

# Law of succession

ONLY STUDY GUIDE FOR  
PVL2602



Departement of Private Law

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# INTRODUCTION

Dear Student

Welcome to the module, Law of Succession. We hope that you will have a positive learning experience. This module consists of a general study of the law of succession and its aim is to provide you with general knowledge of the law of succession which forms an integral part of the South African law. The study of this module will provide you with the knowledge and skills to be able to identify and evaluate legal problems in the field of private law, in which the law of succession plays a role. This module deals with the basic principles of the law of succession which you will need in practice when dealing with wills and deceased estates.

## PRESCRIBED MATERIAL

Your prescribed material for this module is:

- **Jamneck, Rautenbach, Paleker, Van der Linde, Wood-Bodley *The Law of Succession in South Africa* 3rd ed (2017) Oxford University Press Cape Town (This book will be referred to as “J&R” in this tutorial letter.)**
- **Cronjé DSP & Roos *A Erfregvonnisbundel/Casebook on the law of succession* 4th ed (2002) Unisa Pretoria (This book will be referred to as “the Casebook” in this tutorial letter.)**
- **A number of tutorial letters containing general information, comments on the assignments and information on the format of the examination.**

Remember that tutorial letters are part of your study material for assignment and examination purposes. They are at least as important as the textbook itself. Read each tutorial letter, study it and keep it for reference purposes.

## AIMS OF THE STUDY GUIDE

This study guide will guide you through the content of this module by referring to the prescribed textbook. It does NOT replace the textbook and cannot be used on its own in order to study the content of the module.

The aims that we hope you will achieve by studying this module, are the following:

- *Recognising the role of law of succession in everyday life*

After you have mastered this module, you should be able to recognise the role of law of succession in everyday life. This requires an understanding of the most pressing and prevalent issues relating to law of succession that occur within the South African

context. You should also be able to demonstrate your ability to identify and solve issues related to law of succession in real or simulated scenarios.

- *Knowledge of definitions in law of succession*

You will be expected to have ready knowledge of definitions of concepts relevant to the law of succession. These definitions form the basis of your knowledge and understanding of the law of succession and should be studied in detail. Without absolute knowledge of these definitions, you will find it impossible to master the law of succession.

- *Succession in practical context*

You should develop a clear understanding of law of succession in a variety of contexts. You will therefore have to demonstrate your ability to interpret and explain law of succession problems in different contexts.

- *Solving law of succession problems*

You should be able to apply your basic knowledge of law of succession to solve a variety of problems.

- *Engaging with legal texts relating to law of succession*

You should develop the ability to read, understand and apply legal principles contained in case law. You will therefore be required to demonstrate your ability to read, understand and interpret court decisions regarding law of succession.

- *Academic knowledge and skills to enter a career in law*

Having mastered this module, you should have developed a clear knowledge and understanding of the law of succession and the skills to apply your theoretical knowledge to practice in the context of problem situations in your day-to-day work environment. You will be required to demonstrate that you can interpret legal documents in respect of the law of succession, and advise and represent parties in legal proceedings on matters relating to the law of succession.

## METHOD OF STUDY

This study guide comprises sixteen learning units, each referring to a corresponding chapter in the textbook. Each learning unit also refers to your prescribed cases. You will find a list of the prescribed cases in Tutorial Letter 101. These cases are very important and have to be studied in the Casebook when you study the particular learning unit.

Some learning units are shorter than others and may require fewer hours of study. Others, such as learning unit 10, are more intricate and will require more time. When working through this guide and the textbook, take into account the length of each unit to determine the time needed, but make sure that you spend more time on units that require you to know and explain certain concepts. Units such as learning units 5, 10 and

13 (for example) will take much longer to study than the last three units where a very basic knowledge is required of you.

Note that each unit builds on the previous unit and it is very important to understand the basic principles of each before moving onto the next unit. Ensure that you truly understand the principles explained in a unit, then study it and thereafter try to do an activity or an example of a question on the unit. Do not proceed to trying to answer questions before you truly understand the unit. Only proceed to answering assignments and old question papers once you are sure that you KNOW all the work.

In learning unit 1, you will also find the terminology of law of succession. Without a proper knowledge of these terms, you will not be able to study the other units. These terms are very important and you should have a ready knowledge of them in order to be able to apply them in practical questions.

## STRUCTURE OF THE STUDY GUIDE

Each learning unit in this study guide is structured as follows:

### **Overview:**

This paragraph gives you a very brief idea of what you will be studying in the particular unit.

### **Learning material:**

This section indicates which paragraphs have to be studied from the textbook.

### **Content of this chapter:**

Under this heading, each learning unit indicates what content of the module is covered in the unit. It also refers to the prescribed cases that have to be studied with the particular unit.

### **Activity:**

The activity given at the end of each learning unit, guides you in practising some of the principles studied in the unit.

### **Summary:**

The summary of each unit helps you to remember what you studied in that unit.

## HINTS ON STUDYING THIS SUBJECT

- **Definitions:** Definitions form the basis of your knowledge and understanding of the law of succession and should be studied in detail. Without absolute knowledge of these definitions you will find it impossible to study the law of succession.

Do not change the wording of definitions – in the process, you may change the meaning of the definition which, of course, will make it wrong! Study the definitions as they are provided in your textbook. Make sure that you are able to write the definition down without referring to the textbook again.

The correct use of all terminology is extremely important as you do not want to inadvertently change the meaning of your answers in the examination by using the wrong terminology. Take, for example, the terms “incapable” and “incompetent”: A person may be “capable” of taking a benefit (i.e. it is possible for him/her) but the law regards him/her as “incompetent” – in other words the law refuses to give him/her the benefit because, for example, he/she murdered the testator. **It is therefore imperative to use the correct terminology.**

- **Case law:** Note that although certain cases are mentioned throughout the textbook, you only have to study those prescribed in each learning unit. In tutorial letter 101 you will also find a complete list of these cases.

You do not have to know the full reference to a case (for example, *Ex parte Graham* 1963 (4) SA 145 (D)) – you need only know the name of the case, i.e. *Ex parte Graham*. Also note that the **notes on the cases which you will find in the prescribed textbook** (Cronjé & Roos – see tutorial letter 101), are extremely important. These notes not only provide you with a summary of the decision in each case, but also include a detailed discussion of the case and any criticism against the case. These notes, therefore, have to be studied in detail.

