

## LAW OF SUCCESSION – SUMMARY 2014 1<sup>ST</sup> SEMESTER

Introduction to law of succession:

When a person dies he or she leaves behind not family/friends but more importantly for our purposes rights and duties that have to be finalized. The law of succession deals with the finalization of the debt and assets the deceased leaves behind.

**Law of succession** – comprises those legal rules or norms which regulate the devolution of a deceased person's estate upon one or more persons. Thus the law of succession is concerned with what happens to a deceased person's estate after his death.

- **Deceased** – is the person who has died and left behind an estate
- **Estate** – a testator's estate consist of both the assets and the liabilities he had at the time of his death. The estate therefore consists not only of assets but also of any debts that the deceased had incurred during his lifetime
- **Legatee** – inherits a specific asset (legacy)
- **Residue of estate** – refers to that part of the deceased's estate which remains after the payment of funeral expenses, administration costs, tax, the deceased's debts and the legacies
- **repudiation** – heir or legatee may refuse to accept a benefit from a deceased estate
- **Adiation** – heir or legatee accepts benefits from a deceased estate.
- **Succession** – may take place in one of 3 ways:
  1. Testamentary succession - in accordance with a will which the testator regulates the succession.
  2. Intestate succession – through the operation of the law of intestate succession, where the deceased did not leave a will – estate is intestate and is governed by the laws of intestate succession.
  3. Pactum successorium – in terms of a contract or agreement – **contractual succession** -anc is the only contract in which a person may regulate succession to the assets in his or her estate.

### DEATH OF DECEASED

Moment of death – succession can only take place if person is deceased.

Presumption of death – onus is on person who asserts person is dead to furnish proof of same.

### RE: BEAGLEHOLE

**Persons who die in the same disaster** – a beneficiary can inherit only if he/she survives the deceased. When people die in the same disaster and it is not possible to determine who died first, the court will find that they died simultaneously. **EX PARTE GRAHAM**

### WILLS, UNILATERAL AND MULTILATERAL JURISTIC ACTS AND DONATIONS:

Juristic act – is an act which is intended to create or alter rights and/ or obligations and it is an act to which the law attaches at least some of the consequences envisaged by the acting party or parties.

Unilateral juristic act – for example making of a will is performed by the activity of only one person. It is only one person's actions that establish a will and it is only this person's intention that is contained in the will.

Multilateral juristic act – such as the conclusion of a contract, it is a juristic act which is performed only through the cooperation of 2 or more persons – example donation

If the will consists of more than one page, the testator must sign at the end of the wording on the last page, and he must further sign or acknowledge his signature on the preceding pages in the presence of the same two or more witnesses, who are present at the same time. In *Bosch v Nel* the court held expressly that it is not necessary for the testator to sign in the presence of the witnesses, as long as he acknowledges in their presence that the signature on the will is his signature. The testator may sign the page preceding the last page anywhere on the page. The witnesses must sign the will in each others presence and in the presence of the testator. The Act does not prescribe where they must sign, but this provision is normally interpreted to mean that the witnesses must sign the last page of the will anywhere on that page. They need not sign the preceding pages.

2 No. A witness need not know the content of a will or even that he is witnessing a will. He only needs to know that he is witnessing the testator's signature (*Sterban v Dixon*).

3 The Wills Act requires that the witnesses should sign the will. The Act does not prescribe where they must sign. Usually this provision is interpreted to mean that they should sign the last page of the will. Normally the witnesses will sign the will at the end of the last page, but in *Oosthuizen v die Weesheer* it was held that the will was valid although the witnesses had signed at the top of the last page. The witnesses need not sign all the preceding pages of the will.

4 The testator has to sign at the "end" of the will that is, at the end of the wording/ body of the will.

5 No. In *Bosch v Nel* the court held expressly that it is not necessary for the testator to sign in the presence of the witnesses, as long as he acknowledges in their presence that the signature on the will is his signature.

6 A witness to a will must comply with the following three requirements:

- 1 He or she must be 14 years or older.
- 2 He or she must be competent to give evidence in a court of law.
- 3 He or she must be able to write.

7 An attestation clause is a clause that appears at the end of the will in which it is declared that all the parties are present and have signed in each other's presence. When drafting a will, it is common practice to insert an attestation clause, in which it is expressly stated that the will was signed by the testator in the presence of the witnesses and that the witnesses signed in the presence of one another and the testator. No attestation clause is required by law. An attestation clause has evidential value only, that is, it can be of value only in that it constitutes evidence that the required formalities have been complied with.

## CHAPTER 2 – INTESTATE SUCCESSION

Regulated by intestate succession act 81 of 1987. The law of intestate succession identifies the heirs to a deceased estate when the deceased has failed to regulate the devolution of his or her estate by will or anc or where it is impossible to carry out the wishes of the deceased because the beneficiaries are unable to inherit, do not wish to inherit or are predeceased. It is possible for a person to die completely intestate or only partly intestate.

Diagrams to represent lineage: page 11

- double horizontal line = married persons
- horizontal level = same generation
- single line descending from parent = children/descendents
- dotted line = adoption
- letter crossed out = predeceased

- Ascendants – ancestors of the deceased – mother, father, grandparents. – straight downward line
- Descendants – lineal descendant of the deceased – direct line below deceased
- Adopted children – deemed descendants of adoptive parents and not of natural parents, except in the instance where the natural parent was also the adoptive parent.
- Extramarital children – illegitimacy does not affect the capacity of blood relation to inherit (ab intestate) from blood relation.
- Collaterals – persons related to the deceased through at least one common ancestor or ascendant – egg brother, sister cousins.
- Full blood collaterals – related through both parents
- Half blood collaterals – related through one parent – PAGE 15 OF STUDY GUIDE EG.
- Succession per capita – by representation, heir inherit per capita when they inherit equal shares according to law of intestate succession on the ground of the degree of consanguinity in which they stand to the deceased. If there are more than one person related to the deceased in the same way they inherit an equal share – per capita
- Stirps – every descendant of the deceased who survives the deceased and or a predeceased descendent of the deceased who leaves a living descendent forms a stirp/stirpes
- Substitution ex lege – takes place were an heir inherits in the place of an heir who was supposed to inherit in the first place is unable to inherit or repudiates his benefit.

#### Degrees of consanguinity:

1. father and son = first degree
2. grandfather and grandson = second degree
3. each generation = one degree

#### Rules of intestate succession:

1. If a person dies intestate and is survived by a spouse ONLY such spouse inherits entire intestate estate.
2. if a person dies intestate and is survived by a descendent or descendants ONLY such descendent or descendants shall inherit entire intestate estate
3. If person dies leaving both a spouse and descendants the spouse shall inherit either a Child's share of the intestate of R125 000 (whichever is greater) and descendants will inherit the residue if any. – **child's share is calculated by dividing the value of the intestate estate by the number of children of the deceased who have either survived him or have predeceased him but are survived by their descendants plus one.**
4. if a person dies without leaving a spouse or descendants but has both his parents – they will inherit intestate estate
5. If a person dies without leaving a spouse of decedents but only leave one parent and descendants of his deceased parent, surviving parent inherits half estate and other half is divided amongst descendants of his or her predeceased parent. If no descendants then the surviving parent takes entire estate.
6. if survived by only descendants of his mother who are related to him through her only as well as descendants of his deceased father related to the deceased through him only (i.e half brothers and half sisters) intestate estate is divided equally amongst them. Cloven/cleaving – mean that the estate rises to the deceased parents and is split into 2 equal shares.
7. if the deceased is survived only by descendants of one of his deceased parents who are related to him through such parent alone , such descendants inherit the intestate estate

#### **Marriage in community of property –**

Where married icop – they own joint estate. Each spouse has half share in estate. The surviving spouse will therefore take their half share and inherit a child's share or R125 000 whichever one is greater.

**Marriage out of cop –**

**With accrual** – principles of accrual will be applied to the intestate estate before it is divided. Amount of accrual is either deducted or added to the intestate estate before estate is divided

Partial intestacy – where deceased dies partly testate and partly intestate – the amount which a surviving spouse takes in terms of the will is ignored in calculating the intestate amount to which the surviving spouse is entitled

Person dies without leaving intestate heirs – a person may die intestate without leaving any person capable of inheriting from him ab intestate, executors now convert entire estate to money and pay proceeds into the guardian's fund.

IMPORTANT – STUDY GUIDE PAGE 29 TO 34 Q&A

**CHAPTER 3 – FORMS OF WILLS AND TESTAMENTARY FORMALITIES**

Testate or testamentary succession occurs when succession is regulated by a valid will in which the testator provides how succession to his estate is to take place.

**EX PARTE DAVIES – courts decided**

Testamentary writing is a document which defines any one of the 3 essential elements of a bequest:

1. the property bequeathed
2. the extent of the interest bequeathed , ownership , usufruct ,fideicommissum etc
3. the beneficiary

Both will and codicils are therefore testamentary writings.

**FORMALITIES WHEN A TESTATOR SIGNS HIS WILL WITH HIS OWN SIGNATURE**

- One page will – signature of testator at the end is required with 2 or more competent witnesses present at the same time. Witnessing is witnessing not the document or contents but that the testator signature. A witness may not sign by making a mark.
- More than one page – all pages to be signed by testator and 2 or more competent witnesses.
- Competent witness – is any person over the age of 14 whom is competent to give evidence in court. Must be able to “sign” must be 14 years or older, must be able to write and competent to give evidence in court.
- Attestation clause – is a clause that appears at the end of a will which is declared that all parties were present and signed will in each others presence.
- Only a testator can sign will by making a “mark” – thumbprint or cross

Formalities when testator makes a mark – commissioner of oath should be present

1. Certificate is to be attached when the testator sign with a mark of when another person signs on behalf of testator.
2. testator signing with a mark the will must comply with section 2(1)(a)(v) – commissioner of oath must append certificate to a will
3. Content of certificate – commissioner of oath certifies he has satisfied himself as to the identity of the testator, that the will so signed is the will of the testator. Certificate may be append anywhere to the will.

PAGES 50 TO 53 Q&A

The power of the court to order the master to accept a document as a valid will:

The court can order the master to accept a will as being valid although it does not comply with all the formalities for the execution of a will, as long as the court is satisfied the document was drafted or executed by a person who has died in the meantime and intended the document to his or her will.

#### Section 2A:

If a court is satisfied that a testator has –

- made a written indication on his will or before his death caused such indicating to be made
- performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face of the will or
- Drafted another document or before his death caused such document to be drafted.

### **LOST WILLS, FORGED WILL AND THE ONUS OF PROOF**

LOST WILLS – a lost will does not affect the fact that the testator left a valid will. Contents of the will may be proved by means of documentary or oral evidence

Forged wills – it was held in *Kunz v Swart* that a will which is complete and regular on the face of it is presumed to be valid until the contrary is proved. The onus which can be of vital importance then rests with the party who maintains that the will is invalid.

### **CHAPTER 4 – AMENDMENTS TO WILLS**

**Amendment defined in the act as “deletion, addition, alteration or interlineations”**

**Deletion is defined in the Act as “a deletion, cancellation or obliteration in whatever manner effected, excluding a deletion cancellation or obliteration that contemplates the revocation of the entire will”.**

2 types of amendments will affect a will – namely whereby provisions are added and amendments whereby provisions are removed.

Amendments effected to a will before or during completion of the will are governed by common law. In S.a the accepted practice seems to be that all such amendments are signed or initialed by the testator and attested by the witnesses.

Section 2 (1) (b) and 2(2) govern the formalities with which an amendment made after the execution of a will must comply. Formalities here are exactly same as those applying to the initial execution of a will.

### **CHAPTER 5 – REVOCATION OF WILLS**

Animus revocandi – is the intention to revoke a will. A will may be revoked expressly or tacitly. A testator cannot revoke his will orally even if in the presence of witnesses.

Marriage status – if a person gets married his or her status changes to that of married person. But this does not entail an automatic revocation of the persons will.

Divorce – does affect the testators will only for a limited time and only in respect of certain beneficiaries. If a person dies within 3 months after his or her marriage is dissolved by a divorce or annulment the previous spouse will not inherit under that persons will. A person is therefore given 3 months to change his or her will after the divorce or annulment and if this is not done – say if a testator dies four months after his or her divorce/annulment and has not changed his will then the previous spouse will inherit.

#### **Express revocation:**

1. Where a testator makes a later valid will in which he or she expressly revokes all previous wills. This clause is called a revocation clause.
2. when an unmarried testator expressly revokes his or her will by means of a subsequent will
3. Common law – practice if a testator destroys part or entire will with the intention of revocation.

**Tacit revocation:**

A testator may tacitly revoke his or her will either wholly or partially.

Prima facie – looks valid when one simply looks at it.

- When a testator dies leaving various wills and later wills and does not expressly revoke the former wills – it is possible that they will all be valid and they must all be read together and reconciled as far as possible in order to give effect to the testator's actual intention. Where a provision in a later will is in conflict with a provision in an earlier will – the provision in the later will must be given effect to.

**Common law presumptions concerning the revocation of wills:**

1. A will destroyed by the testator – rebuttable presumption that he or she intended to revoke will.
2. Where a will was in the testator's possession prior to death and when he or she dies cannot be found – presumption is that the testator has destroyed will

**CHAPTER 6 – REVIVAL OF A REVOKED WILL**

A testator may wish to revive a will which he or she had previously revoked either partially or wholly.

A revoked will cannot be revived orally or by means of a nontestamentary act>

Requirements for the revival of a revoked will are:

this will should still be in existence – not destroyed

- the will that is being revived must when initially drawn up comply with formalities applicable> it should be revived by a new will
- the reviving must be properly executed in accordance with the formalities prescribed

**CHAPTER 7 – Testamentary capacity and the capacity to benefit under a will**

A will is a unilateral legal act – all persons who are capable of performing legal acts are generally capable of making wills. Legal acts can be performed by persons over the age of 18 – testamentary capacity is on the other hand 16 years of age

When referencing to persons capacity to make a will **the term testamentary capacity must be used and not legal capacity.**

**Capacity to act – in broad terms is a person's capacity to enter into legal acts.**

**Testamentary capacity – is the capacity to make a will. Every person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act, and the burden of proof that he was mentally incapable at that time shall rest on the person alleging the same.**

1. The testator must have been sane (compos mentis) at the time of making the will. Must be of sound mind when he or she and witnesses sign the will
2. Intoxicated person just like an insane person cannot make a will
3. The testator must have the free and serious intention to dispose of his property by will.

The capacity to benefit under a will:

The fundamental principle is that any person, whether natural or juristic, whether born or unborn may be a beneficiary under a will.

- adopted and illegitimate children – both children can inherit
- The unborn – must be conceived at the moment when the bequeathed benefit vests in him or her.
- PERSONS WHO MAY NOT INHERIT TESTATE OR INTESTATE: the person who murdered the testator. (Die bloedige hand – the bloody hand does not inherit), this applies to the person who has murdered the deceased's parent, child or spouse.
- If a person was insane when murdering the testator he has the capacity to inherit.
- Common law – a person whom negligently causes the death of a testator cannot inherit from him or her.
- Marriage in cop – if a spouse married in cop murders his or her spouse he does not inherit half of joint estate
- Extramarital children – can inherit.
- Testate – the person that writes or types the will is disqualified from benefiting under this will
- Testate – a person that signs or witnesses the will is disqualified from benefiting under the will

## CHAPTER 8 – VESTING OF BENEFITS

Vested – has 2 meanings depending on the context – “right vests in a person” – it usually means that such a person is the holder of the right. “Vest can be secondly used to draw a distinction between a right that is certain and one that is conditional. If a beneficiary has a vested right it is certain that the right cannot be taken away, if he has a contingent or conditional right this means that the right is not yet vested in him.

### The presumption that vesting takes place on a testator's death:

Dies cedit – means that when a beneficiary gets a vested right to claim delivery of the bequeathed benefit unconditionally (whether or not the exercise of this right is delayed until some future date which is certain to arrive). This is a technical term used to describe the moment in time when the beneficiary acquires a vested right. Normally takes place immediately on the death of testator, therefore if the beneficiary dies in the interim this benefit will devolve to his estate.

Dies venit – the time when the beneficiaries right to claim delivery of the bequeathed benefit becomes enforceable.

### Vesting and conditional bequests:

A testator may make a benefit conditional – fulfillment of a suspensive condition (for example the beneficiary obtains a degree)

Vested right – is any benefit not subject to a suspensive condition.

Fideicommissum – more than one beneficiary that inherits that same property

Usufruct – one person has ownership of property and one person enjoys use and fruits of benefit.

## CHAPTER 9 – FREEDOM OF TESTATION AND POWER OF APPOINTMENT

Freedom of testation – means the freedom of a person to execute a valid will to govern the transmission and use of property by will and to govern the activities and lives of others after his death.

