cases for the Master him/herself, who will remain attending to the main office. South Africa's Master's Office is also structured similarly. The magistrates in South Africa have "limited jurisdiction;" specifically, estates with a value of more than R50,000 will be transferred to the Master's office. See Master of the High Court of South Africa, online, http://www.doj.gov.za/master/m_deseased/deceased_report.html (last visited May 10, 2007) (indicating that such estates will be transferred, the Master's Office website states, "Therefore, it is advisable to report these estates directly to the Master's Office.")

3. Challenges made to any decision made by the Master, a regional Master, or a magistrate judge must be brought before the High Court.

Education qualifications for employment

4. The people employed in these offices must possess the following qualifications:
 - (1) Master of the High Court - LLB with five years relevant experience;
 - (2) Deputy Master of the High Court - LLB with three years relevant experience;
 - (3) Assistant Master of the High Court - B.A. Law with three years relevant experience;
 - (4) Estate Accounts Examiner and Principal Estate Examiner - Diploma in Law or Appropriate qualification (AAT, ACCPA, B.COM).

The position of Master of the High Court currently does not require a legal education. Interview with a Principal Magistrate Judge in Manzini, Swaziland (Mar. 6, 2007). As a result, the previous Master's "training, qualifications and experience were totally incongruous with the Master's Office." COMMISSION REPROT at 32. Proper education and experience is imperative to an efficient and effective office. The required qualifications set forth in this section reflect the suggestions of the Commission of Enquiry. Id.

Staffing and Training

5. Each regional office must have at least [X] staff members, including at least one Regional Master, one Assistant Regional Master, one secretary, and one accountant.
6. All vacant posts must be filled. In any event, no position may remain open for an amount of time greater than [X] months.
7. All staff must be permanent and pensionable.

Although the Master's Office recently received an increase in the amount of staff, it has a history of being inadequately staffed and allowing positions to remain vacant. Given the crisis currently going on in the Master's Office as far as length of time in taking care of estates, it is not only imperative that the regional offices receive additional staff (as opposed to dispersing the roughly 23 staff members at the headquarters among those offices), but there is no excuse for failing to fill vacant positions. Moreover, sections 5-7 are in line with the Commission of Enquiry's recommendations. *See* COMMISSION REPORT at 34-37.

8. The Master must develop a training policy for all staff. All current and incoming staff must undergo training on such matters as, but not limited to, bereavement, confidential and secret information, handling court processes, certificates, checks, and money. For the regional offices, the staff must be instructed on how to deal with issues of illiteracy.
9. A budget for this training must be ear marked on a continuous basis.

Currently the staff in the Master's Office is not adequately trained. Although a training program had at one point been developed by the Deputy Master, that program was never implemented by the Master and the current staff is severely deficient in adequate training. Training will be essential to the effective performance by the Master's Office of its

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duties. Since the Master's Office is yet to implement such a program, a push from Parliament to do so is in order. Sections 8 and 9 are recommendations set forth in the Commission Report. *See* COMMISSION REPORT at 36-37.

SCHEDULE 9

THE MAGISTRATE'S COURTS (AMENDMENT) ACT, 200X

1. Section 29(b) of the Magistrate's Courts Act is hereby repealed.

Section 29(b) must be repealed to allow the Magistrate's courts to become part of the decentralisation process of the Master's Office. Currently, the Magistrate courts do not hear inheritance matters. Section 29 (b) states that "the Magistrate's courts shall have no jurisdiction in matters in which – (b)the validity or interpretation of a will or other testamentary document is in question;" Thus, the Magistrate's Courts Act precludes such courts from jurisdiction over wills. By repealing section 29(b) no statutory provision or common law would prohibit magistrate courts from serving as regional offices for the Master's Office and being involved in the distribution of estates, as well as having jurisdiction over any inheritance claims that individuals may bring to the courts.