- **This chapter in essence:** At the end of each chapter, you will find a heading “This chapter in essence”. You do not have to study this, but read through it as it gives an overview of the chapter concerned.
- When you have completed your study of this module’s study material, you should have not only a detailed knowledge of each individual chapter, but also a complete picture of the law of succession as a whole. You should therefore be able to answer a question which, for example, combines principles discussed in chapters 2, 3, 10 and 11, or in chapters 1, 3, 8 and 12. Not that we will ask it in such a manner, but we should even be able to ask you one question covering the entire module!

## HINTS ON ANSWERING EXAMINATION PAPERS

- When answering questions in the examination, always approach the question as if you are explaining the legal principles to a client who does not have any knowledge of the law.
- If you are discussing a particular concept, always give a definition – definitions always earn marks! Never give an example unless specifically asked to do so. We find that students often give wrong examples and therefore lose marks. Rather explain the concept and refrain from giving a scenario as an example.
- If you are required to answer a question using one word or a short sentence, do not write more than that.
- If you are required to state only “true” or “false”, do not give a reason for your answer. If, however, you are required to give a reason for your statement, never start with

“true, however ...”. Remember that if you have to qualify your statement by saying “however”, the statement can no longer be true!

- Also study the information at the beginning of the prescribed textbook on “Problem-solving skills”.

## CERTAIN ICONS ARE USED THROUGHOUT LEARNING UNITS

| Icon                                                                               | Description                                                                                                                               |
|------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------|
|   | <b>Study.</b> This icon indicates the relevant sections of the prescribed book or the study guide that you need to study and internalise. |
|   | <b>Read.</b> This icon will direct you to read certain sections of the prescribed book for background information.                        |
|  | <b>Activity.</b> This icon refers to activities that you must do to develop a deeper understanding of the learning material.              |

## CONCLUSION

We trust that you will find this study guide to be a helpful guiding tool that will assist you in working through the module. We wish you all the best with your studies.

Prof J Jamneck

Prof A Roos

Mr PO Matsemela



# Learning unit 1

## Introduction

### OVERVIEW

This learning unit gives you a general introduction to the law of succession in South Africa as it deals with the nature, scope and application of the law of succession. The law of succession prescribes the legal rules that determine what should happen to a person's estate after his or her death. Succession may take place according to a will (testate succession), according to the operation of the law of intestate succession, or in terms of a contract (*pactum successorium*).

### THUS:

In this module, we are going to study the following questions:

- What happens if a person dies without a will?
- Who may make a will?
- How does one make a valid will?
- What should one do if one no longer wishes a particular will to be one's last will?
- Who may benefit under a will?
- What kind of provisions may be made in a will?
- What happens after one's death?

The answers to these questions will give you a basic knowledge of the law of succession. Of course, a lot more detailed knowledge will be required of you as these questions are explored in more detail in each unit.

The purpose of this learning unit is to enable you to:

- define and apply the most important terminology regarding the law of succession when dealing with a succession problem
- explain how the background to the law of succession determines its placement within the legal system
- compare the content and applicability of the common law of succession to the customary law of succession
- describe the ground rules for succession and illustrate your explanation with relevant examples

# LEARNING MATERIAL

## CHAPTER 1: INTRODUCTION

Chapter 1 explains the position of the law of succession in the larger scheme of the law. Before attempting to study chapter 1, please read through the introductory chapter in the textbook which explains the basic skills needed when dealing with an estate and succession, as well as the general process of liquidation of estates.

When studying chapter 1, ensure that you study the terminology until you know it very well, as these terms will be used in the following chapters.



Study the following from *J&R*

---

- **Par 1.1–1.5**
- **Par 1.6**

Please note that the terminology in par 1.6 is **extremely important**.

You have to have a ready knowledge of all the definitions. You only need to know the shortened version of the definition of “trust” (p18 – see chapter 11 also). You do not need to know the long definition from the Trust Property Control Act as presented on p18.

**Then study further:**

**Par 1.7**

## CONTENT OF THIS CHAPTER

### 1. Par 1.1–1.6 GENERAL BACKGROUND – SUCCESSION TERMINOLOGY

#### **CASE: Study**

- *Bhe v Magistrate, Khayelitsha (Commission For Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) (as discussed in *J&R*).

Par 1.6 contains a list of **very important definitions** for your study of the law of succession. Without a thorough knowledge of these definitions, you will not be able to continue on your journey through the law of succession. This list has been designed and published in such a way that it is possible for you to place something over the one side of the table in order to write down either the term itself or its definition. Please see the “Hints on studying this module” in the introduction to this guide for more information on how to approach these definitions.

## 2. Par 1.7 GROUND RULES WITH REGARD TO SUCCESSION

### CASES: Study

- *Ex parte Graham* 1963 (4) SA 145 (D)
- *Estate Orpen v Estate Atkinson* 1966 (4) SA 589 (A)

One of the most important ground rules of the law of succession is that a person must have died before his estate may be divided. To this rule there are a few exceptions, namely estate massing (discussed in Chapter 8) or where a person has disappeared without a trace. See pp19–21 for examples. Make sure that you study all the ground rules as well as the exceptions.



### Activity

As chapter 1 concentrates on the most important definitions in succession, ensure that you know all those definitions very well, as indicated above. Also answer the following question as an introduction to activities that we will require from you in the units following this one.

Read the example in **J&R** p20 and *Ex parte Graham* 1963 (4) SA 145 (D). Then answer the following questions:

- Who will inherit Xavier's estate if he dies first?
  - Who will inherit Brenda's estate if she dies first?
  - Who will eventually inherit if Xavier dies first and Brenda one month later?
  - Who will eventually inherit if Brenda dies first and Xavier one week later?
  - Are there any presumptions as to who died first when the members of a family died in circumstances where it was difficult to determine who died first?
  - What will happen if it is impossible to determine who died first?
- .....

### Some guidelines before you start writing:

You have to study the ground rules as to when a person may inherit before attempting to answer this question. You also have to read *Ex parte Graham* 1963 (4) SA 145 (D) carefully in your Casebook. Make a short summary of the facts and ensure that you know what the decision entailed regarding presumptions on the order of death. Also study the "Note" on the case in the Casebook.

## SUMMARY

In this learning unit, you studied the most important definitions used in the law of succession. You also learnt some of the ground rules of succession, for example that a person must have died before his estate may be divided between his beneficiaries and that, if persons die in the same disaster, there is **no presumption** as to the order in which they died.