Power of appointment – is the delegation of the testator's power to appoint beneficiaries in his will to someone else.

**Competence of the court to make alterations to a will:**

**Voluntas testatoris servanda est – testator is free to dispose of his estate as he wishes and the court must enforce the provisions of the will** except for a few exceptions:

- High court has inherent jurisdiction to delete something from a will that was inserted by mistake and may even add words to a will if this is necessary to give effect to the wishes of the testator by way of rectification.
- In a case where the circumstances since making the will have changed to such a degree that it would have been impossible for the testator to have foreseen them, the court has authority to deviate from the terms of the will.
- Common law – contra bonos mores – provision in a will impossible, too vague or in conflict with the law. Court will not give effect to such a provision
- Conditions that are contra bonos mores – benefit left only “if beneficiary is unmarried” but provision such as spouse inherits as long as she does not remarry is allowed.
- A testator cannot rule the live of beneficiaries from the grave.
- Common law – conditions which require someone to live in a certain place or on a certain property are valid and enforceable

**Power of appointment:**

- Children - The duty of support of children of a testator passed to the estate of the deceased parent. Even if the children were extramarital, they had a claim for maintenance out of the deceased estate, provided that the estate was large enough to provide maintenance for the legitimate children, who had a prior claim. Even a major child that is unable to support him or herself is entitled to maintenance from his parents estate.
- Surviving spouse – maintenance order made upon divorce is not necessarily terminated upon the death of the maintenance debtor. If a marriage is dissolved y death after the commencement of this act (maintenance of surviving spouse act 27 of 1990) the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs until his death or remarriage in so far as he is not able to provide therefore from his own means and earnings.
- Reasonable maintenance needs – relevant factors considered – amount in the estate available for distribution to heirs and legatees (s3(a)) , existing and expected means earning capacity , financial needs and obligations of the survivor and the subsistence of the marriage (s3(b)) , standard of living of the survivor during subsistence of marriage and spouses age at the death of spouse (s3(c)). The survivors claim for maintenance has the same order of preference in respect of other claims against the estate as a claim for maintenance of a child , if claims compete against each other both claims will be proportionately reduced

**Delegation of testamentary power (power of appointment)**

General principle is that a testator must exercise his testamentary power himself and may not leave it another to decide who will inherit under his will. However there is exception to this rule:

1. bequest to charitable organizations – may authorize administrator of the estate to nominate beneficiaries
2. Bearer on an interim right – fiduciary – to nominate the eventual beneficiary.



## CHAPTER 10 – THE CONTENT OF WILLS

- **Beneficiary** – the person upon whom those assets in a deceased person's estate devolve. – general term
- Sole heir – inherits entire estate
- Heir – inherits all the assets or a share of the assets or the residue of the estate
- Legatee – always inherits a specific asset or specific sum of money. (asset known as legacy)
- Prelegacy – is a special bequest which under testamentary instruction enjoys preference over all other bequests (example one legatee receives R10 000 before any other benefit is paid out)
- Bequest price – a legacy may be bequested subject to the beneficiary paying a bequest price to the estate or a third person.

### Differences between an heir and legatee:

- After all debts have been paid an executor must first pay over all legacies to the legatees before handing over inheritances to heirs. If a testator has left legacies of which monetary value equals the net value of estate – legatees are paid their legacies and heirs receive nothing. If value of legacies exceeds net monetary value of estate then legacies are apportioned (abatment) and each legatee received an abated amount and heirs again receive nothing.
- Heirs may be compelled in certain circumstances to account for those benefits which they had received during the testators lifetime (collation bonorum) while legatees are never obliged by law to account for such benefits
- Right of accrual differs in a minor way in the case of heir and legatees.

### Failure of legacy:

1. **ademption** – testator voluntary alienates the object of a legacy
2. **legatee dies** before the legacy vests in him
3. **legatee repudiates legacy**
4. **legatee incompetent**
5. **bequeathed thing is destroyed**
6. **testators estate is insolvent**

### Unconditional (absolute) and conditional bequests:

- Unconditional (absolute) bequest – is one in which the testator leaves property to the beneficiary without any conditions attached.
- If a bequest is subject to a time clause it is subject to an event that will certainly happen in the future (although it may be certain/uncertain when it will arrive)
- A bequest subject to a suspensive time clause – is a bequest where the beneficiary will enjoy the benefit only at a certain future time – dies venit is postponed until a future date
- A bequest subject to a terminative (resolutive) time clause – is one in which the beneficiaries rights are terminated when a certain time arrives.
- Conditional bequest is one which depends on a future event which is uncertain, in the sense that it may or may not occur.
- Resolutive /terminative condition – this bequest is new in which the bequest is made to terminate if a particular uncertain future event takes place.
- Suspensive condition – the beneficiary does not get a vested finally established right to the benefit bequest unless and until a particular uncertain future event takes place.
- Bequest subject to a modus – if a testator obliges a beneficiary to apply a bequest or the proceeds of it to a particular purpose. Reason for making a modus may vary - may be in the interest of the beneficiary himself, may be in the interest of other persons, furtherance of an impersonal objective.

## CHAPTER 11 – SUBSTITUTION:

- Substitution – takes place when a testator appoints a beneficiary to inherit a benefit and at the same time appoints another beneficiary to take first mentioned beneficiaries place.
- Direct substitution – occurs where a testator names a substitute or even a whole series of substitutes who are to inherit if the instituted heir or legatee does not. Direct substitution is substitution in the alternative.
- Fideicommissary substitution – occurs where a testator directs in his or her will that after his death a series of successors (heirs or legatees) are to inherit his or her whole estate or part of it, or specific assets, so that the benefit passes from one successor to another.
- Fiduciary – this is the first successor – fideicommissary is every beneficiary after that.

## CHAPTER 12 - FIDEICOMMISSUM

Fideicommissum – when a testator creates a fideicommissum he leaves property (almost always material corporeal things) to a fiduciary, subject to the burden of handing it over in full ownership to a fideicommissary. Example – “I leave my farm to my son John. Upon his death it must go to my grandson Peter.”

Restrictions on fideicommissa –

The immovable property act of 1994 – restricts all fideicommissa of immovable to a maximum of two substitutions after the original fiduciary has become owner.

- **Section 2(1)** – court has statutory power to remove modify burdens – allows a beneficiary who has an interest in immovable property subject to a restriction imposed by will or other instrument to apply to a court on the ground that such removal or modification will be to the advantage of any beneficiaries.
- **Section 3** – provides that if court finds that share is too small for beneficial occupation, prohibition against subdivision or because circumstances have arisen which the testator did not foresee.

### Conditional fideicommissa –

Ordinary conditional fideicommissa – the property is left to one beneficiary subject to the condition that if a particular uncertain future event takes place the property is to pass to another beneficiary. If that uncertain future event does not take place then the fiduciary will remain owner and when he eventually dies the property will be an asset in his estate.

Si sine decesserit clause – if someone dies without children – if a testator bequeaths his or her property to an estate of another, stipulating that if the beneficiary dies after the testator leaving no children (si sine decesserit), the property or estate must pass to a third party.

Fideicommissum residui - property is left to a beneficiary subject to the condition that as much of it as may be left at the time of the beneficiary's death is to devolve upon another person. This therefore constitutes an exception to the general rule that the fiduciary may not alienate the fideicommissary property.

The legal position of the fiduciary - may not alienate or mortgage the fideicommissary property except where he obtains the cooperation of all fideicommissaries and if they are all majors. Alienation or mortgage is possible in all other cases with the consent of the High court.

- Insolvent fiduciary – fideicommissary property does not become part of his insolvent estate
- Marriage in cop - fideicommissary property does not form part of joint /common estate.
- Fiduciary - is obliged to manage the fideicommissary property as a reasonable person.
- Fiduciary – entitled to the fruits or produce of the fideicommissary property.
- Mine – where there is a mine on the fideicommissary property the fiduciary is entitled to the interest on the price obtained for the minerals.
- Fiduciary predeceases the testator – the fideicommissary acquires a vested right to the ownership of the property at the very moment the testator dies.

- fideicommissary is the person to whom the fiduciary must hand over the fideicommissary property as directed in his or her will by the testator
- Positive law – can take steps to protect his interests - for immovable property may have his right registered against the title deeds of the property.
- Usufruct – is a personal servitude (limited right) occurs where a testator bequeaths ownership of a thing to one person and the right of use of the thing to someone else (the usufructuary , whom takes the fruits and enjoys the thing)
- Distinction between fideicommissum and usufruct – fideicommissum ownership of property always vest in the fiduciary. In a usufruct the usufructuary will never have ownership.

## CHAPTER 13 – THE TRUST

Concept of treuband – to be entitled party, not for oneself but for another or for a particular impersonal purpose. 2 types of trusts – inter vivos trust and trust mortis causa. We only look at trust mortis causa.

Trust – the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –

1. to another person , the trustee – in whole or part to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument
2. to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.

Trust instrument – is defined as a written agreement, a testamentary writing or a court order in terms of which a trust was created (s1). In terms of section 2 a document which represents the reduction to writing of an oral agreement by which a trust was created or varied shall also be deemed to be a trust instrument.

Requirements to establish a valid trust:

- founder must intend to create a trust
- trust must be created by means of a written agreement (anc) ,a testamentary writing or a court order
- trust property must be established for an object or a purpose
- essential that the purpose of the trust is clearly indicated

### Legal position of the trustee:

Trustee is the person who administers the trust property for the benefit of the trust beneficiaries or for an impersonal purpose, irrespective of whether the trustee or the beneficiaries are entitled to the trust property or not. Any person including the founder of a trust, who is authorized to act as trustee under section 6 of the act. A founder nominates or appoints a trustee before the master authorizes such a nomination.

Power of assumption – is the capacity given to an existing trustee to appoint additional trustees. A trustee may only assume another trustee if such power of assumption has been conferred upon him in the trust instrument.

Power and duties of a trustee:

Trustee must act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.

1. The trustee must lodge the trust instrument of a certified copy with the master before he assumes control of trust property.
2. trustee has to furnish security if not exempted in the trust instrument (s6(2))
3. trustee must furnish the master with an address where notice and process may be served upon him
4. whenever he receives money in his trust account - funds to be deposited into the trust bank account

5. Must indicate clearly in his bookkeeping what property he holds in his capacity as trustee.
6. Must at the written request of the master account for his administration and disposal of trust property.
7. Trustee cannot destroy any trust document relating to assets, investments safe custody before the expiry of the five year period from the termination of the trust.

Termination of the service of the trustee

1. trusteeship of a trustee terminates on his death
2. he may resign
3. removed from office by the court
4. Removed from office by master because – fails to give security, mentally ill, fails to perform any duty imposed upon him.

Trust for an impersonal purpose is a trust which is intended to be used for charitable purposes.

Termination of a trust – is object of trust is realized, trust becomes impossible (as a result of destruction), and court terminates the trust.

#### **CHAPTER 14 – ADIATION, JOINT AND MUTUAL WILLS, ELECTION AND MASSING**

Adiation – acceptance of an inheritance

Repudiation – refusal of inheritance

Joint will – is found where two or more testators set out their respective wills in the same document

Mutual will – is found where two or more testators confer benefits on each other in the same document.

Massing – takes place when the whole or portions of the estates of various testators are consolidated into one economic unit for the purposes of a testamentary disposition by the testators jointly. Consequence is once the spouse has accepted the bequeathed benefit under the joint or mutual will the surviving spouse is not capable of subsequently making an independent will which is in conflict with the provisions of the joint will. – will is made irrevocable once accepted.

**Massing and the doctrine of election** – “election” has to take place when a testator leaves a benefit to a beneficiary and at the same time imposes a burden on him.

#### **CHAPTER 15 – THE RIGHT OF ACCRUAL (ius accrescendi)**

Right of accrual – is the right of an heir or legatee to inherit those bequeathed benefits which a co-heir or co-legatee refuses to inherit or is incompetent to inherit.

1. Joinder re – occurs where the testator has given the same thing (or benefit) to two or more persons in different bequests in his will (intention is that testator intended that accrual must take place.
2. joinder re et verbis – occurs where the testator in a single bequest – in one breath as it were – bequeaths the same benefit to two or more beneficiaries “I leave my farm to A & B – accrual must take place
3. joinder verbis tantum – takes place in principle where separate benefits are left to different beneficiaries but in a single bequest in one breath as it were. Et verbis – one benefit one bequest – verbis tantum – 2 benefits one bequest.

Circumstances under which the right of accrual does not operate –

1. testator completely separated the interests – eg – car to a and house to b – no accrual
2. Testator named a substitute to inherit if the instituted beneficiary does not inherit.
3. if section 2 ( c ) applies right of accrual excluded

## CHAPTER 16 – INTERPRETATION OF WILLS

High court is the only court that may interpret a will a magistrate court has no jurisdiction to do so.

### When to interpret a will:

The necessity for the interpretation of a will by the court arises only where there is some obscurity or ambiguity in the will.

### The principles of interpretation of wills:

Golden rule – wills is that the testator's intention and it appears from the word he used in his will, must be ascertained. **The golden rule is, therefore to determine the testator's intention as it appears from his will read as a whole.**

Sources of interpretation:

1. the will itself
2. ordinary grammatical and everyday meaning
3. Technical meaning – unless it is apparent from the context of the will.
4. Rectification – occurs wherein the court adds or deletes words or rectifies an obvious mistake made by the testator in order to clarify the meaning of the will.
5. Armchair evidence – is the evidence which the court uses to place itself in the position in which the testator was at the time of the making of the will by paying attention to all the relevant facts and circumstances.
6. Extrinsic evidence – is evidence outside the document itself or other words evidence of facts which do not appear from the document itself. Where the will is clear and testator's intention appears clearly from it no extrinsic evidence is admissible
7. Rectification takes place where a court adds deletes or changes something in a will because the testator made a mistake when making the will and the will does not reflect his intention correctly. A will can be rectified when a will after the testator's death a mistake in the will and the will therefore does not represent the testator's intention. The court will then rectify the mistake.
8. prerequisites for rectification – because of mistake the will in itself does not represent the testator's intention, of what the testator really meant to say needs to be proven
9. Extent of court's power to rectify – clerical mistake (10 000 instead of 1000), words or clauses can be inserted erroneously; word or clauses can be omitted erroneously.
10. presumptions – person may die partly intestate and partly testate, presumption that testator intended for all his children to inherit equally, if a testator had a will and when he dies the will cannot be found it is presumed he destroyed it
11. Costs of rectification – are born by the testator's estate

## CHAPTER 17 – ADMINISTRATION OF DECEASED ESTATES

Master of the high court – is the upper guardian of all minor persons. He also supervises the administration of deceased estates

Death notice (s7) – death notice is to be prepared and lodged with the master when a person dies. Duty of the surviving spouse or nearest relative or person in control of property.

Registration of wills - (s8) – every person who has a will in his possession at the time after his death shall forthwith deliver this will to the master or magistrate concerned. This does not necessarily mean that the will is valid.

Preparation of an inventory – 2 inventories to be lodged with the master – 1<sup>st</sup> – preliminary inventory prepared before the L.E and the second inventory must be compiled by the executor after his or her appointment. –

provided a classification of assets under 4 categories , immovable property , movable property , claims in favour of the estate and cash found in the estate.

Executor – is the person who normally winds up the deceased estate. He/she has the power to accept payment on behalf of the estate, to transfer ownership of assets in the estate, to pay the estate creditors, and to distribute the remaining assets among the legatees and heirs of the estate.

Security – general rule is security is required by all executors unless – they are testamentary or assumed and have been exempted by the will from providing security or are close family members of the testator (spouse).

L.E – the issuing of the letters of executorship entitles the person to whom they are granted to administer the assets in S.A.

Duties of the executor – the executor is in a position of trust in relation to the estate. Common law – must disclose any personal interest they might have when dealing with their fiduciary duties, they may not reap any secret profits if an executor buys property from the estate, and they need to ask the court for permission to do so. Duties set out in the act – to preserve the estate during its administration and to liquidate the estate. To liquidate to sell enough and only enough assets to pay creditors out of the estate.