Do you know what the ground rules for succession are after studying this unit?

To refresh your memory and to contribute to your understanding, do the following:

(a) Write down the definitions of

- ascendants
- capacity to act
- competent witness
- estate
- executor

Remember that this list contains only a few of the definitions and that you will have to return to all the definitions as you study each unit!

(b) Write a note on the rule that a beneficiary should be alive at the time of *dies cedit*.

In the next learning unit, we will deal with the intestate succession, in other words with what happens when a person dies without leaving a valid will.

# Learning unit 2

## Intestate succession

### OVERVIEW

As you have already seen, succession may take place in three ways. The law of intestate succession dictates how succession is to take place in one of these three instances, namely when a person dies without a valid will. The law of intestate succession is regulated by the Intestate Succession Act 81 of 1987 which will be discussed in this chapter. (If you are interested in the historical background of intestate succession in South Africa, see Van der Merwe & Rowland *Die Suid-Afrikaanse Erfreg* (1990) 22 ff or Corbett, Hofmeyr & Kahn *The Law of Succession in South Africa* (2001) 562 ff.)

The content of Chapter 2 is **very important**. You have to have ready knowledge of the rules of intestate succession for the examination. In this chapter you will see diagrams depicting the family tree of a deceased person. It is necessary to draw these diagrams in order to facilitate your answering of questions with regard to intestate succession. Note that it is not expected of you to draw diagrams in the assignments or the examination in order to receive marks. However, it is almost impossible to answer an intestate succession question without drawing such a diagram and it is therefore good practice to draw a diagram of the family concerned before attempting to answer such a question.

The purpose of this learning unit is to enable you to:

- distinguish between testate and intestate succession
- define the law of intestate succession
- discuss when vesting of an intestate inheritance takes place
- explain various persons' capacity to inherit intestate
- discuss a number of Constitutional challenges to the intestate succession rules
- answer problem type questions on the law of intestate succession

### LEARNING MATERIAL

#### CHAPTER 2: INTESTATE SUCCESSION



Study the following from *J&R*

You have to study this entire chapter, in other words:

- **Par 2.1–2.10**
- **Par 2.6.2:** Also note the discussion of *Hassam v Jacobs NO 2009 (5) SA 572 (CC)* below.

## CONTENT OF THIS CHAPTER

### 1. Par 2.1 INTRODUCTION

This paragraph gives a definition of the law of intestate succession and explains which two acts apply to intestate succession in South Africa. The Intestate Succession Act applies to all intestate estates in South Africa and is read in conjunction with the RCLSA. The RCLSA has importance for customary law estates and is explained in Chapter 15, but has to be kept in mind when studying this chapter.

### 2. Par 2.2 BASIC CONCEPTS

This paragraph explains various terms which you will need when working with intestate succession. It deals with various relatives within a family and explains representation. These terms are **very important**.

A few basic rules to remember:

- When dealing with an intestate estate, always remember that only **blood relations** may inherit intestate from the deceased. A person who was married to the deceased is considered to be a blood relation, but as soon as the marriage is ended by divorce, that relationship is also terminated.
- Keep in mind that descendants always inherit before ascendants or collaterals. An intestate estate, therefore, always goes down the line (in your drawn diagram), before it goes up or sideways.

### 3. Par 2.3 WHEN DOES A PERSON DIE INTESTATE?

In South African law, it is possible for a deceased to die:

- (a) wholly intestate,
- (b) wholly testate or
- (c) partly testate and partly intestate.

This paragraph explains what is meant by this and when intestate succession applies.

### 4. Par 2.4 VESTING OF AN INTESTATE INHERITANCE

#### CASE: Study

- *Harris v Assumed Administrator Estate MacGregor* 1987 (3) SA 563 (A)

This paragraph deals with the vesting of a right when intestate succession applies. When a right vests in a person, that person becomes the holder of the right. This will be explained in more detail in Chapter 9. A problem arises with regard to vesting when a person dies partially intestate and this problem was discussed in *Harris v Assumed Administrator Estate MacGregor* 1987 (3) SA 563 (A) – see the “Pause for Reflection” box in par 2.4 and study this case in your Casebook.

## 5. Par 2.5 CAPACITY TO INHERIT INTESTATE

When a person makes a will, he/she is free to decide who may inherit his estate. When he/she does not do so, the law decides who may inherit. During the course of history, certain persons were prevented from inheriting intestate from certain family members, for example, an extra-marital child was allowed to inherit only from his or her mother and her relations. These rules have, however, changed and this paragraph explains who is qualified to inherit in terms of modern intestate succession rules.

## 6. Par 2.6 CONSTITUTIONAL CHALLENGES

Traditionally, the roles of women, domestic partners and multiple spouses were not recognised in our law. Over the years, the *boni mores* with regard to these positions changed and, with the advent of the Constitution, came various challenges to some of these traditional views. Our courts have, over time, made various decisions on the position of these parties.

### CASES: Study

- *Bhe v Magistrate, Khayelitsha (Commission For Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) (as discussed in **J&R**)
- *Daniels v Campbell* 2004 (5) SA 331 (CC) (as discussed in **J&R**)
- *Hassam v Jacobs* 2009 (5) SA 572 (CC) (discussed below and in **J&R**)

The Intestate Succession Act 81 of 1987 has been challenged in the Constitutional Court on a number of occasions. Study all the cases as discussed in **J&R** and add the following discussion:

### ***Hassam v Jacobs NO 2009 (5) SA 572 (CC)***

This case is also discussed in the textbook at p31 and again at p135 but you need to take note of it already in the context of intestate succession. Here follows some more detail on this case.

*In this case, the Constitutional Court decided that a woman who is a party to a polygynous Muslim marriage concluded under Muslim personal law is a spouse for the purpose of inheriting or claiming from the estate of the deceased spouse who died without leaving a will.*

### **Facts:**

The applicant, Mrs Fatima Gabie Hassam, was a party to a polygynous Muslim marriage. Her husband (the deceased) died intestate. The executor of her husband's estate refused her claims for maintenance and an intestate inheritance on the basis that polygynous Muslim marriages are not legally recognised. She applied to the High Court, challenging the validity of certain provisions of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990. She argued that they unfairly exclude widows in polygynous Muslim marriages from protection provided for in those statutes by excluding them from the concepts of "spouse" and "survivor".

### Decision of court:

The High Court declared section 1(4)(f) of the Intestate Succession Act to be inconsistent with the Constitution to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir. The declaration of invalidity was referred to the Constitutional Court for confirmation in terms of the Constitution.

In the confirmation proceedings before the Constitutional Court the applicant contended that the exclusion of widows in polygynous Muslim marriages from the benefits provided for in the Act, infringes their constitutional rights to equality, religion and culture.

The Constitutional Court confirmed the declaration of constitutional invalidity made by the High Court. As to the Maintenance of Surviving Spouses Act, it held that the objective of the Act, which is to lessen the dependence of widows on family benevolence, would be frustrated if the continued exclusion of widows in polygynous Muslim marriages was to persist. *It held further that the Act violates the applicant's right to equality. The exclusion of women in the position of the applicant from the protection of the Act unfairly discriminates against them on the grounds of religion, marital status and gender. This exclusion is not justifiable in a society guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.*

In conclusion, the Court held that the word "spouse" in the Act is not reasonably capable of being understood to include more than one spouse in the context of a polygynous marriage. To remedy the defect, the words "or spouses" is to be read-in after each use of the word "spouse" in the Act.

As to the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 81 of 1987 to the estate of a deceased person who is survived by more than one spouse, the Court held:

- (a) A child's share in relation to the intestate estate of the deceased shall 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;**
- (b) Subject to paragraph (c), **each surviving spouse shall 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*, whichever is the greater; and
- (c) **Where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided amongst the surviving spouses.**
- (d) The declaration of invalidity of the section operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership prior to the date of the order in the case of any property pursuant to the distribution of the residue of an estate, unless it is established that, when transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application.

## 7. Par 2.7 APPLICABLE INTESTATE SUCCESSION LAWS

This paragraph explains the implications of the recent developments in common and customary law of succession for the application of intestate succession rules.

Section 1(1)(c) of the Intestate Succession Act 81 of 1987 provides that if a person dies intestate and is survived by a spouse as well as a descendant, the spouse shall inherit **either** a child's share of the intestate estate **or** so much of the intestate estate as does not exceed the amount fixed from time to time by the Minister of Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater, and the descendant shall inherit any residue of the intestate estate. This amount is currently **R250 000** (*Government Gazette* 38238/2014). We will refer to this amount as the **statutory amount**.

This means that if a person dies intestate and is survived by a spouse and descendants, the spouse will inherit **either** a child's share **or** the statutory amount (R250 000) of the intestate estate and the descendants will inherit the residue.

To calculate a child's share/portion, the value of the estate is divided by the number of children who either survive the deceased, or who predeceased the deceased but are survived by their descendants, plus the number of spouses left by the deceased (see section 1(4)(f)). **Please note that this definition is VERY important** as it determines the entire calculation of an intestate estate.

## 8. Par 2.8 THE ORDER OF SUCCESSION UNDER THE INTESTATE SUCCESSION ACT READ WITH THE RCLSA

This paragraph explains the rules with regard to the order in which intestate succession takes place. These rules are very important and should be studied in detail.

When confronted with an intestate succession problem, you should be able to explain the devolution of the estate. As mentioned above, the amount that the surviving spouse is entitled to inherit that is determined by the Minister of Justice and Constitutional Development, is currently R250 000. **The definition and calculation of the child's share/portion is therefore very important** in order to determine whether the surviving spouse/s will inherit the statutory amount or the child's share/portion.

## IN THE EXAMINATION

In the examination you will be expected to divide an intestate estate. An example follows below.

***Study the method used to do the devolution and apply the method when answering questions on problems concerning intestate estates.***

### Question

Xavier dies intestate and leaves the following relatives: His wife Wendy, to whom he was married in community of property, his son Sam, his mother Mary and his full brother

Ben. The total value of the joint estate is R800 000. Divide Xavier's estate giving reasons for your answer.

## **Answer**

### **Step 1: Determine the value of Xavier's estate.**

In this case, the joint estate of R800 000 must be divided by 2 ( $R800\,000 \div 2 = R400\,000$ ), because the marriage was in community of property – Wendy is therefore entitled to her half share of the joint estate. **[NB:** Wendy is entitled to this amount in terms of matrimonial property law. She does not inherit this amount.]

Xavier's estate thus amounts to R400 000.

### **Step 2: Calculate a child's portion**

The next step is to calculate a child's portion in order to determine what Wendy will inherit from Xavier's estate, since she inherits either a child's portion or R250 000, whichever is the greater.

[There are two issues that you should carefully take notice of in order to avoid confusion.

- First of all, remember that the concept of "a child's portion" was created by the legislature and it does not mean that this is the amount that a child will actually inherit in the end.
- Secondly, a statutory minimum amount of R250 000 is determined. This is the minimum amount that a spouse will inherit if the estate is big enough. Do not confuse the R250 000 with a child's share.]

According to the Act, a child's portion is equal to the value of the estate divided by the number of children who have either survived the deceased or who have predeceased him (or her), but are survived by descendants, plus the number of spouses.

**(You should give the definition exactly as it is spelled out here. Do not try to shorten it or leave out any aspect thereof.)**

In this example, there is one child plus the spouse, therefore:  $R400\,000 \div 2 = R200\,000$ . A child's portion therefore amounts to R200 000.

### **Step 3: Determine what amount the spouse inherits**

The spouse inherits a child's portion **or** R250 000, whichever is the greater amount; i.e. Wendy inherits R250 000 since that is more than the child's portion.

**[Take note:** a child's portion has to be calculated in each and every case where there is a spouse and children. The child's portion is not a fixed amount. Sometimes students think that a child's portion equals R250 000 but that is incorrect! R250 000 is the amount determined by the Minister.]

#### **Step 4: Divide the residue of the estate between the descendants (or other heirs if no descendants)**

The descendant, Sam, inherits the remainder of the estate, that is R150 000. (If there were more descendants, the amount would have been divided between them – see the examples in *J&R*.)

Mary and Ben inherit nothing because they are ascendants and in the collateral line and are excluded by the descendant.

### **9. Par 2.9 DISQUALIFICATION AND REPUDIATION**

This paragraph explains what happens when an intestate heir is disqualified from inheriting or repudiates his/her inheritance. Note that Section 1(6) and 1(7) of the Intestate Succession Act corresponds to section 2C(1) and (2) of the Wills Act – see the discussion in Chapter 10.