Specific duties set out in the act –

1. he must take personal possession of all assets and documents relating to estate
2. draw up an inventory of estate assets must state values – an executor that sells assets not in the inventory commits an offence
3. He must ascertain who the creditors are and get them to submit their claim. – does this by advertising the death in GG and another newspaper. – section 29 of the act.
4. He must assess solvency or otherwise of the estate.
5. Open a bank account in the name of the estate as soon as he holds R100 or more of estate money.
6. Must liquidate the estate – sell sufficient assets to pay the creditors and must not sell more except with permission of the master.
7. L&D account – list all assets together with valuations including fiduciary assets, all creditors with full details. This account is sent to the master for approval and must lie for public inspection – section 35 – advertisement of account in GG and another newspaper stating account is lying for inspection for the period of 21 days
8. when account lied for inspection and no objections the executor must pay creditors and beneficiaries in the estate according to account
9. if executor is unable to pay funds to beneficiaries within 2 months after finalizing the account – he must these funds to the master – guardians fund
10. after the executor has performed all his duties – he is entitled to his discharge – (s56)

## CHAPTER 18 – COLLATION

**Collation** is the principle according to which the executor of an estate must under certain circumstances take benefits given to certain heirs by the deceased during his lifetime into account when distributing the estate among certain beneficiaries. Collation is based on a presumption that parents wish to treat their children on an equal basis as far as succession is concerned.

Who must collate – only takes Place in the direct line of descendents - this is deceased children and their children. Person who collates has the choice of collating goods or their value.

Benefits that must be collated:

- Benefits received as a child as part of his inheritance.
- Benefits received for the promotion of a Childs occupation or business
- Benefits given with a view to a marriage.

## 2 NEW DEVELOPMENTS

### 2.1 Influence of the Constitution on the law of succession

#### 2.1.1 Intestate succession

Section 1(4)(b) of the Intestate Succession Act provided that an “intestate estate” included any part of an estate in respect of which section 23 of the Black Administration Act 38 of 1927 did not apply. In other words, section 1(4)(b) excluded intestate estates that were subject to the Black Administration Act from the operation of the Intestate Succession Act. The Black Administration Act was accompanied by regulations (Regulations for the Administration and Distribution of the Estates of Deceased Blacks (R200 published in Government Gazette No 10601 dated 6 February 1987)). This parallel system of intestate succession, set up by section 23 and the regulations, purported to give effect to the **customary law of succession**. It prescribed which estates were to devolve in terms of what the Act described as “Black law and custom” and detailed the steps that had to be taken in the administration of those estates. Central to the customary law of succession is the **principle of male primogeniture**, in terms of which the eldest son of the head of the family is his heir. Women generally do not inherit in customary law (see *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA) par [8]). In the *Bhe* case the constitutionality of section 23 and its accompanying regulations and the rule of male primogeniture were attacked. The Constitutional Court held that section 23 was unconstitutional, being contrary to sections 9 and 10 of the Constitution because of its blatant discrimination on the grounds of race, colour and ethnic origin and its harmful effects on the dignity of persons affected by it. This discrimination could not be justified in terms of section 36 of the Constitution. It was accordingly held that section 23 had to be struck down.

The rule of male primogeniture as it applied in customary law to the inheritance of property was also held to be inconsistent with the Constitution and invalid to the extent that it excluded or hindered women and extramarital children from inheriting property.

The Court was of the opinion that the Legislature was the appropriate forum in which to make the adjustments necessary to rectify the defects identified in the customary law of succession. The Court held that as an interim solution, until the Legislature adopted the necessary legislation, section 1 of the Intestate Succession Act should be applied to all intestate estates.

This could be done by ensuring that s 1(1)(c)(i) and s 1(4)(f) of the Intestate Succession Act, which made provision for the child's share of the single surviving spouse and the manner of calculating this share, should apply with three qualifications if the deceased was survived by more than one spouse:

(a) A child's share in relation to the intestate estate of the deceased should be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, **plus the number of spouses** who have survived such deceased person.

(b) **Each surviving spouse should inherit a child's share** of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette (R125 000 at present), whichever is the greater.

(c) Notwithstanding the provisions of subpar (b) above, **where the assets in the estate are not sufficient** to provide each spouse with the amount fixed by the Minister, **the estate must be equally divided among the surviving spouses**.

#### Effect of the *Bhe* decision on the law of intestate succession

□□ At present there is only one Act, namely the Intestate Succession Act, which regulates the devolution of all intestate estates. *Bhe* amended the calculation of a child's share when a deceased is survived by more than one spouse, in that a child's share would be determined by adding all the surviving spouses (ie, not “plus one”, but “plus the number of surviving spouses”).

### 2.1.2 Meaning of “survivor” and “spouse” in the Maintenance of Surviving Spouses Act 27 of 1990 and the Intestate Succession Act 81 of 1987

The Intestate Succession Act is discussed in chapter 2 of the study guide and the Maintenance of Surviving Spouses Act 27 of 1990 in par 9.1.4 on page 113 et seq of the study guide. You should study the following paragraphs in conjunction with these paragraphs. Although both the Maintenance of Surviving Spouses Act 27 of 1990 and the Intestate Succession Act 81 of 1987 confer rights on “spouses” who have been predeceased by their husbands or wives, neither defines the word “spouse”. In terms of section 1 of the Maintenance of Surviving Spouses Act “survivor” is defined as “the surviving spouse in a marriage dissolved by death”. The Constitutional Court had to decide on the meaning of “spouse” and “survivor” as used in the Maintenance of Surviving Spouses Act in relation to Muslim marriages (*Daniels v Campbell* and *Hassam v Jacobs NO*) and persons living in a permanent heterosexual life partnership (*Volks v Robinson*). The meaning of these words as used in the Intestate Succession Act also came up for decision in respect of Muslim marriages (*Daniels v Campbell* and *Hassam v Jacobs NO*) and persons living in a same-sex life partnership (*Gory v Kolver*).

#### (a) *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC)

In this case, the applicant had been married to her husband (the deceased) for 30 years. The couple were married by Muslim rites. The marriage was monogamous at all times. It was never solemnised by a marriage officer appointed in terms of the Marriage Act. The deceased died intestate. The applicant was told by the Master that she could not inherit from the estate of the deceased because she had been married under Muslim rites, and therefore was not a “surviving spouse”. A claim for maintenance against the estate was rejected on the same basis.

The Constitutional Court held that the word “spouse” in its ordinary meaning included parties to a Muslim marriage. It further held that the relevant Acts were to be interpreted so as to include a party to a **monogamous Muslim marriage** as a spouse. So interpreted, the Acts were not invalid and unconstitutional. A declaration had to be made indicating to all interested parties that the applicant was a “spouse” and a “survivor” under the Acts.

#### (b) *Hassam v Jacobs NO* [2009] ZACC 19

In this case, the Constitutional Court held that women who are party to a **polygynous Muslim marriage** concluded under Muslim personal law are spouses for the purpose of inheriting or claiming from estates where the deceased died without leaving a will.

**Effect of *Daniels v Campbell* and *Hassam v Jacobs NO* on the law of succession**  
**A party to a Muslim marriage, irrespective of whether it is monogamous or polygynous, is a “spouse” and a “survivor” in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act and can therefore be an intestate heir of the deceased and can claim maintenance from the deceased estate.**

#### (c) *Govender v Ragavayah NO* 2009 (3) SA 178 (D)

In this case the KwaZulu-Natal High Court, Durban held that the word “spouse” as used in the Intestate Succession Act 81 of 1987 includes the surviving partner to a **monogamous Hindu** marriage.

#### (d) *Volks v Robinson* 2005 5 SA 446 (CC)

You will find a reference in the study guide on page 113 to *Robinson v Volks* 2004 (6) BCLR 671 (C) in which the Cape Provincial Division of the High Court found section 1 of the Maintenance of Surviving Spouses Act to be unconstitutional to the extent that it fails to include permanent life partners within the ambit of the Act. However, the Constitutional Court **overturned** this decision in *Volks v Robinson* 2005 5 SA 446 (CC). You have to amend this reference to reflect the new position: In *Volks v Robinson* the **majority of the judges** of the Constitutional Court found that differentiating between a spouse and a **heterosexual** life partner (ie, someone of the opposite sex to the deceased) by excluding the heterosexual life partner from a maintenance claim against the estate of his or her deceased life partner in circumstances where a spouse would have had such a claim does **not** constitute **unfair discrimination**. Nor does it violate the surviving life partner’s right to dignity. The Court was of the opinion that **the law may distinguish between married and unmarried**



**people and may accord benefits to married people which it does not accord to unmarried people.**

In a **minority judgment**, Justice Mokgoro and Justice O'Regan disagreed with the majority. They were of the opinion that cohabiting partners are a vulnerable group and that in the absence of legal regulation, the fact that they are excluded from the provisions of the Act can have a grave impact on their interests and furthermore that limiting the scope of the Act to married spouses constitutes unfair discrimination which cannot be justified.

#### **Effect of *Volks v Robinson* on the law of succession**

**A heterosexual life partner is not a "spouse" or a "survivor" in terms of the Maintenance of Surviving Spouses Act and cannot claim maintenance from the deceased life partner's estate. (e) *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (3) BCLR 249 (CC); 2007 (4) SA 97 (CC)**

The deceased and the applicant (Gory) were, at the time of the deceased's death, allegedly partners in a permanent, same-sex life partnership. When the deceased died intestate, his parents nominated the first respondent (Kolver) to be appointed by the Master as the executor of their son's estate, and claimed to be entitled to his assets as his intestate heirs. This resulted in a dispute with the applicant as to who the lawful intestate heir was. In the Constitutional Court the issue was whether section 1(1) was unconstitutional. The Court held that it was unconstitutional.. The Court held that section 1(1) of the Act confers rights of intestate succession on heterosexual spouses but not on permanent same-sex life partners. As these partners were at the time not legally entitled to marry [this position was subsequently changed by the promulgation of the Civil Union Act 17 of 2006 – see below] this amounted to **discrimination on the listed ground of sexual orientation** in terms of section 9(3) of the Constitution, which discrimination is presumed in terms of section 9(5) to be unfair unless the contrary is established. No justification was found in terms of section 36 for the limitation of these rights. It was held that the order of constitutional invalidity should operate retrospectively in the main, but with limitations so as to reduce the risk of disruption in the administration of deceased estates and to protect the position of *bona fide* third parties as far as possible.

#### **Effect of *Gory v Kolver* on the law of succession:**

**A partner in a same-sex life partnership in which the partners have undertaken reciprocal duties of support, is a "spouse" in terms of the Intestate Succession Act.**

It may be asked whether the decision in *Gory v Kolver NO and Others* Case CCT 28/06 remains of importance after the adoption of the Civil Union Act (see below). It is submitted that the decision remains valid for partners in a **same-sex life partnership in which the partners have undertaken reciprocal duties of support without concluding a civil union.**

#### **(f) Civil Union Act 17 of 2006**

This Act was signed into law on 30 November 2006. In terms of this Act, marriage is no longer restricted to persons of the opposite sex. According to section 1 of the Act, "a 'civil union' means the voluntary union of **two persons** who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others." (my emphasis) According to section 13(1), "the legal consequences of a marriage contemplated in the Marriage Act [25 of 1961] apply, with such changes as may be required by the context, to a civil union."

The Act further provides in section 13(2) that any reference to "marriage" in any other law, including common law, includes with such changes as may be required by the context, a civil union. Also, the words "husband", "wife" or "spouse" in any other law, including common law, include, with such changes as may be required by the context, a civil union partner.

**The effect of the Civil Union Act on the law of succession:**

**A partner in a civil union will be entitled to inherit in terms of the Intestate Succession Act and will also be able to claim maintenance in terms of the Maintenance of Surviving Spouses Act. 2.1.3 Racial and gender clause in a trust created by a will: *Minister of Education and Another v Syfrets Trust Ltd NO 2006 (4) SA 205 (C)***

**This case is one of the prescribed cases for this module. The following discussion should be studied in detail.**

It is indicated in the study guide (par 9.1.3 on p 111) that the Constitution might influence the freedom of a testator to include clauses in his will that discriminate against certain persons on the basis of race, gender, religious and sexual orientation. In *Minister of Education and Another v Syfrets Trust Ltd NO 2006 (4) SA 205 (C)*, the testator created a trust in his will, providing that only certain groups of persons may benefit from the trust. The discussion of the case that follows is therefore of importance in relation to freedom of testation (discussed in par 9.1.3), as well as in relation to trusts, which are discussed in the study guide in chapter 13.

**Study the discussion that follows with regard to both freedom of testation and trusts. You need not study all the arguments in detail. You should be able, however, to demonstrate that you are aware of the effect of the Constitution on the freedom of a testator to include provisions in a will and testamentary trust on the basis of race, gender or religion.**

**Facts:**

The late Mr Scarbrow (the testator) made a will in 1920 in which he provided that the residue of his estate should be held in trust. He further provided that after the death of his wife, and in the event of his sons dying without issue, the residue should be applied for the purpose of “forming a Fund, to be called the “Scarbrow Bursary Fund”. The testator in addition directed that the administrators of his estate were to use the income from this fund to “provide bursaries for deserving students with limited or no means of either sex (but of European descent only) of the University of Cape Town” who wished to study overseas. The governing body of the University was granted the sole discretion to decide who would receive the bursaries, what amount would be paid and for what period it would be paid. The testator further provided that the bursaries should be advertised periodically in a newspaper. A few months after the execution of the will, the testator added a codicil to the will in which he provided that “persons of Jewish descent and females of all nationalities” were not eligible to receive such bursaries. **In other words, in terms of the will and the codicil thereto, only white, non-Jewish males were eligible for the bursaries.**

The testator died in 1921. The trust was established in 1956 after the death of both his sons without issue. Syfrets was appointed as the trustee of the trust and the University of Cape Town administered the awarding of the bursaries from the trust. However, in 1969 the Council of the University decided that it could no longer administer the trust, because of its discriminatory provisions. Syfrets took over the administration of the bursaries in the place of the University. In 2002 an advertisement, inviting past and present students of the University of Cape Town to apply for a Scarbrow bursary appeared in a weekend newspaper. The Minister of Education also saw the advertisement and was upset because of the fact that the bursaries were only open to students who were of European descent, male and non-Jewish. The Minister wrote to Syfrets and requested Syfrets to remove the criteria for applicants relating to race, gender and religion in the light of the constitutional protection of equality. Syfrets did not defend or justify the discriminatory condition, but indicated that the principle of freedom of testation precluded them from deviating from or varying the wishes of the testator as contained in the will, unless a Court order directed them to do so. The Minister thereupon brought a court application requesting the deletion of the discriminatory provisions in the will. The University of Cape Town was the second applicant. Syfrets was the first respondent and the Master the second. Both respondents abided by the decision of the Court. (Consequently this case will probably not go on appeal.) A *curator ad litem* was appointed to represent the potential beneficiaries from the class referred to in the will.

**Importance of *Minister of Education and Another v Syfrets Trust Ltd NO and Another 2006 (4) SA 205 (C)* for the law of succession:**

The principle of freedom of testation cannot be ignored, but there are limits to freedom of testation. One of these limits is the common law principle that provisions that are *contra bonos mores* may be deleted.

Provisions that constitute unfair discrimination are contrary to public policy, as reflected in the foundational constitutional values of non-racialism, non-sexism and equality.

- The Court may order the deletion of discriminatory provisions of a will based on its common law power to delete provisions in a will that are against public policy.
- Not all clauses in wills or trust deeds that differentiate between different groups of people are invalid. It is only where the differentiation can be considered to be unfair discrimination on the grounds of race, gender and faith that they can be held invalid and be deleted.

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#### **SUMMARY OF PRESCRIBED CASES:**

##### **BRAUN v BLANN AND BOTHA – conferment of a power of appointment upon a trustee:**

In clause 3 of her will a testator had bequeathed the residue of her estate to her administrators. She had conferred upon the administrator *inter alia* the power to appoint in their discretion the income as well the capital beneficiaries from a group of persons she designated. She further provided when the trust must be dissolved and in a proviso to clause 4(d) she empowered her administrator in certain circumstances to “apply such portion of the capital as they determine to the creation of a trust for such lawful issue. The testator’s daughter contested the validity of the trust on the ground that a power of appointment could not be conferred onto a trustee.

Court dismissed the application and the appeal was unsuccessful. 2 important matters have been decided here. The first one concerns the granting of a power of appointment to trustees. After this case it is certain that power can be granted to trustees to appoint beneficiaries from a specified class of persons designated by the testator. The second important matter decided by the appellate division is that the trust *mortis causa* is no longer constituted as a *fideicommissum* as previously.

##### **CUMING v CUMING – interpretation of wills and the so-called “golden rules of interpretation:**

The testator left the residue of his estate to his sister in law, the respondent, whom he was married in community of property. The testator was aware that the sister in law was estranged from her spouse for 16 years and were separated. In the L&D account the executor awarded the residue to the testator’s brother. The respondent lodged an objection with the master but it was not sustained by the master. She then applied to the court for an order setting aside the master’s direction and amending the account so as to transfer residue of estate to her, unencumbered by any community. Court granted application and an appeal against this decision was rejected.