### **10. Par 2.10 CUSTOMARY LAW OF SUCCESSION**

This paragraph explains that the customary law of succession was, to a large extent, abolished by the *Bhe* case and the RCLSA which came into operation on 20 September 2010. A testator may, however, stipulate in his or her will that his or her estate should devolve in terms of customary law of succession.



#### **Activity**

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There is a myriad examples of intestate succession problems that may come your way. Here we are going to give you only one example and explain how to solve such a problem.

#### **Example**

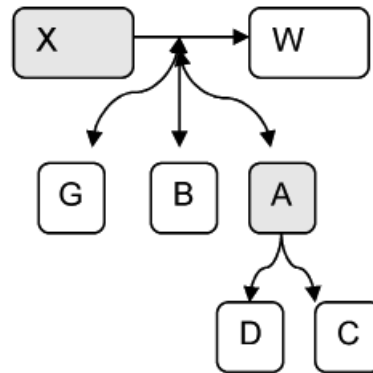
Xavier and Wanda were married in community of property and have three children, Anna, Grace and Ben. Anna died in 1999, leaving her two children, Deon and Carl. Xavier died in February of 2014 and left Wanda, Grace, Ben and his two grandchildren, Deon and Carl, behind. Xavier and Wanda's joint estate is worth R1 600 000.

**What you have to do:** Start by drawing a diagram of the facts. Calculate how Xavier's estate is going to devolve and indicate how much each person will receive. Give reasons for your calculations. (Note that you will be allowed to take a non-programmable calculator with you into the examination hall.) Remember that the reasons for each calculation are more important than the calculation itself.

**Some guidelines before you start writing:** You have to study the rules of intestate succession very carefully in order to solve an intestate problem. If you do not know the rules, you will be unable to answer the question! Do not even attempt to solve such problems if you do not have a thorough knowledge of the rules.

In the examination you must give the solution in the same manner as explained below. (If you prefer, you may shorten the names to the first letter.)

Start by drawing a diagram of the facts. This does not count for marks, but you will be unable to solve the problem if you are unable to see the picture of the family in front of you.



Then explain as follows (see the steps explained above):

(Step 1: *Determine value of estate*)

- (a) In terms of matrimonial property law, W is entitled to half of the joint estate when the marriage comes to an end because of the death of X, since X and W were married in community of property. In other words, X and W had one joint estate of R1.6 million which had to be divided equally between them at the death of one of the spouses or if they divorced.)
- (b) W **receives** her share of R800 000, because technically it belongs to her.
- (c) The intestate estate of X is therefore worth R800 000.

(Step 2: *Determine child's share*)

- (d) W, the wife, inherits **either** R250 000 (the statutory amount) **or** a child's portion, whichever is the greater.
- (e) A child's portion is calculated by dividing the value of the intestate estate by the number of children of the deceased who have either survived him or her (G and B), or have predeceased him or her but who are survived by their descendants (in this instance A), plus the number of surviving spouses (in this instance only W) (see section 1(4)(f) of the Intestate Succession Act.)
- (f) X's intestate estate should be divided by four (W, G, B, A).
- (g) This means a child's portion amounts to R200 000 ( $R800\,000 \div 4 = R200\,000$ ).

(Step 3: *Determine how much the wife inherits*)

- (h) W will inherit R250 000, because it is more than a child's share.

(Step 4: *Divide rest of estate*)

- (i) The remaining R550 000 ( $R800\,000 - R250\,000 = R550\,000$ ) of X's estate, has to be divided equally amongst his children.
- (j) G, B and A (represented by D and C), will each inherit  $\frac{1}{3}$  of R550 000 ( $R550\,000 \div 3 = R183\,333$ ).
- (k) G and B will each inherit R183 333 and A's children, D and C, will share R183 333, each taking R91 666.

## SUMMARY

In this chapter we discussed some general concepts which are relevant to the law of intestate succession. We also discussed the rules of intestate succession which apply when a person dies without leaving a valid will.

To refresh your memory and to contribute to your understanding, do the following:

- Write a few notes on:
  - ascendants
  - descendants
  - stirps
  - vesting of an intestate inheritance
  - *Bhe v Magistrate, Khayelitsha (Commission For Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC)
  - *Daniels v Campbell* 2004 (5) SA 331 (CC)
  - *Hassam v Jacobs* 2009 (5) SA 572 (CC)
  - the order of succession

In the next learning unit, we will start discussing the law pertaining to testate succession and, in particular, the general rules relating to the making of a will.

# Learning unit 3

## Testate succession: general rules

### OVERVIEW

In the previous chapter, we discussed the law of intestate succession. We are now going to discuss the law of **testate succession**. **Testate succession** (*testate erfopvolging* or *testamentêre erfopvolging*) occurs when succession is regulated by a valid will in which the deceased has laid down how succession to his property is to take place. Please re-read the introductory chapter (Basic Skills) in **J&R** where you will find an example of what a will looks like. This type of will would, in practice, have been drafted after the basic principles explained in Chapter 3 had been complied with. In other words, a testator who has testamentary capacity and who has decided to make a will of his own free will, will draft and execute such a document and express his free will in the document.

In this learning unit, we are going to look at certain general rules which apply in testate succession – these rules are very important for the further study of wills.

The purpose of this learning unit is to enable you to:

- define the concepts “will”, “codicil” and “testamentary writing”
- explain the difference between joint and mutual wills
- differentiate between adiation and repudiation
- explain when and how the doctrine of election is applicable

### LEARNING MATERIAL

#### CHAPTER 3: TESTATE SUCCESSION – GENERAL RULES

In this chapter, the general rules behind testate succession are explained. A will is a certain type of document that has to adhere to basic rules before it can even begin to be drafted or formally executed. These rules include, for example, that the testator must have the free will to make a will and that he or she must express his or her intention freely. In the next chapter, we will also see when a person qualifies to be a testator, but in this chapter we are first going to look at the type of document that constitutes a will and the testator’s free intention.



Study the following from **J&R**

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- **Par 3.1**
- **Par 3.2**

– In par 3.2.1 you will find four definitions of a will. You may **read** definitions 1, 2 and 3 but **study** definition 4.

- **Study “Definition 4” of a will** (Definition 4 is the most comprehensive definition and you therefore have to know this definition.)
- **Par 3.3–3.5**
- **Par 3.6**

## CONTENT OF THIS CHAPTER

### 1. Par 3.1 INTRODUCTION, Par 3.2 WILLS, CODICILS AND TESTAMENTARY WRITINGS, Par 3.3 JOINT AND MUTUAL WILLS

#### CASES: Study

- *Spies v Smith* 1957 (1) SA 539 (A)
- *Kirsten v Bailey* 1976 (4) SA 108 (C)

These paragraphs explain what a will is and give you several possible definitions. Read through all the definitions, but make sure that you know “Definition 4” in par 3.2.1. The difference between joint and mutual wills is also explained.

Note that a testator must have the intention to make a will for the will to be valid. Furthermore, he or she must exercise his or her intention freely without influence or duress from someone else (see *Spies v Smith* 1957 (1) SA 539 (A) and *Kirsten v Bailey* 1976 (4) SA 108 (C) in this regard). These are basic pre-requisites for any will to exist and must be considered when one is faced with a will that, on the face of it (*prima facie*), looks formally valid. See Chapter 5 on the formalities required for a will to be formally valid.

### 2. Par 3.4 ADIATION AND REPUDIATION

No beneficiary is obliged to accept any benefit in terms of a will. He or she may either accept (adiate) or refuse (repudiate) such a benefit. Make sure that you know the rules relating to adiation and repudiation and refer back to learning unit 2 on intestate succession in this regard. Also study the “Example of devolution of a repudiated benefit” just below table 3.3.

### 3. Par 3.5 DOCTRINE OF ELECTION

Take note that the doctrine of election applies only if a burden is placed on a beneficiary. It does not refer to the normal case where a beneficiary simply has to decide whether he/she is going to adiate or repudiate a benefit.

### 4. Par 3.6 CUSTOMARY LAW OF SUCCESSION

Note that anyone may make a will and that a person who regards himself or herself as being subject to customary law may also make a will. This will is then subject to the rules of succession and the Wills Act, just like any other will.



## Activity

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While on a business trip, Tsepo meets Yandi and has an affair with her. She threatens to tell his wife unless he makes a will leaving his entire estate to her. In order to prevent his wife from finding out about the affair, he decides to make a new will in which he bequeaths his entire estate to Yandi.

**What you have to do:** Discuss the validity of the will in light of the *animus testandi* requirement.

**Some guidelines before you start writing:** Study *animus testandi* and volition and take into account that the will was made under duress. The testator therefore did not have the necessary *animus testandi*. It may also be argued that, even if he did have the *animus* to make a will, he did not express his will freely and therefore the will is also invalid on this ground. Add a discussion of *Spies v Smith* 1957 (1) SA 539 (A) and *Kirsten v Bailey* 1976 (4) SA 108 (C).

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## SUMMARY

In this learning unit, we learnt what testate succession is and studied the general rules which apply in testate succession. To refresh your memory and to contribute to your understanding, do the following:

- Write notes on
  - adiation
  - repudiation
  - *animus testandi*
  - volition

This learning unit forms the basis of our further study of wills. We are now going to study a person's capacity to make a will.

# Learning unit 4

## Testamentary capacity

### OVERVIEW

In the previous chapter, we studied certain general principles or rules with regard to testate succession. Now that you have an idea of these rules, we are going to start studying the rules pertaining to wills in particular and we are going to start by looking at who may make a will. In legal terms, this is called a person's capacity to make a will, or **testamentary capacity**.

The purpose of this learning unit is to enable you to:

- distinguish between testamentary capacity and contractual capacity
- define testamentary capacity as defined in the Wills Act
- distinguish between testamentary capacity, freedom of testation, volition and *animus testandi*
- identify whether a testator had testamentary capacity when he or she executed a will

### LEARNING MATERIAL

#### CHAPTER 4: TESTAMENTARY CAPACITY



Study the following from *J&R*

- **Par 4.1–4.3**

- Note that under the RCLSA any person is free to make a will which will have to conform to the prescriptions of the Wills Act and the common law rules. We will study the RCLSA in chapter 15.

### CONTENT OF THIS CHAPTER

#### 1. Par 4.1 INTRODUCTION

Read the introductory paragraph attentively. This paragraph explains the difference between testamentary and legal capacity in brief. You have already studied the difference between these two important terms in Chapter 1. Please review those definitions.

## 2. Par 4.2 TESTAMENTARY CAPACITY

### CASES: Study

- *Spies v Smith* 1957 (1) SA 539 (A)
- *Kirsten v Bailey* 1976 (4) SA 108 (C)

Take careful note of the different prescribed ages for different competencies in the legal field:

- Testamentary capacity: 16 years old
- Contractual capacity: 18 years old
- Capacity to witness a will: 14 years old

(You will study a witness' capacity to witness a will in Chapter 5, but take note of the age difference here already.)

Par 4.2.3 describes the mental capabilities that form part of a testator's testamentary capacity. You have already studied two cases in this regard in Chapter 3 (*Spies v Smith* 1957 (1) SA 539 (A) and *Kirsten v Bailey* 1976 (4) SA 108 (C)). Read these cases again, and also see the discussion of *Katz v Katz* [2004] All SA (4) 545 (C) and *Smith v Strydom* 1953 (2) SA 799 (T).



### Activity

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While on holiday, Tsepo meets Yvonne and is involved in a holiday romance with her. He contracts malaria and ends up in hospital where he lies in a delirious stupor for three weeks. Yvonne visits him every day and, after his death, it transpires that, at some stage during these three weeks, he made a will leaving his entire estate to her.

**What you have to do:** You need to determine whether Tsepo had the necessary testamentary capacity needed to execute a valid will.

**Some guidelines before you start writing:** This will may be invalid on two grounds: Firstly, Tsepo may have been mentally incapable of appreciating the nature of his acts due to the delirium or due to the effect of drugs which he was given in hospital. He therefore did not have the necessary capacity to make the will. Secondly, even if he did have the capacity to make the will, it is possible that Yvonne influenced him to such an extent that the will no longer contained his own free will and is therefore invalid. See testamentary capacity, *Spies v Smith* 1957 (1) SA 539 (A) and *Kirsten v Bailey* 1976 (4) SA 108 (C), discussed in Chapter 3 and 4.

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## SUMMARY

In this learning unit we studied testamentary capacity and learnt that various ages are required for various legal acts. Although this is a rather brief learning unit, it is very important as one of the first questions asked when dealing with a will is whether the testator had the capacity to make such a will.