Once testator’s intention in will is determined effect must be given thereto.

##### **DU PLESSIS v STAUSS – si sine liberis decesserit clause**

The testator one Strauss in his will left a farm to his son, A L Strauss and also bequeathed a farm to each of his 2 daughters. These bequests were *inter alia* to a condition.

If it leaves a benefit to A and provides that the property must go to B if A should die without children (*si sine liberis decesserit*) there is no problem if A should die without children. B will then inherit the property. If A dies and is survived by children, the *fideicommissary* condition is not fulfilled and B can therefore not inherit.

From this decision it is clear that if a *si sine liberis decesserit* clause is attached to a conditional *fideicommissum*, the mere fact that children are not mentioned in the condition means that a *fideicommissum tacitum* is created in their favour, provided that the children are descendants of the testator.

##### **GAFIN v KAVIN – capacity of an heir to inherit from the wife whom he had killed while mentally ill**

The respondent and his wife executed a joint will in terms of which it was provided that, in the event of his wife predeceasing him, he was to be the sole heir of her estate. The respondent shot and killed his wife and 2 of his children and wounded his other child, he was charged with murder but found not guilty because as he was mentally ill, he was incapable of acting in accordance with an appreciation for the wrongfulness of his acts at the time of the commission of his acts and was accordingly not criminally responsible for his acts. The executor of the estate of his deceased wife applied for an order declaring that the respondent was unworthy to inherit from his wife’s estate “die bloedige hand”. The court accepted the findings of the trial court that the respondent was not criminally responsible for his acts and found that he was not disqualified from inheriting from his wife.

From this decision it is clear that where the killing is justified (self defense , no fault of the perpetrator then he is not unworthy to inherit from his victim

**HARRIS v ASSUMED ADMINISTRATION ESTATE MCGREGOR – vesting on intestate succession:**

The testator created a trust in respect of the whole of his estate and stipulated that the trust income was to be paid to his wife during her lifetime. After her death the trust capital was to devolve upon the children. Should they not have any children , it was to go to his brother, AG Macgregor and to his brothers children if his brother predeceased the testators wife. No children were born of the marriage of the testator and his wife and his brother predeceased the testator wife the testators wife leaving no issue surviving him. Every contingency that the testator provided for therefore failed and consequently the capital of the estate had to devolve ad intestato.

In this decision the appellate division has brought about certainty concerning a matter on which the courts were divided in the past. Where the deceased died without making a will at all or without leaving a valid will the intestate estate vests on the date of his death when his intestate heirs also have to be determined. On the other hand where the testator leaves a valid will which took effect of his death but which subsequently became inoperative either toto or pro parte the intestate estate vests on the date when it became certain that the will had become inoperative. The intestate heirs will then need to be determined not at the testators death but rather when the intestacy occurred.

**JEWISH COLONIAL TRUST v ESTAT NATHAN – meaning of the term “vest”**

The testator bequeathed his estate in trust to administrators and directed that certain annuities were to be paid out of income for a period of fifty years.

Thereafter the residue of the estate was to be handed over to the Jewish colonial trust for the purpose of creating a fund the “Solomon Nathan Family Fund”. After fifteen years had passed the Jewish colonial trust claimed payment from the administrators of so much of the residue as was not required for payment of the annuities. In support of their claim they alleged ,inter alia, “plaintiff Jewish colonial trust is the residuary heir or legatee and its interest as such is in law vested in it.” The administrators objected to this declaration on the ground that the Jewish colonial trust is not the residuary heir or legatee but a trustee of fiduciary without beneficial interest. The court a quo upheld the exception ,but on appeal it was rejected. The court held that the Jewish colonial trust obtained vested rights on the death pf the testator. however it was further found that grounds for the acceleration of the benefit could not be allowed.

**KIRSTEN v BAILEY – testamentary capacity – undue influencing of a testator:**

The testator made 3 wills shortly before her death. The defendant was the only beneficiary in terms of the first and third will. The master accepted the third as the testators valid will. The testators intestate heirs who were beneficiaries under her second will , challenged the validity of the first and third will on the ground that the testator had not had the required testamentary capacity when she made them. The plaintiffs also claimed that the defended had unduly influenced the testator when she made the first and third wills. The plaintiffs consequently claimed an order setting aside the third will and declaring the second will to be the testators last will. Alternatively they claimed an order declaring that the testator had died intestate. The court held that she had died intestate.

**LELLO v DALES – right of accrual – ius accrescendi**

The testator left her estate in trust and stipulated that the income of the trust was to be paid to her son Harry during his lifetime. On Harry death the estate was to devolve on his lawful issue. If he should die without leaving lawful issue the estate was to devolve as follows “ half to my brother Edward , or his lawful issue if any and the other half in equal shares to my nephews and nieces , the children of my brothers”

In addition Edward had 3 brothers . in all these brothers had 13 children who survived the testator. Edward had never married and died intestate before Harry’s Harry also survived the testators remaining brothers. After he died childless his widow (as executor) applied for a declaratory order to the effect that the half that Edward and his children would have inherited if they had survived Harry was now to devolve on harries estate in terms of intestate succession. The nephews and nieces opposed the application contending that Edwards half should accrue to their half of the estate. The court a quo held that Edwards half should **go to harrys estate. An appeal against this decision was upheld**

**LEVY v SCHWARTZ – condition in a will calculated to break up an existing marriage:**

The testator left certain benefits to his one daughter, Mrs Levy, which she was only to receive “in the event of her marriage being dissolved by the death of her husband or through any other cause before the date of distribution” The benefits left to the testator's other children were not subject to the restrictions as in the case of Mrs Levy. Mrs Levy and her husband who applied for a declaratory order, contended that the provisions in the will that restricted Mrs Levy's right to receive benefits were invalid because they were against public policy and contra bonos mores as it was the testator's intention to bring about a dissolution of their marriage. She maintained that Mrs Levy was therefore entitled to the gifts free from the objectionable restrictions. The application was opposed by the executors of the will and the other beneficiaries. The court granted the application.

**PILLAY v NAGAN – capacity of a person who forged the testator's will to inherit from the testator:**

The first defendant forged his mother's will. In terms of his will he was appointed sole heir and certain immovable property which had formerly belonged to his mother was transferred into his name. Other children of the deceased claimed an order declaring that the deceased had died intestate and the setting aside of the transfer of the immovable property to the first defendant. They also sought an order declaring that the first defendant was unworthy of taking any benefits from the estate of the deceased. The order was granted.

**RE ESTATE WHITING – revocation of a will by a subsequent will :**

The testator had executed a will – 31/08/1908, appointing the plaintiff as his executor and the plaintiff and his wife as his heirs. On 3/09/1908 he executed a will in terms identical to those of the previous one, save for a correction in the address of the plaintiff. This second will expressly revoked all previous wills and had been written by the plaintiff as requested and dictated by the testator, however it did not contain a ratifying endorsement of the bequest to the plaintiff by the testator. The plaintiff and his wife were consequently in terms of the law applicable when the will was executed, unable to receive any benefit under the second will because the plaintiff had written it. The plaintiff sought an order declaring the will dated 31/08/1908 the valid will of the testator directing that the master issue him with letters of administration under such will. The plaintiff contended that it had not been the testator's intention to revoke the first will but that he had merely intended to correct his address. The court held that the will of 03/09/1908 was the last will of the testator.

**RENS v ESSELEN – rectification:**

In clause 1 of his first will the testator bequeathed his farms to his son Douglas, and property situated at Margate to his son Stanley and daughter Stella. In clause 2(ii) he bound the property by means of a fideicommissum in favour of their issue. At a later stage the testator sold the Margate property and had to change his will as a result. In his second will he bequeathed money to Stanley and Stella. The attorney who had drafted the second will and the testator's nurse testified the testator had instructed the attorney to delete clause 2(ii) of the first will as he wanted to give Douglas the farms unencumbered. When the will was typed, clause 2(ii) was inserted by mistake as clause 3(ii), in the second will. The testator's sight was impaired and as his eyes were tired he did not read the will and just signed. Douglas applied for an order directing that clause 3(ii) be regarded as pro non script. The court granted the application.

**BOSCH v NEL – testator may acknowledge his signature in the presence of the witnesses:**

In 1984 the testator executed a valid will in terms of which he appointed his wife (plaintiff) as his sole heir and as the executor in his estate. In 1988 the testator's brother in law at the testator's request drew up another will for the testator. In terms of this will the brother in law was appointed executor and the estate was to be divided amongst the plaintiff and 3 other persons. This will consisted of 2 pages and both were signed but when he signed the will no witnesses were present. Later the same day the testator acknowledged his signature on the will in the presence of 2 persons who signed the will as witnesses. The plaintiff contested the validity of the second will on the grounds that it did not comply with s2 (1) of the Wills Act in that there were no witnesses present when the testator

signed his will. She consequently sought an order declaring the second will invalid and that the first will was valid. Application was dismissed.

There was never before the case under discussion necessary for the court to decide the point but now it has been put beyond any doubt.

**EX PARTE ESTATE DAVIES – meaning of testamentary writing:**

In clause 2 of his will the testator bequeathed 2000 pounds “to a person who will not be named in this will but whose name will be disclosed by me in a separate note of hand addressed to my executors”. The beneficiary could draw this 2000 pounds over a 15 year period as required. The testator's 2 sons were to receive any money which had not yet been paid during this period. At the time the testator executed his will he had handed to his attorney a sealed envelope containing a document addressed to his executors disclosing the name of the person mentioned in his will. This document had been signed by the testator but was not witnessed. The executor applied for an order authorizing payment of the money to the 2 sons. The court granted the application.

In this judgment “testamentary writing” is defined. It is important to know what qualifies as a testamentary writing as no will executed after 1/01/1954 is valid unless the formalities prescribed by s2 (1) of the wills act have been complied with. In section 1 “will” is defined as “including a codicil and any other testamentary writing”

Any document in the nature of a testamentary writing should itself be executed in accordance with the formalities required for a valid will.

**EX PARTE GRAHAM: presumption regarding sequence of death**

A woman of fifty in her fifties left her estate to adopted son of 16. The will also provided that should the son predecease her the testator then her entire estate was to go to her mother. The testator and adopted son were both killed in an air disaster in which all crew members and passenger perished. The executor awarded her entire estate to her mother but the registrar of the deeds first wanted an order of court declaring that the adopted son died before or simultaneously with the testator before he would transfer the immovable property to the mother. The executor then applied for an order declaring that her son and she died simultaneously and this order was granted.

The general rule today is that if the sequence in which people died cannot be proved on a balance of probabilities, there is no presumption of either survival or simultaneous death. Unless there is evidence to the contrary the courts will however find that commorientes died simultaneously. If there are no witnesses to point out who died first the court can do nothing else but find that they died simultaneously.

**KIDWELL v THE MASTER – the end of a will for purposes of section 2(1) (a) (i):**

The testator's will consist of 2 pages. The first page contained the dispositive portion of the will while page 2 only contained 2 unimportant clauses. On page 1 there was an open space of nine centimeters between the last paragraph and the testator's signature. The last paragraph on the second page of the will was followed by an attestation clause. Immediately below this 2 witnesses signed on the left hand side of the page. The testator himself signed the second page on the right hand side at the extreme bottom page. Between signature of the testator and second witnesses was a blank space of 13 centimeters and the testator's signature appeared 17 centimeters below the attestation clause. The master refused to accept the will because it was in his opinion not signed at the end thereof as required by section 2(1) (a) (i). The testator's daughter, the sole heiress under the will applied for an order that the will be declared valid and in the alternative the first page be declared the testator's valid will. The court held that both pages of the will were invalid and the application was refused.

There are varying opinions about this decision and this judgment does not bring absolute clarity on how far from the last testamentary provision the testator's signature must be appended.

**LIEBENBERG v THE MASTER – witnesses signing the top of last page of the will:**

The testator's will consisted of one page. The testator signed the will at the end thereof but the witnesses who were present when the testator signed his will signed as witnesses in the presence of each other and of the testator above the body of the will. The master (respondent) disputed compliance with section 2(1) (a) (v) in that the witnesses did not sign at the end of his will. The court held that the will was valid.

The testator is specifically required to sign at the end of the will while it is not said where the witnesses should sign, it is submitted that they may sign anywhere on the last page and that the decision under consideration is therefore correct.

**BACK v MASTER OF THE SUPREME COURT – application in terms of s2 (3) of the wills act for the acceptance of a document as a will: notes only**

Before a court can make an order in terms of section 2(3) of the wills act that a document or amendment to a document which does not comply with all the formalities of the wills act can be accepted as valid there are requirements to be met:

**The document or amendment must have been drafted or executed by a person who has since died and who intended the document to be his or her will.**

A wide discretion is therefore conferred upon the courts to decide a case on its own facts and circumstances. This principle can perhaps best be illustrated by comparing the facts of *Ex parte Maurice* and the *Back* case – the *Maurice* case the deceased instructed a person to draw up his will, these instructions “still had to be knocked into shape” and approved by the testator. These instructions could therefore not have been intended by the deceased to be his will. In the *Back* case on the other hand the deceased had already approved the final draft. It is therefore easy to understand that the court held that the intended document to be his will.

**EX PARTE WILLIAMS: In re Williams Estate - application in terms of s2 (3) of the wills act for the acceptance of a document as a will: notes only**

**It is evident from the decision of the case, inter alia, not necessary for the deceased to have personally drafted the document and that section 2(3) further does not imply that at least certain of the formalities should have been observed or that there must have been a substantial compliance with the formalities.**

**MOSES v ABINADER – revival of a revoked will:**

The testator executed a will on 6/08/1948 in which he appointed his 2 step-brothers as his sole heirs. On 12/08/1948 he executed a second will which revoked the first. In terms of the second will Mrs Moses the appellant was appointed heiress to half his estate, while his step-brothers were to receive the remaining half. On the advice of a friend who did not know of the second will, the testator subsequently varied clause 4 of his 1<sup>st</sup> will in a codicil to the first will. A disagreement arose between Mrs Moses and one of the step-brothers the respondent, as to whether the provisions of the codicil of the 1<sup>st</sup> will preceded over those of the second will. The court *quo* held that the first will, as revised by the codicil was effective as the deceased's last testamentary disposition and that the second will, in so far as it conflicted with the first was invalid. However the appellate division held that effect should be given to the second will and the codicil.

**MARAIS v THE MASTER – revocation by destruction of a copy of a will:**

The testator was divorced from his wife in 1972 and his will executed in 1977 he bequeathed his entire estate to his divorced wife. The testator was only in possession of a copy of his will which was sent by him to his attorneys, bound within a cover and accompanied by a letter referring to the original will which was in custody of the attorneys. Copy was unsigned. It was otherwise a replica of the original. Before his death the testator attempted

to revoke his will by writing words on all the documents ( the cover , will and the letter) indicating that he wished to revoke his will. On cover he wrote that his mother should inherit his property. These directions did not amount to a will because the formalities for the execution of a will were not complied with. If the testator's will was considered to be revoked then his estate would devolve intestate and his 3 children would inherit estate. The master rejected original will and the former wife of the testator sought an order declaring the will valid. The court held that the will was validly revoked.

In terms of s2A of the wills act – a court is satisfied that a testator intended to revoke his/her will or part thereof by means of written indication on the will or performed any other act to the will which is apparent on the face of the will or if such intention appears from another document, the court must declare the will or the part concerned revoked.

**TREGA v GODART – testamentary capacity – mental ability of a testator:**

Whilst the testator was undergoing treatment in a hospital shortly before his death , he told one Reid to have a will drawn up for him , in which he left his house and half the residue of his estate to his sister Trega , who nursed him in hospital. The other half was to go to his nephews and nieces, whom he described as “named in a will executed by me during 1934 or 1953 and drawn by Livingston, Doull & Dumat of Durban Solicitors, which will is with Standard Bank”. Neither of the testator’s previous wills fitted this description. During his last days the testator continually asked for Reid. On the day he died he was very ill and conscious only for three brief intervals. According to Reid, he read the testator's will to him that morning and asked him if it was in order to which the testator replied “yes”

Approximately 2 hours before he died the testator made his mark on the will and Reid who was appointed executor of the estate and one Thompson signed as witnesses.2 of the testator's nephews who were beneficiaries in terms of a previous will contested the validity of this will on the ground that the testator did not have the necessary testamentary capacity when he made it.

The trial court held that the onus was on the defendants (Reid and Sister Trega) to prove that the will was valid and that they had not discharged the onus. An appeal against this decision was upheld.

**VAN ZYL v VAN ZYL – presumption against fideicommissary substitution:**

Under a mutual will the testator and his wife bequeathed a portion of a farm to each of their children and should a child predecease to his or her lawful descendants. All the bequests to the children were subject to (a) usufruct in favour of the surviving spouse and (b) a provision that in the event of a legatee dying without leaving children then the land left to such legatee should revert in equal shares to the other living legatees or their descendants by representation. One son FW Van Zyl died without leaving children. The surviving children to the testator applied for an order declaring that the portion of the farm bequeathed to FW Van Zyl did not form part of the joint estate of the said FW Van Zyl and his surviving spouse but that they as the surviving legatees were entitled to it. FW Van Zyl's widow was the first respondent in her capacity of executor in his estate and second respondent in her personal capacity. The question for decision was whether clause (b) quoted above constituted a direct or fideicommissary substitution. The applicants contended that the provision constituted a fideicommissum in their favour. They were unsuccessful in the court a quo. This decision was reversed by the appellate division.

**Notes only:**

**ARKELL v CARTER – power of appointment – effect of invalidity:**

In our law the use of “general power of appointment” merely denotes that the grantee has a free choice when selecting beneficiaries, as opposed to a special power of appointment where the beneficiaries have to be selected from a designated class or group of persons. In addition it is clear that the effect of an invalid power of appointment will depend on the testator’s intention. If the testator intended to benefit the grantee, the grantee receives the property free from any burden. If on the other hand the grantee was granted only an administrative interest in the property, the property would revert to the residue of the testator’s estate.

**BOTHA v BOTHA – the effect of a suspensive condition and a time clause on vesting:**

In clause 5 of their joint will the testator's bequeathed the residue of their immovable property to their sons and children, subject to certain conditions. Clause 5(d) stipulated that if the son should die without any legitimate



descendants, a church would become entitled to the proceeds of the immovable property. The son had 2 children, but had been predeceased by one of them at the time of his death. The surviving grandson applied for a declaratory order to the effect that he was sole heir to the residue of the immovable property. The widow of the predeceased grandson (respondent) opposed the application. The court granted the application.

It should be noted that a condition and a time clause do not have the same effect on the vesting of rights in a bequeathed benefit. In the case of a condition we are dealing with an uncertain future event. In the case of time clause, on the other hand we are dealing with a point in time which is certain.

If the testator intended his grandchildren to obtain vested rights immediately upon his death then the testator would not have nominated the church to become a beneficiary.

### **EX PARTE STEENKAMP AND STEENKAMP – capacity of a murderer to inherit from the heir of the murdered person.**

The testator bequeathed a farm and certain movables to their grandchildren. These children's father (Steenkamp) then murdered both testators. He was then convicted and sentenced to life imprisonment. One of the grandchildren died and Steenkamp and his wife applied, inter alia, for an order declaring that they were the sole heirs of the deceased child. The master raised the question whether Steenkamp could inherit anything out of the estate of his child which had come from the grandparent's estate as he had murdered them. The court held that he was not unworthy to inherit from the child.

It is not general unworthiness to inherit which attaches to a murdered. As is evident from this case a person may, for example be unworthy to inherit from one person but may still be able to inherit from another, for example the heir of the murdered person. In Steenkamp case the court found that there was no causal relationship between the murder and the enrichment but that the cause of Steenkamp's enrichment was the birth and death of the child and not the murder.

### **SPIES v SMITH – testamentary capacity – undue influencing of a testator.**

The testator was mentally handicapped and also suffered from epilepsy. At the age of 21 he made a will in which he appointed the 2 daughter of his stepmother (the appellant) as his heirs. After his father's death he went to live with his uncle, who was the curator bonis as the rest of the family wanted to have him committed to an institution. Thereafter he made a second will revoking the first and appointing his uncle's children (the first respondent) as beneficiaries. After his death approximately ten years later, his step mother contested the validity of the second will on behalf of her minor daughter. She contended that the testator had not been "mentally capable" when he made the second will. In the alternative she contested that the uncle had unduly influenced him. The court held that the second will was valid and an appeal against this decision was dismissed.

In our law there is rebuttable presumption that a testamentary writing was executed by a competent testator and that it reflects the testator's intention. Consequently a person, who alleges that a will was executed as a result of undue influence, will have to prove that is the case.

### **ARONSON v ESTATE HART: condition in a will compelling a beneficiary to marry a Jew.**

The testator's will contained a condition providing for a forfeiture by a beneficiary of all benefits bequeathed to such beneficiary under the will if he or she "should marry a person not born in the Jewish faith or forsake the Jewish faith". One of the beneficiaries under the will applied for an order declaring the condition to be void. The application was dismissed by the court a quo and an appeal against this decision was unsuccessful.

There can therefore be no doubt that a clause in a will providing that a beneficiary will forfeit a benefit should he or she not marry a person of a certain race, faith in principle is valid.

### **BARCLAYS BANK DC & O v ANDERSON – condition in a will with regard to the disruption of an existing marriage:**

A testator left certain portions of a farm to his children. In clause 12(b) of the will it was provided that every beneficiary "shall .... Personally, permanently and beneficially occupy" the land bequeathed to him/her. In clause 12(c) it was provided that should a beneficiary fail to occupy his/her land, he/she would lose all right and claim to his/her portion of the farm.

**Missing: *Rhode v Stubbs* 2005 (5) SA 104 (SCA)**

**Facts**

Attie and Lettie Williams, who were married in community of property, executed a joint will. In the Will they provided that the plot ("erf") in Pniel on which they resided and in respect of which they had rights of occupation, had after the death of the first-dying to be divided into two more or less equal parts. There were two houses on the plot, an old one and a new one. The rights to the one part of the plot (with the old residence thereon) were bequeathed to their son, Archie Williams, and the rights to the other part (with the new residence thereon) were bequeathed to Ethel Mentoor (Attie's daughter from a previous marriage). These bequests were made subject to a usufruct in favour of the "survivor of us". The will further provided in clause 8: We nominate and appoint the children born out of our marriage as heirs of the residue of our joint estate, loose assets as well as fixed property . . . and desire that they shall inherit the residue in equal shares. When Attie died, his share of the immovable property devolved upon the two legatees (Archie and Ethel), while Lettie enjoyed the usufruct over the whole property. Prior to Lettie's death, the situation was that Ethel was entitled to an undivided half share of the part of the plot with the new residence on it and Archie was entitled to an undivided half share of the part of the plot with the old residence on it, while Lettie was entitled to undivided half shares in both parts of the plot of land. She was also entitled to the usufruct over the whole property. At some point the plot was subdivided into two plots and the part of the original plot with the new house on it became plot 171. Prior to her death Lettie executed a will in which she bequeathed her half share of plot 171 to Charles Stubbs, a son from a previous marriage. She bequeathed her half share in the other plot (with the old house on it) to Archie. After Lettie's death a dispute about the properties arose. It was agreed that Archie was entitled to all the rights in the plot with the old house on it. However, the rights of occupation of the whole of erf 171 (the plot with the new residence on it) were registered by the Pniel Transitional Council in the name of Ethel, despite a liquidation and distribution account accepted by the Master in which half of plot 171 was awarded to Charles. It was common cause that the rights of the persons involved, and at the same time the correctness of the transitional council's decision, depended entirely on whether the mutual will of Attie and Lettie massed their estates.

[If massing had taken place, Lettie's freedom of testation would have been restricted and she could not have disposed of her half share of the property in a manner different to the way it was disposed of in the mutual wills - see study guide par 14.2.2. Ethel would then be entitled to inherit the rights of occupation of erf 171.]

The court referred to *The Receiver of Revenue, Pretoria v C H Hancke and Others* 1915 AD 64, where the following was held: The two elements then which must concur in order to deprive the survivor of the right to revoke the mutual will are a disposition of the survivor's property or a specific portion of it after the survivor's death, and an acceptance by the survivor of some

benefit under the will. Upon electing to take the benefit, he automatically assents to the bequest. On the other hand if he elects to reject the benefit, he reverts to his legal position before the testator's death, the mutual arrangement falls away, and the will of the first dying operates only upon his share of the property. The court points out that since then it has been accepted that a disposition of the survivor's

property **after the death of the first dying** (that is, not only after the death of the survivor) will also result in massing and put the survivor to his election, that is, require the survivor to decide whether to reject the benefit **or** accept the benefit subject to a burden. If the disposition is accepted subject to a burden, the survivor is bound to give effect to the *modus* or burden.

The question was whether the acceptance by the widow Williams of the benefits under the mutual will (the usufruct over the whole property) resulted in massing. The court held that that was **not** the case. **The acceptance of the benefits from a mutual will could not in itself bring about massing.** If in the first place there was no massing, any act by the survivor which would otherwise point to adiation was meaningless (par [15]). Although adiation is necessary for the effectiveness of a massing, it is not necessary for the creation thereof. On the other hand, **massing on its own also has no consequences.** It merely gives the survivor the choice to accept benefits in terms of the will and then also to be bound by any burdens.

The court pointed out [par 16] that when two (or more) testators jointly make a will, grammatical uncertainty may arise. The use of the first person plural does not clearly convey to the reader of the will whether each testator is only making provision with regard to himself, or also with regard to the other testator(s). In our law, the solution to this interpretation problem is to be found in the common law rules of interpretation, which state that when interpreting a joint or mutual will of parties married in community of property, one has to start off on the premise that one is dealing with two separate wills by the parties, until the contrary becomes clear. The reason for this is to be found in common law.

The court referred [par 17] to *Joubert v Ruddock and Others* 1968 (1) SA 95 (EC) on 98F - G where Eksteen J quoted a passage from Van Leeuwen *Censura Forensis* 3.11.6 in which he underlined the importance of the principle that one should be able to change one's will until the day one dies. This statement was supported by the following sentence: ". . . there is nothing to which men are more entitled than that their power of making a last will should be free, and hence the rule; that no one can deprive himself of this power".

According to the court [par 18], this statement was not completely correct. A testator can, by means of massing, deprive himself of his power to make a will, but if there is any uncertainty about his intention, the will should be interpreted in a manner that will allow the greatest possible measure of freedom of testation. This also gives rise to another rule of interpretation of wills, namely that there is a presumption against massing. This presumption operates when the golden rule for the interpretation of wills, namely to give meaning to the testator's words within the framework of the will, cannot operate because of uncertainty or equivocation.

The court pointed out [par 22] that clause 8 dealt with a disposition of "our joint estate" after the death of the survivor. If it was clear from the wording of this section that the first-dying testator intended to dispose not only of his own property but also of that of the survivor, it would have been an indication that massing was intended. However, according to the Court, the provision in clause 8 was nowhere near clear enough to rebut the presumption against massing of estates: the expression "our joint estate" did not unquestionably point to the testators desiring the massing of their estates since the provision was capable of two interpretations (par [22]).

The Court held that upon analysis of the other provisions of the will, the wording of the joint will of Attie and Lettie did not offer proof in rebuttal of the presumption that it had to be interpreted as two wills. Clause 8 did not provide clear proof of an intention to mass their respective estates. Since massing was not intended, Lettie was therefore entitled to make a new will and to dispose of her

half share of the two properties as she pleased. She was entitled to leave her half share of plot 171 to Charles. Her acceptance of the usufruct could not result in massing.

**The importance of *Rhode v Stubbs* 2005 (5) SA 104 (SCA) for the law of succession:**

□□ According to our common law rules of interpretation, when interpreting a joint or mutual will of parties married in community of property, one has to start off on the premise that one is dealing with two separate wills of the parties, until the contrary becomes clear.

□□ This rule results from the common law rule that no one can deprive himself of the power to freely make a last will.

□□ A testator can, by means of massing, deprive himself of his power to make a will, but if there is any uncertainty about his intention, the will should be interpreted in a manner that will allow the greatest possible measure of freedom of testation.

□□ This gives rise to the subsidiary rule of interpretation, namely the presumption against massing, which applies when the golden rule of interpretation, namely to give meaning to the testator's words within the framework of the will, cannot be applied because the words are unclear or subject to more than one interpretation.

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□□ For massing to take place, it is necessary for one testator to dispose of both his own estate (or a part thereof) and the estate (or a part thereof) of the other testator.

□□ For massing to take effect, the surviving beneficiary must adiate a benefit under the mutual will.

□□ However, if massing was not intended, acceptance of the benefits from a mutual will cannot in itself bring about massing.

## SUMMARY OF PAST YEAR EXAM PAPERS AND ASSIGNMENTS

### Define the law of succession. (2)

The law of succession is a branch of private law. (1) The law of succession comprises those legal rules or norms which regulate the devolution of a deceased person's property upon one or more persons. (1) Thus the law of succession concerns itself with what happens to a deceased person's estate after his/her death. (1)

### (b) Distinguish between an "estate" and the "residue of an estate". (4)

The testator's estate consists of the assets (½) and liabilities. (½)

The residue of the estate refers to that part (½) of the deceased's estate which remains after the payment of funeral expenses, (½) administration costs, (½) tax (½) (if any), the testator's debts (½) and the legacies. (½). (4)

### (c) X dies intestate and leaves the following relatives: His wife W to whom he was married in community of property, his son S, his mother M and his full brother B. The total value of the estate is R400 000. Explain the devolution of X's estate, giving reasons for your calculations. (6)

The joint estate of X and W has to be divided into two halves at X's death in terms of matrimonial property law, since the marriage was in community of property ( $R400\ 000 \div 2 = R200\ 000$ ).

(1)

The spouse inherits a child's share or R125 000, whichever is the greater (s 1(1)(c)) (1). A child's share is the value of the estate divided by the number of children who either survived the deceased or who predeceased him but are survived by descendants, plus one (1)

Therefore, in this case a child's share is  $R200\ 000 \div 2$  (S + one) = R100 000. (1)

W inherits R125 000 since it is more than R100 000.(1)

S inherits the residue (R 200 000 – R 125 000) = R75 000. (1)

M & B inherit nothing because M is an ascendant and B is a relative in the collateral line and they are excluded by the child and the spouse. (1) (max 6)

**(d) X dies intestate and leaves the following relatives: His wife W and his two sons S and D. X's estate amounts to R450 000. X and W were married out of community of property with the accrual system. X's estate is entitled to R150 000 accrual from W. Explain the devolution of X's estate giving reasons for your calculations. (4)**

X's estate is **entitled to accrual:**  $R450\ 000 + R150\ 000 = R600\ 000$ . [NB: Since X was entitled to accrual, the amount is added to his estate. If his wife was entitled to accrual, the amount had to be deducted from the estate. X's estate amounts to R 600 000. (1) The surviving spouse is entitled to a child's share or R125 000, whichever is the most (s1(1)(c)). (1)

A child's share is the value of the estate divided by the number of children who either survived the deceased or who predeceased him but are survived by descendants, plus one (1)

A child's share equals  $R600\ 000 \div 3$  (S and D plus one) = R200 000 (1)

In this case the spouse inherits a child's share because it is more than R125 000. W inherits R200 000. (1)

The children (S & D) share the rest ( $R\ 600\ 000 - R\ 200\ 000 = R400\ 000$ ) equally and inherit R 200 000 each. (1) (4)

**(l) Section 2(3) of the Wills Act 7 of 1953 may only be applied if the deceased has personally drafted or executed the particular document. (1)**

*Bekker v Naude* 2003 (5) SA 173 (SCA) (1)

**(ii) A will may be rectified by the insertion of words. (1)**

*Botha v The Master* 1976 (3) SA 597 (OK) (1)

**(iii) A condition in a will, which has the effect of breaking up an existing marriage, is valid where such effect is purely incidental and did not form part of the testator's intention. (1)**

*Barclays Bank DC & O v Anderson* 1959 2 SA 478 (T) (1)

**(iv) A person who negligently caused the death of the testator may not inherit from the testator. (1)**

*Casey v The Master* 1992 (4) SA 505 (N) (1)

## Question 2

Read the following set of facts and then answer the questions that follow:

**Mary and John are siblings. In his will John appointed his sister Mary to inherit his whole estate. In her will Mary appointed her husband Peter to be her heir. Mary and John are killed in the same car accident, and no evidence exists as to who died first. John leaves behind both his parents. Mary leaves behind her parents and her husband Peter. (a) Who will inherit John and Mary's respective estates? Briefly explain your answer. (7)**

When two people die in the same disaster and it is not possible to establish who died first, the court will find that they died simultaneously.(1) *Ex parte Graham* (1) held that in our law no presumption as to the order of death exists.(1) That means that two persons who die in the same accident, cannot inherit from each other, because one has to survive a person to be able to inherit from him/her.(1) John's will cannot be given effect to because Mary cannot inherit from him.(1) John's estate will therefore devolve in terms of the law of intestate succession (1) and his mother and father will inherit his estate. (1) Mary is survived by her husband and he will inherit her estate in terms of her will. (1)

**(b) Would it have made a difference to your answer if John died at the scene of the accident and Mary died two hours later in hospital? Briefly explain your answer.**