To refresh your memory and to contribute to your understanding, do the following:

- (a) Write down the different ages required for testamentary capacity, contractual capacity and capacity to witness a will.
- (b) Write notes on
  - testamentary capacity
  - mental capabilities
  - *animus testandi*
  - volition
- (c) Discuss
  - *Spies v Smith* 1957 (1) SA 539 (A)
  - *Kirsten v Bailey* 1976 (4) SA 108 (C)

In the next learning unit, we are going to study the formalities for a valid will.

# Learning unit 5

## Formalities for a will

### OVERVIEW

In the previous chapter we studied a person's capacity to make a will, or **testamentary capacity**. Once it is established that a person has the capacity to make a will, a will is drafted for him or her. This document must comply with certain requirements laid down by the Wills Act in order for it to be a valid will.

After the testator's death, such a will is handed in at the Master's office and the Master then determines whether or not the prescribed formalities were complied with. If the Master rejects the will as being formally invalid, the testator's beneficiaries have the option to approach the court for an order in terms of section 2(3) of the Wills Act ordering the Master to accept the will. The formalities and section 2(3) are discussed in this learning unit.

The purpose of this learning unit is to enable you to:

- know where the various parties involved in the execution of a will should attach their signatures
- explain where the "end" of a will is
- explain what constitutes a signature
- explain the attributes witnesses to a will have to exhibit
- be able to advise a client on the formalities required when executing a will
- be able to advise a client on the formalities required when executing a will if the client is unable to sign himself
- discuss the requirements for a certificate by a commissioner of oaths
- advise a client on the formalities required when an amendment is made to a will
- advise a client on the circumstances when an application in terms of section 2(3) can be brought
- discuss case law relevant to a section 2(3) application

### LEARNING MATERIAL

#### CHAPTER 5: FORMALITIES FOR A WILL

If you have a look at the example of a will in the introductory chapter (Basic Skills) in your textbook, you will see that the document contains various signatures. These signatures are made by the testator and witnesses during the formal legal process, called the "execution" of the will. The various requirements of this process are discussed in this chapter. Please note that the process contains a lot of detail that has to be followed to the letter in order for a will to be valid.



Study the following from *J&R*

• **Par 5.1–5.5**

## CONTENT OF THIS CHAPTER

### 1. **Par 5.1–5.5 INTRODUCTION – CUSTOMARY LAW OF SUCCESSION**

You have to study all these paragraphs in detail. The formalities for the execution of a will are very important as no will is valid if it does not comply with these prescribed formalities. These paragraphs explain in detail who must sign a will, where it must be signed, when it must be signed and how it must be signed.

#### **CASES: Study**

- *Back v Master of the Supreme Court* [1996] 2 All SA 161 (C)
- *Bekker v Naude* 2003 (5) SA 173 (SCA) (see *J&R*)
- *Ex parte Williams: In re Williams Estate* 2000 (4) SA 168 (T)
- *Kidwell v The Master* 1983 (1) SA 509 (E)
- *Radley v Stopforth* 1977 (2) SA 516 (A)

The formalities for executing a valid will are extremely important and very detailed. Remember that the Master will reject a will as being invalid if it does not comply with the formalities and this may result in the testator dying intestate. This, in turn, may mean that his/her estate will devolve in a manner that could be the total opposite of what he/she wanted. Ensure that you know every detail of who has to sign a will, where they have to sign, when they have to sign and so on.

Note that a commissioner of oaths has to be present when a testator makes a mark or when someone else signs on his/her behalf. The commissioner is not required when the testator signs with his own signature. Make sure that you know the extra formalities required when a testator signs with a mark or an *amanuensis* signs on his behalf.

Also note that the same formalities that are required for the **execution** of a will, are required when an **amendment** is made to a will. Study the definition of “amendment” and distinguish “amendment” from “rectification”. **Rectification** of a will can only be effected by a court where the will does not express the testator’s intention due to some error (see Chapter 13), while an amendment is effected by the testator him or herself.



#### **Activity**

The late Tom executed a will in 2001 that had been prepared for him by his attorney. In this will, Tom appointed his nephew Peter and his friend Ben as his heirs. When Tom executed this will he was recovering from a serious illness and was unable to write or sign his name, so his attorney’s secretary signed the will on behalf of Tom and on his direction. This was done in the presence of Tom’s friends Anna and Ben and they then signed the will next to the secretary’s signature. The next day Tom’s wife took the will to

a police station where a policeman wrote the following words on the will: **"I certify that this is the will of Tom."** The policeman then signed his name beneath this statement and stamped it with a rubber stamp that stated: **"P Chetty, Police Constable, Umbilo Police Station, Durban."**

**What you have to do:** Establish whether Tom's will had been validly executed. If not, explain how it should have been executed. Explain if there are any legal steps that Peter can take in order to inherit in terms of this document.

**Some guidelines before you start writing:** The will was not validly executed as the Act requires a commissioner of oaths to be present when the testator signs by making a mark or when someone signs on his behalf. The commissioner also did not state his office as "commissioner of oaths" on the will. In this regard you have to discuss *Radley v Stopforth* 1977 (2) SA 516 (A).

As to the second question (are there any legal steps Peter can take to inherit in terms of the document?): Peter can bring an application in the High Court in terms of section 2(3) of the Wills Act. In terms of section 2(3), the court is empowered to order the Master to accept a document as a valid will if the court is satisfied:

- (1) that a person drafted or executed the document,
- (2) who died in the meantime,
- (3) and who intended that document to be his will although it does not comply with all the formalities for the execution of wills.

You have to **discuss all three the above requirements** and the following cases:

- *Back v Master of the Supreme Court* [1996] 2 All SA 161 (C)
- *Ex parte Williams: In re Williams Estate* 2000 (4) SA 168 (T)
- *Bekker v Naude* 2003 (5) SA 173 (SCA) (This decision by the SCA is very important. See the discussion of this case in **J&R.**)

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## SUMMARY

In this learning unit, we studied the formalities for a will. The details of this learning unit are very important.

To refresh your memory and improve your understanding, do the following:

- Make a detailed list of the formalities required
  - when a testator signs his will with his own signature
  - when a testator signs by means of a mark
  - when someone signs on behalf of a testator.

In the next learning unit, we are going to study revocation and revival of wills.