Yes. If Mary survived John, she would have inherited John's estate as indicated in his will (1), and her husband would then have inherited both her and John's estates as John's estate would have formed part of her estate. (1). John's parents would then not have inherited. (1) (3)

### Question 3

**(a) Explain what a "testamentary writing" is as defined by the court in *Ex parte Davies* 1957 (3) SA 471 (N). (3)**

A testamentary writing is a document which defines any one of the three essential elements of a bequest, namely:

- 1 the property bequeathed (1)
- 2 the extent of the interest bequeathed (whether it is full ownership or a usufruct, or *fideicommissum*, etc) (1)
- 3 the beneficiary (1)

**(b) In their mutual will B and S consolidated their estates with the intention of massing their estates. On B's death S refused to accept any benefit under the mutual will.**

**Answer the following questions:**

**(i) What is a mutual will? (2)**

A mutual will is a joint will in which two or more testators (1) mutually benefit each other. (1) (2)

**(ii) What is the effect of S's refusal to benefit? (2)**

S may not receive any benefit from B's estate (1). S keeps her own estate and may dispose of it as she sees fit. (1) (2)

**(c) Name five ways in which a legacy can fail. (5)**

- 1) ademption (if a testator voluntarily alienates the object of a legacy in his lifetime)
- 2) if the legatee dies before the legacy vests in him
- 3) if the legatee repudiates the legacy
- 4) if the legatee is incapable of inheriting under the will
- 5) if the bequeathed thing is destroyed
- 6) if the testator's estate becomes insolvent (5)

**(d) What is the "golden rule" when interpreting a will? (1)**

The testator's intention must be established from the words he/she used in the will. (1)

**(e) Do the common law presumptions regarding the revocation of wills still have any application in our law? Discuss. (2)**

Yes. The Master may not consider them, (1) but they are considered by the court.(1)

Only a court may hear evidence and because the hearing of evidence is necessary when presumptions are considered, only the court may consider presumptions.(1) (max 2)

### Question 4

**Discuss the formalities prescribed by section 2(1)(a) of the Wills Act 7 of 1953 which have to be complied with in order for a will to be valid if a testator signs a will, consisting of two pages, with his or her mark. (20)**

If the will consists of **two pages** and the testator signs with a **mark**, the following formalities are prescribed by section 2(1)(a) of the Wills Act 7 of 1953:

The testator must make his or her mark on the last page of the will **at the end of the will**, (1) and on the first page, **anywhere** on that page. (1) The end of the will is at the end of the body of the will, in other words, directly below the last words of the will. (1) (*Philip v The Master / Tshabalala v Tshabalala / Kidwell v The Master*)(1).

The testator must make his or her mark or acknowledge it (1) in the presence of two or more (1) competent witnesses (1) who are present at the same time (1) (see *Bosch v Nel*) (1) and in the presence of a commissioner of oaths (1) (see section 2(1)(a)(v)) (1). In order to qualify as a competent witness, the witness must be at least 14 years old and competent to give evidence in a court of law. (1) The **same two** witnesses must sign or attest the will (1) in the presence of one another (1) (see *Oosthuizen v Die Weesheer*) (1) and in the presence of the testator and the commissioner of oaths. (1) Since two witnesses must sign in the presence of the commissioner of oaths, this implies that the commissioner of oaths cannot be counted as one of the two witnesses. (1) The witnesses may not sign by making a mark, but they may sign by writing their initials (1). The witnesses normally sign at the bottom of the last page of the will, but in *Liebenberg v The Master* (1), the court held that the will was valid although the witnesses had signed at the top of the last page.(1) The witnesses need not sign the previous page of the will.(1) The witnesses need not know the contents of the will.(1) It is not even necessary for them to know that they are witnessing a will. The only requirement is that they should know that they are witnessing the testator's signature. (1) Where the testator signs with a mark, the requirements of section 2(1)(a)(v) must be complied with. (1) This means that a commissioner of oaths must be present during the execution of the will and that he or she must append a certificate to the will.(1) In the certificate it must be certified that the commissioner has satisfied himself or herself as to the identity of the testator (1) and that the will so signed is the will of the testator. (1) The commissioner of oaths need not follow the exact wording of the will in this regard, but may use his or her own words, provided that the certificate reflects the above two aspects. (1) (See *In re Jennett; Radley v Stopforth*). (1) In *Radley v Stopforth* it was held that the certifying officer must indicate his office as that of commissioner of oaths and not only for example, as "attorney", on the will. (1) The commissioner of oaths may append the certificate **anywhere** to the will, (1) in other words on any page and on any place (for example, at the top or bottom of a page; he or she may even add a page or the specimen form contained in the Act.) (1) In that case, however, the commissioner of oaths must also **sign each page** of the will where the certificate does not appear (1) anywhere on such page(s).(1) The commissioner of oaths may not sign by making a mark. (1) The commissioner of oaths must append the certificate **as soon as possible** after the testator and the witnesses signed the will in the commissioner's presence.(1) Should the testator die after the will was signed, but before the commissioner of oaths had appended the certificate, the commissioner must, as soon as possible thereafter, make or complete the certificate. (1) The Legislature obviously intended the certificate to be made *uno contextu*, that is, in one continuous operation.(1) No attestation clause is required by section 2(1)(a) of the Act. (1)

### Question 5

**In this question you receive a number of definitions of principles or concepts from the law of succession. Write down the name of each particular concept below its definition.**

**(a) Refusing to inherit. (1)**

Repudiation (1)

**(b) The legal institution where property is left to a beneficiary subject to the condition that as much of it as may be left at the time of his or her death is to devolve upon another person. (1)**

*Fideicommissum residui*

**(c) The type of trust where the beneficiary is the owner of the trust property. (1)**

*Bewind* (1)

**(d) The time when a beneficiary's right to claim delivery of bequeathed property becomes enforceable. (1)**

*Dies venit* (1)

**(e) If an inheritance is made subject to this concept, vesting of the bequeathed property in the heir only takes place upon the happening of an uncertain future event. (1)**

Suspensive condition (1)

**(f) If a bequest is made subject to this concept, the beneficiary loses his vested rights when a certain future event takes place. (1)**

Resolutive time clause (1)

**(g) This takes place when any benefit received by a descendant from the testator during the latter's lifetime, is taken into account upon division of the estate in order for a fair distribution to take place. (1)**

Collation (1)

**(h) In this account the executor lists all assets and liabilities of the estate and sets out how the estate is to be distributed. (1)**

Liquidation ( $\frac{1}{2}$ ) & distribution account ( $\frac{1}{2}$ ) (1)

**(l) this evidence is evidence of facts and circumstances which were known to the testator and places the court in the testator's position at the time of making the will, when the court interprets the will. (1)**

Armchair evidence (1)

**(j) This concept applies when a testator leaves a specific benefit, for example a house or a farm, to a beneficiary. (1)**

Legacy (1)

**T's valid will contain the following bequest:**

**"I leave my farm to my son S. should he ever leave the farm permanently; the farm has to go to my brother, B." T dies in June 1993, leaving his wife W, his son S, S's son D and T's brother B. Explain whether the following legal concepts are applicable giving reasons for your answers. Apply those that are applicable to the above facts and indicate when *dies cedit* and *dies venit* take place for each of the parties.**

**(a) Resolutive condition (3)**

This is a case of a resolutive condition for the son, S.(1) His rights will terminate (1) if an uncertain future event (leaving the farm) takes place.(1) *Dies cedit* and *dies venit* take place for S on T's death.(1)

**(b) Modus (3)**

A modus is an obligation or qualification added to a bequest. (1) It has no effect on vesting of rights (1). It is not applicable here (1).

**(c) Direct substitution (3)**

Direct substitution occurs where the testator names a series of (two or more) Beneficiaries to inherit in the alternative (1). When the first one inherits the substitute has no hope of ever inheriting. (1) It is not applicable here as the beneficiaries inherit one after the other. (1)

**(d) Fideicommissary substitution (6)**

Fideicommissary substitution takes place where a testator nominates beneficiaries to Inherit one after the other (1). The first beneficiary is called the fiduciary and the next Beneficiary is called the fideicommissary (1).The fiduciary has to pass the benefit to the fideicommissary on the happening of an uncertain future event (in case of a condition, as in this case) (1). It is applicable in this case (1) as the farm will pass from S to B, according to the express fideicommissum.(1) A fideicommissum *tacitum* in favour of D may also be read into the provision (*Galliers and du Plessis* cases) (1). *Dies cedit* and *dies venit* take place for S on T's death.(1) *Dies cedit* and *dies venit* are postponed for B until S leaves the farm.(1)

## Question 7

**(a) Write a note on the establishment of a trust. (5)**

For a trust to be valid, the following requirements must be met:

(1) The founder must intend to create a trust. (1)

(2) The creation of the trust must be by means of a written agreement (eg an antenuptial contract), a testamentary writing or a court order (1).



- (3) The trust property must be reasonably clearly defined. (1)  
 (4) The trust must be established for a specific purpose or and objective (1) that is the Trust property must be intended to be applied for the benefit of a specific or Determinable person(s), or with an eye to a determined or determinable aim. (1) The Trustee may be authorized to appoint beneficiaries from a specified class of persons Designated by the testator. (*Braun v Blann and Botha*)(1). the object or purpose of The trust may not conflict with a particular legal rule, *boni mores* or public policy. (1)

**(b) Section 13 of the Trust Property Control Act provide for the variation of trust Provisions by the court. Discuss briefly. (5)**

If a trust instrument contains any provision which brings about consequences (1) which in the court's opinion the founder did not foresee or contemplate (1) **and** which  
 (1) Hampers the achievement of the objects of the founder (1) or  
 (2) Prejudices the interests of beneficiaries, (1) or  
 (3) Is in conflict with public interest (1)  
 the court may delete or vary such provision or make in respect of it any order which the court deems just, (1) including an order whereby particular trust property is substituted for other particular property, or an order terminating the trust. (1) (max 5)

**QUESTION 1**

(a) Xavier and Wanda were married in community of property and had three children, Anna, Graca and Ben Anna died in 1999, leaving her two children, Deon and Carl. Ben was married and had a daughter, Linda. Xavier died intestate in February of 2001 and left Wanda, Grace, Ben and his three grandchildren, Deon, Carl and Linda behind. He also left His father, Fred. Xavier and Wanda's joint estate was worth R800000. Calculate how Xavier's estate devolved and indicate how much each person received. Give reasons for your calculations.

1. **X and W were married in community of property; therefore the joint estate has to be divided equally in terms of matrimonial property law. (R800 000 ÷ 2 = R400 000)**
2. **W gets R400 000. INB - note that she does not inherit this money, she receives it in terms of matrimonial property law.]**
3. **In terms of section 1(1) (c) of Intestate Succession Act, W inherits a child's share or R125 000, whichever is the greater. [The R125 000 is an amount determined from time to time by the Minister, and is the minimum that the surviving spouse may receive. Because it is determined by the Minister, it may be increased in future.]**
4. **The definition of a child's share: "a child's share is calculated by dividing the value of the intestate estate by the number of children of the deceased who have either survived the deceased**
5. **Or have predeceased him/her but are survived by their descendants**
6. **Plus one." (For the surviving spouse.) [Note that this definition does not only refer to children of the deceased spouse, but also to children who have predeceased him/her but who leave behind descendants. Also do not forget to add one to the number of children for the surviving spouse.]**
7. **A child's share is R400 000 ÷ 4. We divide the estate by 4 because we count A (who can be represented by her children), G and B plus the spouse W. In other words, a child's share = R100 000.**
8. **A child's share (R100 000) is less than R125 000, therefore W inherits R125 000.**
9. **The children (A, G and B) inherit the residue of estate equally. R400 000 - R125 000 = R275 000. R275 000 ÷ 3 = R91 666 each.**
10. **a is predeceased and is represented by D and C - each get half of her share, that is 1/2 of R91 666 = R45 833.**
11. **L does not inherit because she cannot represent her father who is still alive.**
12. **F, X's father, does not inherit because parents only inherit if there are no spouse or descendants to inherit.**

**QUESTION FOR ASSIGNMENT 01**

Xander and Wanda were married in community of property in 1960. Two sons were born during the marriage, namely Ben and Carl. They also adopted a daughter, Dina. Wanda also had a son, Peter, from a previous marriage. Dina died in 2000, and left two children, Ethel and Frans. Xander died in 2008 without leaving behind a valid will. Xander was also survived by his sister and brother, Mathew and Nelly. Xander and Wanda's joint estate amounted to R 1 600 000. Calculate how Xander's estate will devolve giving reasons for your answers. Also indicate which relatives will not inherit, giving reasons.

1. Xander (X) died without a valid will. His estate will therefore be divided in terms of intestate Succession rules.
2. X and Wanda (W) were married in community of property. At X's death the joint estate (R1 600 000) is therefore divided between equally between X and W in terms of matrimonial property law, Each receiving R 800 000.
3. The total amount of X's estate available for division between his intestate heirs is therefore R 800 000.
4. Since X had a spouse and children, section 1(1) (c) of the Intestate Succession Act applies (rule 3) In terms of which the spouse inherits **either** a child's share **or** a statutory minimum amount of R125 000, whichever of the two is the greater.
5. A child's share is calculated by dividing the value of the intestate estate by the number of children of the deceased, who have either survived him,
6. Or have predeceased him but are survived by their descendants,
7. Plus one for the spouse (or, plus the number of spouses if there are more than one spouse).
8. Adopted children may inherit from their adoptive parents and their family, since they are Considered to be the children of their adoptive parents (s 1(4) (e)).
9. Step children of a deceased cannot inherit from the deceased in terms of intestate succession, Since they are not blood relations. Therefore Peter (P) will not inherit from X.
10. To calculate the child's share we therefore count Ben (B), Carl (C) and adopted daughter Dina (D) (Since she left children to represent her) plus one (= 4), and divide R800 000 by 4.
11. This means a child's share amounts to R200 000.
12. Since a child's share (R 200 000) is more than R125 000, W inherits a child's share.
13. Of X's estate there remains R600 000 (R 800 000 – R 200 000) to be divided equally amongst his children. X's children, B, C and D (represented by her children), inherit the residue in equal Shares, each inheriting R 200 000 (R600 000  $\div$  3 = R200 000).
14. B and C each inherits R200 000 and Ethel (E) and Frans (F) inherit D's share equally, each Inheriting R100 000.
15. Mathew (M) and Nelly (N), the siblings of X, inherit nothing, because the surviving spouse and Children inherit to the exclusion of persons in the next parental. (Or, put in another way, if there Are a surviving spouse and children, they inherit the whole estate to the exclusion of other Relatives.)

**Answer question 1 – question 5 about the following set of facts:**

T and W were married out of community of property without accrual. T died in 2008. T had made a valid will in 2006 in which he provided as follows:

- (1) I leave my beach house to my sister, S. If she emigrates before my death, the house must go to my brother, B.
- (2) I leave my BMW motorbike to my friend, F. F must pay R 20 000 to my brother B within 6 months of my death.
- (3) I leave my house in Pretoria to my daughter, D. If D dies without children, the house must go to my brother B after her death.
- (4) The residue of my estate I leave to my children D, C and K in equal shares.
- (5) To my wife, W, who never loved me, I leave nothing.

The bequest of the beach house to S is...

[1] An inheritance.

[2] A modus.

[3] subject to a *fideicommissum*.

**[4] subject to a direct substitution in favour of B.**

#### Question 2

The bequest of the motorbike to F is...

**[1] Subject to a modus**

[2] subject to a condition.

[3] subject to a time clause.

[4] subject to a direct substitution in favour of B.

#### Question 3

The bequest of the house to D...

[1] Is subject to a usufruct in favour of B.

**[2] Creates a *fideicommissum tacitum* in favour of her children.**

[3] Is subject to a direct substitution in favour of B.

[4] Is subject to a suspensive condition.

#### Question 4

The bequest of the residue of the estate to the children is known as...

[1] A legacy.

[2] Accrual.

**[3] An inheritance.**

[4] A Prelegacy.

#### Question 5

Disinheriting the wife in the last clause...

[1] Is *contra bonos mores*.

[2] Makes the will invalid.

**[3] Is allowed in SA law.**

[4] Cannot be given effect to.

#### Question 6

In 2008 T learns that his wife is cheating on him with his best friend. He takes his will made in 2006 in which the wife was nominated as his only heir and writes the word "cancelled" across every page. He then writes a letter addressed to his wife accusing her of infidelity and stating that he leaves his entire estate to his parents. As a heading to this letter, he writes the words: My last Will and Testament. He signs the letter with his signature. Thereafter he commits suicide. In this set of facts...

[1] T's wife should rather throw the letter away.

[2] The will of 2006 was not validly revoked.

[3] The Master may of his own volition accept the 2008 document as a valid will.

**[4] The High Court may order the Master to accept the 2008 document as a valid will.**

#### Question 7

According to the rule "de bloedige hand erft niet", the person who caused a deceased's death will...

[1] Be generally unworthy to inherit.

**[2] Be unworthy to inherit from the deceased, whose death he intentionally or negligently Caused, as well as from the deceased's parent, child or spouse, if he/she is morally Blameworthy for his/her actions.**

[3] Only be unworthy to inherit from the deceased whose death he intentionally caused and from the deceased's parent, child or spouse.

[4] Under no circumstances be able to inherit from the deceased.

**Question 8**

What is the process called if a court adds, deletes or amends something in a will because the testator had made a mistake when drafting the will and the will therefore does not reflect his true intention?

- [1] **Rectification**
- [2] Amendment
- [3] Ratification
- [4] Execution

**Question 9**

What is the principle called according to which the executor of an estate, in certain circumstances, has to take certain benefits given to beneficiaries by the testator during his lifetime into account when deciding upon the distribution of the estate between the beneficiaries?

- [1] Prelegacy
- [2] **Collation**
- [3] Ademption
- [4] Bequest Price

Testator, T, provided in his will that he leaves his estate to “my sister’s children”. At T’s death his sister had a daughter, D, and an adopted son, S, and she was expecting a child C. His sister also had a stepchild; B. B was her husband’s son from a previous relationship. After T’s death, C was born alive and T’s sister had another two children, E and F. Who can inherit T’s estate?

- [1] D, C, E and F
- [2] D, S, C, E and F
- [3] D, S, B
- [4] **D, S, C**

**Question 11**

According to *Rhode v Stubbs* 2005 (5) SA 104 (SCA) massing takes place when...

- [1] The surviving testator accepts a benefit in terms of a mutual will, irrespective of the intention of the parties to the mutual will.
- [2] A testator in a mutual will disposes of his/her own estate as well as of the estate of the other Testator.
- [3] Testators married in community of property mutually benefit each other in a mutual will.
- [4] **testators join their estates or portions of their estates, with the purpose of disposing of the joint unit in a will and the surviving testator then accepts a benefit in terms of the will.**

**Question 12**

T leaves his farm to his son, S, subject to a usufruct in favour of his widow, W. When will *dies cedit* and *dies venit* occur for S and W respectively?

- [1] For S *dies cedit* and *dies venit* will occur at W’s death; for W *dies cedit* and *dies venit* will occur at T’s death.
- [2] **For S *dies cedit* will occur at T’s death and *dies venit* will occur at W’s death; for W *dies Cedit* and *dies venit* will occur at T’s death.**
- [3] For S *dies cedit* and *dies venit* will occur at T’s death; for W *dies cedit* and *dies venit* will occur at T’s death.
- [4] For S *dies cedit* will occur at W’s death and *dies venit* will occur at T’s death; for W *dies cedit* will occur at T’s death and *dies venit* will occur at W’s death.

**Question 13**

Which one of the following statements is the correct version of the court’s decision in *Ex parte Graham* 1963 (4) SA 145 (D)?

[1] **When persons die in the same disaster, there is no presumption about the order of their Deaths in our law.**

[2] When persons die in the same disaster, there is a presumption in our law that the eldest person Died first.

[3] When persons die in the same disaster, there is a presumption in our law that they died Simultaneously.

[4] When persons die in the same disaster, the presumptions about the order of death are only Relevant in our law if the persons are related to each other.

#### Question 14

X dies intestate and leaves behind his son B and daughter C. B has a son E. C has a son F. C murdered X. Who will be X's heir(s)?

[1] B.

[2] B and E.

[3] **B and F.**

[4] B, E and F.

#### Question 15

Which case serves as authority for the statement that section 2(3) of the Wills Act 7 of 1953 will only be applied if the intended testator personally drafted or executed the document?

[1] *Back v Master of the Supreme Court* [1996] 2 All SA161 (C)

[2] ***Bekker v Naude* 2003 (5) SA 173 (SCA)**

[3] *Bosch v Nel* 1992 (3) SA 600 (T)

[4] *Braun v Blann and Botha* 1984 (2) SA 850 (A).

#### Question 1

##### (a) Define the law of succession. (2)

The law of succession is a branch of private law. (1) The law of succession comprises those legal Rules or norms which regulate the devolution of a deceased person's property upon one or more Persons. (1) Thus the law of succession concerns itself with what happens to a deceased Person's estate after his/her death. (1) (Max 2)

##### (b) Distinguish between an "estate" and the "residue of an estate". (4)

The testator's estate consists of the assets ( $\frac{1}{2}$ ) and liabilities. ( $\frac{1}{2}$ )

The residue of the estate refers to that part ( $\frac{1}{2}$ ) of the deceased's estate which remains after the Payment of funeral expenses, ( $\frac{1}{2}$ ) administration costs, ( $\frac{1}{2}$ ) tax ( $\frac{1}{2}$ ) (if any), the testator's debts ( $\frac{1}{2}$ ) and the legacies. ( $\frac{1}{2}$ ).

##### (c) X dies intestate and leaves the following relatives: His wife W to whom he was married in community of property, his son S, his mother M and his full brother B. The total value of the estate is R400 000. Explain the devolution of X's estate, giving reasons for your calculations. (6)

(1) The joint estate of X and W has to be divided into two halves at X's death in terms of Matrimonial property law, since the marriage was in community of property ( $R400\ 000 \div 2 = R200\ 000$ ). X's estate amounts to R200 000. (1)

(2) The spouse inherits either a child's share or statutory determined minimum amount of R125 000, whichever is the greater. (1).

(3) A child's share is determined by dividing the value of the estate by the number of Children who either survived the deceased or who predeceased him but are survived by Descendants, plus the number of spouses. (1)

(4) Therefore, in this case a child's share is  $R200\ 000 \div 2$  (S + one) = R100 000. (1)

(5) W inherits R125 000 since it is more than R100 000. (1)

(6) S inherits the residue ( $R\ 200\ 000 - R\ 125\ 000$ ) = R75 000. (1)

(7) M and B inherit nothing because M is an ascendant and B is a relative in the collateral line And they are excluded by the child and the spouse. (1) (Max 6)

##### (d) X dies intestate and leaves the following relatives:

**His wife W and his two sons S and D. X's estate amounts to R450 000. X and W were Married out of community of property with the accrual system. X's estate is entitled to R150 000 accrual from W. Explain the devolution of X's estate giving reasons for your calculations. (4)**

- (1) X's estate is **entitled** to accrual from W's estate:  $R450\ 000 + R150\ 000 = R600\ 000$ . X's Deceased estate that has to be divided in terms of intestate succession now amounts to R 6000 000. (1) [NB: If **the deceased** was entitled to accrual, the amount is added to his/her estate. If the surviving spouse was entitled to accrual, the amount will have to be deducted from the Deceased's estate. It is important to start with the correct amount otherwise you will Receive 0 for your answer!] (2) The surviving spouse is entitled to either a child's share or a statutory determined minimum amount (at present R125 000), whichever is the most. (1)
- (3) A child's share is calculated by dividing the value of the estate by the number of children Who either survived the deceased or who predeceased him but are survived by? Descendants, plus the number of spouses. (1)
- (4) A child's share is calculated as follows:  $R600\ 000 \div 3$  (S and D plus 1) = R200 000 (1)
- (5) The surviving spouse (W) inherits a child's share of R200 000 because it is more than the Statutory determined amount of R125 000. (1)
- (6) The children (S and D) share the rest ( $R\ 600\ 000 - R\ 200\ 000 = R400\ 000$ ) equally and Inherit R 200 000 each. (1) (Max 4)

**(e) From the following list of names of decided cases, (all of which have been prescribed for This module) you must choose ONE that serves as authority for a particular statement Made hereunder, and then write the name of the case underneath the statement.**

**(i) Section 2(3) of the Wills Act 7 of 1953 may only be applied if the deceased has Personally drafted or executed the particular document. (1)**

*Bekker v Naude* 2003 (5) SA 173 (SCA)

**(ii) A will may be rectified by the insertion of words. (1)**

*Botha v the Master* 1976 (3) SA 597 (OK)

**(iii) A condition in a will, which has the effect of breaking up an existing marriage, is valid Where such effect is purely incidental and did not form part of the testator's intention. (1)**

*Barclays Bank DC & O v Anderson* 1959 2 SA 478 (T)

**(iv) A person who negligently caused the death of the testator may not inherit from the Testator. (1)**

*Casey v the Master* 1992 (4) SA 505 (N)

## Question 2

**2.1 Discuss the importance of *Rhode v Stubbs* 2005 (5) SA 104 (SCA) with regard to massing. [Do not discuss the facts of the case. Only discuss the importance of the case.] (5)**

- (1) According to our common law rules of interpretation, when interpreting a joint or mutual will Of parties married in community of property, one has to start off on the premise that one is Dealing with two separate wills of the parties, until the contrary becomes clear.
- (2) This rule results from the common law rule that no one can deprive himself of the power to Freely make a last will.
- (3) A testator can, by means of massing, deprive himself of his power to make a will, but if there Is any uncertainty about his intention, the will should be interpreted in a manner that will allow The greatest possible measure of freedom of testation.
- (4) This gives rise to the subsidiary rule of interpretation, namely the presumption against Massing, which applies when the golden rule of interpretation, namely to give meaning to the Testator's words within the framework of the will, cannot be applied because the words are Unclear or subject to more than one interpretation.
- (5) For massing to take place, it is necessary for one testator to dispose of both his own estate (Or a part thereof) and the estate (or a part thereof) of the other testator.

(6) For massing to take effect, the surviving beneficiary must adiate a benefit under the mutual will.

(7) If massing was not intended, acceptance of the benefits from a mutual will cannot in itself bring about massing. (max 5)

## **2.2 Discuss the use of the will itself as source of interpretation when establishing the testator's intention. (10)**

(1) The first step when interpreting a will is to determine the testator's intention as it appears from his will read as a whole. (1).

(2) Next, the court must give to the words the ordinary grammatical and everyday meaning which they had at the time of the making of the will unless it appears from the context that the testator used the words in another meaning (1).

(3) The court must attach the technical meaning to words unless it is apparent from the context that the testator used them in another sense. (1)

(4) Where words have a technical as well as an ordinary meaning, they must be given their ordinary meaning unless it is clear from the will that the other meaning is intended (1).

(5) Where the same word is found more than once in the will, there is a rebuttable presumption that the testator used it in the same sense every time unless the contrary is apparent from the will. (1)

(6) If a word or expression in a will is capable of bearing more than one meaning, the court must attach to it the meaning which will make it valid rather than invalid, or according to which it will make sense instead of nonsense, or according to which the beneficiaries will benefit rather than be placed under an obligation or prejudiced (1).

(7) Where contradictory words, expressions or provisions appear in a will, an attempt must be made to reconcile them with one another or with the general intention of the testator as it appears from the will read as a whole (1).

(8) It must also be borne in mind that if one of the provisions is the dominating clause in the will and nominates a beneficiary or makes a bequest, full effect must be given to it unless it is apparent from the rest of the will that the testator wished to qualify it (1).

(9) It may sometimes be necessary to give effect to the testator's intention without paying attention to certain words in the will. This is the case where these words do not reflect the clear intention of the testator (1).

(10) It may even be necessary to add words in order to complete a sentence or to give effect to the testator's intention where the testator has obviously omitted words from his will. This is called rectification. (1)

(11) The court may, however, only deduce or imply a provision, bequest or disposition in a will where it is a necessary implication and obviously in accordance with the contents of the will (1).

(12) In the interpretation of wills attention must be paid to punctuation and to the arrangement of the paragraphs in the will, since these may be a valuable aid in interpretation. They may even be the deciding factor in the preference of one interpretation to another. The value of the punctuation will, however, depend on the circumstances of the case concerned (1).

(13) The court may also take into account the fact that a will was made by a layman, an inexperienced draftsman or an experienced draftsman (1). (max 10)

## **2.3 Discuss briefly the court's statutory power to remove a fideicommissum on immovable property. (5)**

(1) In terms of the Immovable Property (Removal of Restrictions) Act 94 of 1965 (1) the court has the power to remove restrictions (including *fideicommissa*) on immovable property in the following circumstances:

(2) Where a beneficiary who has an interest in immovable property which is subject to a restriction imposed by will or other instrument apply to court for removal or modification of the restriction, on the ground that such removal or modification will be to the advantage of any beneficiaries, present or future, born or unborn, certain or uncertain.(1)

(3) If the court finds that the shares of the immovable property are too small for beneficial occupation,(1)

(4) or because beneficial use is prevented by a prohibition against subdivision,(1) or

- (5) because circumstances have arisen which the testator did not foresee, (1).  
 (6) or if it will be in the public interest or in the interests of the beneficiaries (1) (max 5)

### Question 3

**3.1 Read the following set of facts and then answer the questions that follow:**

**Mary and John are siblings. In his will John appointed his sister Mary to inherit his whole estate. In her will Mary appointed her husband Peter to be her heir. Mary and John are killed in the same car accident, and no evidence exists as to who died first. John leaves behind both his parents. Mary leaves behind her parents and her husband Peter.**

**(a) Who will inherit John and Mary's respective estates? Briefly explain your answer. (7)**

When two people die in the same disaster and it is not possible to establish who died first, the court will find that they died simultaneously. (1) *Ex parte Graham* (1) held that in our law no presumption as to the order of death exists. (1) That means that two persons who die in the same accident, cannot inherit from each other, because one has to survive a person to be able to inherit from him/her. (1) John's will cannot be given effect to because Mary cannot inherit from him. (1) John's estate will therefore devolve in terms of the law of intestate succession (1) and his mother and father will inherit his estate. (1) Mary is survived by her husband and he will inherit her estate in terms of her will. (1) (max 7)

**(b) Would it have made a difference to your answer if John died at the scene of the accident and Mary died two hours later in hospital? Briefly explain your answer. (3)**

Yes. If Mary survived John, she would have inherited John's estate as indicated in his will (1), and her husband would then have inherited both her and John's estates as John's estate would have formed part of her estate. (1). John's parents would then not have inherited. (1)

**3.2 T's valid will contains the following bequest:**

**"I leave my farm to my son S. Should he ever leave the farm permanently, the farm has to go to my brother, B."**

**T dies in June 1993, leaving his wife W, his son S, S's son D and T's brother B.**

**Explain whether the following legal concepts are applicable giving reasons for your answers. Apply those that are applicable to the above facts and indicate when *dies cedit* and *dies venit* take place for each of the parties.**

**(a) Resolutive condition (3)**

This provision contains a resolutive condition for the son, S. (1) His rights will terminate (1) if an uncertain future event (leaving the farm) takes place. (1) *Dies cedit* and *dies venit* take place for S on T's death. (1)

**(b) Modus (3)**

A modus is an obligation or qualification added to a bequest. (1) It has no effect on vesting of rights (1). It is not applicable in this instance. (1).

**(c) Direct substitution (3)**

Direct substitution occurs where the testator names a series (two or more) of beneficiaries to inherit in the alternative (1). When the first one inherits, the substitute has no hope of ever inheriting. (1) It is not applicable in this set of facts as the beneficiaries inherit one after the other. (1)

**(d) Fideicommissary substitution (6)**

Fideicommissary substitution takes place where a testator nominates beneficiaries to inherit one



after the other (1). The first beneficiary is called the fiduciary and the next beneficiary is called the fideicommissary (1). The fiduciary has to pass the benefit to the fideicommissary on the happening of an uncertain future event (in case of a condition, as in this case) (1). It is applicable in this case (1) as the farm will pass from S to B, according to the express *fideicommissum*. (1) A *fideicommissum tacitum* in favour of D may also be read into the provision (*Galliers and du Plessis* cases) (1). *Dies cedit* and *dies venit* take place for S on T's death. (1) *Dies cedit* and *dies venit* are postponed for B until S leaves the farm. (1)

**3.4 Manu and Vera were married on 10 January 1990 and were divorced on 12 May 2007. They had two children, Bongani and Chris. Manu died in a car accident on 29 July 2007. Manu's valid will (which he made in 1991) provided that Vera, Bongani, Chris and his secretary, Sarah, inherit his entire estate.**

**(a) Write down the names of the persons who were to inherit Manu's estate. (2)**

Bongani, Chris, Sarah (1) (You would not have received any marks, had you included the ex-wife.) (1)

**(b) Give a reason for your answer. (3)**

The Wills Act provides (1) that if the testator dies within 3 months of his/her divorce (1), the previous spouse does not inherit in terms of the will. (1)

Succession can take place

a by virtue of a will (testamentary succession)

b by virtue of the law (intestate succession)

c by virtue of an ante nuptial contract

Distinguish between testate and intestate succession.

1 (The answer to this question is partly to be found in Ch 1.) Testate succession applies when a person dies leaving a valid will. Intestate succession applies when a person dies and does not leave a valid will.

2 Define the law of intestate succession.

The law of intestate succession identifies the heirs to a deceased estate when the deceased has failed to regulate the devolution of his estate by will or antenuptial contract, or where it is impossible to carry out the wishes of the deceased because the beneficiaries are unable to inherit, do not wish to inherit or are predeceased. It is possible for a person die completely intestate or only partly intestate.

In *Ex parte Davies* 1957 (3) SA 471 (N) the court decided that a testamentary writing is a document which defines any one of the three essential elements of a bequest:

1 the property bequeathed

2 the extent of the interest bequeathed, that is, ownership, usufruct, fideicommissum, et cetera

3 the beneficiary

In *Kidwell v The Master* 1983 (1) SA 509 (E), the testator signed the second page of his two-page will some 13 cm below the signature of the second witness, and 17 cm below the attestation clause. It was held that the will was invalid because of the possibility of fraud. This decision is criticised by *Sonnekus* 1983 TSAR 188 and *Cronje* 1983 THRHR 345, because, although it was found that no fraud had taken place, the court still declared the will invalid (see the discussion of this case in *Cronje & Roos*). In this regard it is important to take note of section 2(3) of the Wills Act. This is a new provision introduced by the Law of Succession Amendment

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Act, which empowers the court to accept a document as a valid will even if it does not comply with all the formalities required for the execution of wills. It is quite conceivable that a court may in future accept a document such as the one in the Kidwell case as a valid will by using its power of condonation in terms of section 2(3). (See the discussion below in unit 4.) The "end" of the will also has significance as to the placing of the certificate by the certifying officer when a testator signs by means of a mark or where someone else signs on behalf of the testator. (We will discuss these formalities below in unit 3 but would like to point out where the "end" is for those purposes here.) Before section 2(1)(a)(v) was amended by the Law of Succession Amendment Act, the certifying officer was required to introduce the certificate "at the end" of the will. This requirement created problems in practice, since decisions differed on where the end of a will was for the purposes of section 2(1)(a)(v) (see Philip v The Master 1980 (2) SA 934 (D); Tshabalala v Tshabalala 1980 (1) SA 134 (O); Gantsho v Gantsho 1986 (2) SA 321 (Tr); Stemmet v Die Meester 1957 (3) SA 404 (C)). This problem has now been solved by the amendment of section 2(1)(a)(v), in terms of which the commissioner of oaths may make the certificate anywhere on the will. He must then sign all the pages of the will on which the certificate does not appear. We shall come back to the certificate later.

It is submitted, however, that the will in the Tshabalala case would also, under the amended Act, have been invalid unless the court decided to exercise its discretion under section 2(3) to accept the will as valid. In this case the testator signed his will by means of a thumbprint. The first page contained the whole substantive content. The second page contained only the certificate. The certifying officer had neglected to sign the first page, and the court held that the will was invalid. For this reason the will would also have been invalid under the amended Act unless the court exercised its discretion in terms of section 2(3) and accepted the will as valid. In his decision, Flemming J points out (136±137) that the testamentary formalities are meant to obviate fraud, but that the question of fraud should not be overemphasised.

## Question 1

### 1.1 Give a definition of each of the following concepts:

#### 1(a) Legacy (2)

A **legacy** is a bequest of a specific asset (for example a house) or a specific amount of money (for example R10 000).

#### 1(b) Fideicommissary substitution (2)

Fideicommissary substitution occurs where, in his will, a testator directs that after his death a series of successors (heirs or legatees) are to own his whole estate or part of it (1), or specific assets, so that the bequest passes from one successor to another (1). The different successors thus inherit the same property of the testator one after the other. (2)

**1(c) Direct substitution (3)**

Direct substitution (*substitutio vulgaris*) occurs in the will where, a testator names a substitute or even a whole series of substitutes who are to inherit if the instituted heir or legatee does not inherit (1): for example, if the instituted heir or legatee repudiates (1) or is incompetent (1) to take a benefit under the will or if he dies before the testator (1). Either the instituted heir /legatee or the substitute inherits

(max 3)

**1(d) Suspensive condition (3)**

If an inheritance is made subject to this concept, vesting (1) of the bequeathed property in the heir only takes place upon the happening of an uncertain (1) future (1) event. (or: vesting is postponed (1) until happening of an uncertain (1) future event (1).) (3)

**Question 1.2**

**T committed suicide on 10 December 2008. He left a letter in which he wrote that he revokes all previous wills and leaves all his possessions to his two children from his first marriage, S and D. This letter is only signed with T's signature. It appears that he executed a valid will in 2003 in which he left all his possessions to his second wife and nothing to his children.**

**Answer the following questions and give reasons for your answers:**

**(a) Is the letter that T left behind a valid will? Discuss. (2)**

No, (1) it was not signed by witnesses (1) (2)

**(b) S and D approach you for advice. They want to know if there is any way that they can inherit. Explain fully any action available to them. (13)**

In terms of s2(3) the court is empowered to order the Master to accept a document as a valid will if the court is satisfied that a person, who has since died, intended that document to be his or her will, although it does not comply with all the formalities for the execution of wills.(1)

The court is obliged to give the order if it is satisfied that the testator intended the document to be his will (1).

The court's power to condone is limited by the requirements set by section 2(3). These requirements are:

(a) The court has to be satisfied that the document concerned must have been drafted or executed by a person (1)

(b) who has since died, (1) and who

(c) intended the document to be his will.(1)

The first requirement, namely that the document concerned must have been drafted or executed by a person who has since died, caused problems as, literally interpreted, it means that the deceased had to personally draft the document.(1) At first it was decided that there is nothing in section 2(3) to indicate that the testator has to draft the document personally and that there must be very few people who still write out a will by hand. The courts thus accepted that a will, drawn up by someone else on behalf of the testator, may also be judged in terms of section 2(3) - *Back v Master of the Supreme Court* (1). However, in *Bekker v Naude* 2003 (5) SA 173 (SCA), (1) the Supreme Court of Appeal settled the differences of opinion that existed regarding the interpretation that should be given to the word "drafted" in section 2(3) of the Wills Act 7 of 1953. The Supreme Court of Appeal preferred the narrow interpretation in terms of which the testator should have personally (1) drafted the document. The Courts reasons were as follows:

First of all, the basic principle in the interpretation of statutes is that effect must be given to the ordinary, grammatical meaning of words, unless that would lead to absurdity, inconsistency, hardship or anomaly. The Court was of the opinion that section 2(3) contained no absurdities and that in the Act itself there was no indication of inconsistency, hardship or anomaly. (1)

Secondly, there was a strong indication that the legislature intended a restrictive interpretation, if reference was had to the wording of section 2A, which was incorporated simultaneously with s 2(3) into the Act.(1)

Thirdly, the Court looked at the intention of the legislature. The Court discussed the viewpoint in Back's case regarding the intention of the legislature in enacting section 2(3). One of the arguments was that the purpose of section 2(3) was to prevent the last wishes of a testator from being nullified by non-compliance with technical formalities. If the personal, physical drafting by a testator should be a prerequisite to the operation of section 2(3), the legislature would in fact be requiring compliance with another formality before recourse may be had to a provision which "condones" non-compliance with the

formalities prescribed in section 2(1). In *Back* it was argued that this could not have been the intention of the Legislature and would in fact make a conspicuous absurdity of section 2(3).(1)

A fourth reason refers to the legislative history of section 2(3). Olivier JA differed from Van Zyl J's view in the *Back* case that the history of the section provides support for a wide interpretation of section 2(3). The Court was of the opinion that the history of the origin of the relevant section supported a literal interpretation.(1)

In the end, the Court was of the opinion that there are no grounds which justify a departure from the ordinary, literal meaning of section 2(3).(1) It held that the Court has a "power to condone"(kondoneringsbevoegdheid) only if the intended will was brought into being by the testator personally. *In casu* the testator had asked the bank to draft the will and, apart from the instructions of the deceased, the bank had used its own standard terms and wording. Consequently, it could not be said that the document had been "drafted" by the testator and not "caused to be drafted". The appeal was denied.

From *Theron v Master of the High Court* (1) it is clear that the second requirement, namely that the will must be executed by "a person who has since died" are a reference to the testator, which may include a surviving testator in the case of a joint will.(1)

The most important requirement which has to be satisfied before a court will grant an order in terms of section 2(3) is the requirement that the court has to be satisfied that the testator **intended** the document to be his will.(1) The facts of each case must be considered to ascertain the testator's intention (1) - *Ex parte Maurice; Back v Master of the Supreme Court*.(1)

(max 13)

TOTAL Q1: [25]

## Question 2

**Thomas married Jonathan in terms of the Civil Union Act 17 of 2006 on 29 December 2006. On 7 February 2007 he made a valid will in which he made the following provisions:**

- “(1) I leave my beach house to my sister, Susan.**
- (2) My house in Waterkloof, I leave to my adopted son, Greg.**
- (3) To Jonathan, who cheated on me, I leave nothing.”**

**Thomas signed the will with his signature and his sister, Susan, and his friend, Dan, signed the will as witnesses.**

**Thomas was murdered on 20 February 2007 by his adopted son, Greg. He is survived by Jonathan, his adopted son Greg, and his sister Susan.**

**Answer the following questions:**

**2.1 Discuss the capacity of the following beneficiaries to inherit:**

**(a) Thomas' sister, Susan, D. (3)**

Susan was a witness to the will. In terms of section 4A(1) of the Wills Act a witness to a will is disqualified from receiving any benefit under the will (1). However, in terms of section 4A(2), the court may declare such person competent to receive a benefit under a will if the court is satisfied that that person did not **defraud (1) or unduly influence (1)** the testator in the execution of the will.

(3)

**(b) His adopted son, Greg. (3)**

Although G's adoption does not exclude him from inheriting as adopted children are treated as own children (1), a person who intentionally caused the death of the deceased is incapable of inheriting any benefit in the estate of the deceased(1) Thus a murderer (G) is incapable of inheriting any benefit from his victim (T) - *Ex parte Steenkamp and Steenkamp* (1)

(3)

**2.2 Provide a detailed discussion of any possible claims that Jonathan may have against Thomas' estate. (14)**

Jonathan & Thomas were married in terms of the Civil Union Act of 2006. In terms of this act the word "spouse" in any law or, as used in the common law, also refers to a partner in a civil union entered into in terms of this act **(1)**. Although Thomas disinherited Johnathan, he will have a claim for maintenance terms of the Maintenance of Surviving Spouses Act **(1)**.

If a marriage is dissolved by death after the commencement of this Act the survivor shall have a claim against the estate of the deceased spouse for the provision of his reasonable maintenance needs (1) until his death or remarriage (1) in so far as he is not able to provide therefore from his own means and earnings.(1)

In determining the **reasonable maintenance needs** of the surviving spouse the following factors, in addition to any other relevant factor, should be considered:

- (1) the amount in the estate of the deceased spouse available for distribution to heirs and legatees (1)
- (2) the existing and expected means (1), earning capacity (1), financial needs and obligations of the survivor (1) and the subsistence of the marriage (1)
- (3) the standard of living of the survivor during the subsistence of the marriage (1) and his age at the death of the deceased spouse (1)

The survivor's claim for maintenance has the same order of preference in respect of other claims against the estate of the deceased spouse as a claim for maintenance by a dependent child of the deceased spouse.(1) If the claim by the survivor and that by a dependent child compete with each other, those claims shall, if necessary, be reduced proportionately (1).

Where there is a conflict of interests because the survivor, in addition to his own claim for maintenance, also has to institute a claim for maintenance on behalf of a minor dependent child of the deceased spouse, the Master may defer the claim for maintenance until the court has decided on the claim (1).

The executor of the deceased spouse's estate is empowered to enter into agreements with the survivor, heirs and legatees having an interest in the agreement, including the creation of a trust, and in terms of the agreement to transfer assets of the deceased estate, or a right in the assets, to the survivor or the trust, or to impose an obligation on an heir or legatee, in settlement of the claim of the survivor (1). = (15)

**(max 14)**

**TOTAL Q 2: [20]**

### **Question 3**

**3.1 Write a note on the variation of trust provisions by the court. Include a discussion of *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) in your answer.**

**(15)**

- 3.1 Section 13 of the Trust Property Control Act 57 of 1988 extends the power of the court to vary trust provisions. If a trust instrument contains any provision which brings about consequences which, in the opinion of the court, the founder of the trust did not contemplate or foresee (1) and which (1) hampers the achievement of the objects of the founder,(1) or

(2) prejudices the interests of the beneficiaries, (1) or  
 (3) is in conflict with the public interest,(1)

the court may, on the application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which the court deems just.(1) This may include an order whereby trust property is substituted for other property, as well as an order terminating the trust . *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust*.(1) In 1899 the testator left his estate in trust to his son to be used for the establishment of homes for "destitute white children". The court decided that the testator did not foresee that economic circumstances would change to such an extent that the number of white destitute children would become so few that his charitable intention would be frustrated. The court also decided that it would not be against public policy to accept children of all races into these homes. The court accordingly ordered the rescission of the word "white" from the will.(1)

It is no longer a requirement that there should have been a change of circumstances unforeseen by the founder, but the Act does require that the consequences of the trust provisions should have been unforeseen by the testator Therefore, if the trust provisions prejudice the interests of the beneficiaries, but this has been foreseen by the founder, the court **cannot** vary the trust provisions.(1)

In *Minister of Education and Another v Syfrets Trust Ltd NO 2006 (4) SA 205 (C)* the court had to decide on the validity of a trust. The trust, created in 1920, provided that only white, non-Jewish men may be beneficiaries of the trust. (1) The validity of these provisions were challenged in 2002. The applicants based their application for an order deleting the discriminatory provisions on three

Grounds:

- (a) Section 13 of the Trust Property Control Act (1)
- (b) Common law, which prohibits bequests that are illegal, immoral or contrary to public policy (ie *contra bonos mores*). (1)
- (c) The Constitution, specifically the equality and anti-discriminatory provisions of section 9. (1)

The Court granted the application, because the provision was considered to be *contra bono mores*.(1)

The Court held:



- The principle of freedom of testation cannot be ignored, but there are limits to freedom of testation. One of these limits is the common law principle that provisions that are *contra bonos mores* may be deleted. (1)
- Provisions that constitute unfair discrimination are contrary to public policy, as reflected in the foundational constitutional values of non-racialism, non-sexism and equality.(1)
- The Court may order the deletion of discriminatory provisions of a will based on its common law power to delete provisions in a will that are against public policy.(1)

Not all clauses in wills or trust deeds that differentiate between different groups of people are invalid. It is only where the differentiation can be considered to be unfair discrimination on the grounds of race, gender and faith that they can be held invalid and be deleted.(1) = (17) (max 15)

**3.2 X dies intestate in 2009 and is survived by B, C and D, his wives to whom he was married according to Muslim rites.**

**X and B had two children, E and F. F is still alive but E died in a car accident in 2007 and is survived by a daughter, Y.**

**X and C had two children, G and H. H is still alive but G also died in the accident in 2007 and is survived by her adopted son, Z.**

**X is also survived by his parents, M and P, and his brother, S.**

**X's estate amounts to R700 000. Calculate how X's estate will devolve and give reasons for your calculations.**

**(10)**

3.2 In ***Hassam v Jacobs NO (1)*** the Court held that the word "spouse" as used in the Intestate Succession Act 81 of 1987, includes a surviving partner to a polygamous Muslim marriage. We have to calculate a child's share in order to work out how the estate will devolve as a spouse is entitled to a child's share or R125 000, whichever is the greatest (1). A child's share is calculated by dividing the estate by the number of the deceased's children who have either survived him (1), or have predeceased him but are survived by descendants (1) plus the number of surviving spouses. (1) The *Bhe case (1)* amended the calculation of a child's share when a deceased is survived by more than one spouse, in that a child's share would be determined by adding all the surviving spouses (ie, not "plus one", but "plus the number of surviving spouses").

X's estate amounting to R700 000 must be divided by 7 = R100 000.(1) Reasons: X is survived by F and H. His child E is survived by Y and G is survived by Z (adopted children are deemed to be natural children (1)). Therefore 4 children plus 3 wives (1)

Each wife will receive R125 000 as it is more than a child's share (1). The residue of R375 000 will be shared by F, H, Y (representing E (1)) and Z (representing G). M and P do not inherit as they are ascendants (1) and S doesn't inherit as he is a collateral. (=12)

(max 10)