# Learning unit 6

## Revocation and revival of wills

### OVERVIEW

In the previous learning unit, we studied the formalities for the validity of a will and for the amendment of a will. In this learning unit, we are going to study revocation and revival of wills. In this unit, you will see that the main difference between amendment and revocation of wills, legally speaking, is that revocation does not require any formalities. In contrast, the same formalities needed for execution of a will, have to be complied with when amending a will.

The purpose of this learning unit is to enable you to:

- recognise various methods of revoking a will
- discuss express revocation
- discuss implied or tacit revocation
- discuss the power of a court to declare a will to be revoked
- explain the presumptions regarding revocation
- explain if, when and how a revoked will may revive

### LEARNING MATERIAL

#### CHAPTER 6: REVOCATION AND REVIVAL OF WILLS



Study the following from *J&R*

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- **Par 6.1–6.3**
  - Ignore par 6.4
- **Par 6.5–6.7**

### CONTENT OF THIS CHAPTER

#### 1. Par 6.1 INTRODUCTION

In the Introduction, it is explained that a testator may revoke a will as he or she sees fit, as long as he or she has the intention of revoking the will and revokes the will in a legally recognised manner. There are only two exceptions to this rule, namely when massing has taken place (see Chapter 9) and in the case of an antenuptial contract.

## 2. Par 6.2 METHODS OF REVOKING A WILL

### CASE: Study

*Marais v The Master* 1984 (4) SA 288 (D)

This paragraph and its subparagraphs explain the various recognised methods of revoking a will. A testator who revokes a will in any of these ways does not have to comply with any formalities when revoking the will. It is also possible that a testator may revoke only a part of a will and, in such a case, his or her intention is important. If he/she intended to revoke a part of the will, no formalities are required, but if he/she intended to amend the will, he/she will have to comply with the formalities. Of course, if a court is faced with a will where it is unclear whether the testator intended an amendment or a partial revocation and no formalities appear, it is more likely that the court will find that the testator intended a partial revocation. The reason for this is that the court will rather follow an interpretation through which the will (or the amendment or revocation) can be regarded as valid than one through which it will be invalid.

An example of such a case is where a testator simply draws two lines through part of a will. In this case, it looks like an amendment which would need the testator's and two witness' signatures, but it could also be that the testator simply intended to revoke that part of the will, in which case no formalities are needed. The court will usually follow the latter approach.

## 3. Par 6.3 PRESUMPTIONS CONCERNING THE REVOCATION OF WILLS

The presumptions referred to in this paragraph are legal presumptions that have developed through the years to help the courts in reaching a decision. These presumptions are particularly important when it is known that a testator did have a will, but it cannot be found after his/her death – in other words, when the will appears to be lost.

## 4. Par 6.5 REVIVAL OF REVOKED WILLS

### CASE: Study

- *Moses v Abinader* 1951 (4) SA 537 (A)

If a testator revokes a will, that will cannot be revived automatically by revoking or destroying the revoking will. This scenario happens when a testator executes **Will number 1** and then revokes it by stating in **Will number 2** that he/she revokes **Will number 1**. Later on he/she decides that **Will number 1** is indeed the better of the two wills and revokes **Will number 2** by executing a document that simply states, "I hereby revoke Will number 2".

It is important to note that **Will number 1** will not automatically be in operation again after the testator's death (i.e. does not revive automatically) and, therefore, in these facts, the testator will die intestate! In order for **Will number 1** to indeed have effect again, it will have to be re-executed. The testator will therefore have to either re-execute **Will number 1** as it was *in toto* or he will have to incorporate it by reference into the document that revokes **Will number 2**. He/she will therefore have to state in this document: "I revoke

Will number 2 and declare Will number 1 to be my final will.” This reviving document will then have to comply with all testamentary formalities.

## 5. Par 6.6 REVOCATION BY THE COURT: SECTION 2A

Section 2A is very similar to section 2(3) in that a court may declare a will to be revoked in certain circumstances. This paragraph also explains when a court may declare a will to be partially revoked.

Please note the manner of reference to this section: Section 2**A** – i.e. the A is a capital letter.



### Activity

In the case of *Marais v The Master* 1984 (4) SA 288 (D), how did the particular testator attempt to revoke his or her will? What did the court decide in the above-mentioned case – was the will validly revoked? If section 2A of the Wills Act had been in operation when the *Marais* case was decided, would it have made a difference to the court’s decision?

**What you have to do:** Study *Marais v The Master* 1984 (4) SA 288 (D).

**Some guidelines before you start writing:** Remember that section 2A now empowers the court to declare a will, or part of it, to be revoked if the testator’s intention to revoke is apparent from the will *or from a separate document*. In the *Marais* case, the decision would have been the same had it taken place in current SA law as the testator’s intention to revoke was evident from another document.

## SUMMARY

In this learning unit we learnt that revocation of a will can be done without any formalities and that a revoked will does not revive automatically. We also learnt that a court can declare a will revoked or partially revoked in terms of the Wills Act.

- Re-read *Marais v The Master* 1984 (4) SA 288 (D) and *Moses v Abinader* 1951 (4) SA 537 (A) to refresh your memory.

In the next learning unit, we are going to study the beneficiaries’ capacity to inherit.

# Learning unit 7

## Capacity to inherit

### OVERVIEW

In the learning units up to now, we have dealt with the will and its formalities as well as with the amendment and revocation of wills. We are now going to study the beneficiaries' capacity to inherit, both in terms of intestate and testate succession.

The purpose of this learning unit is to enable you to:

- identify who will be disqualified from inheriting
- explain the position of adopted and illegitimate children, as well as that of persons of unsound mind
- explain when the unborn will be able to inherit in terms of a will
- distinguish between beneficiaries who may not inherit at all, those who may not inherit in terms of intestate succession, and those who may not inherit in terms of testate succession
- explain the position of beneficiaries who were involved in the execution of the will
- explain what happens to a beneficiary's benefit if he/she is disqualified from inheriting that benefit

### LEARNING MATERIAL

#### CHAPTER 7: CAPACITY TO INHERIT



Study the following from *J&R*

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- **Par 7.1–7.3**
- **Par 7.4: Study par 7.4.1**
  - **Ignore** par 7.4.1.1 to just before par 7.4.2
- **Par 7.4.2–7.4.4 & 7.5**

## CONTENT OF THIS CHAPTER

### 1. Par 7.1–7.3 INTRODUCTION – PERSONS CAPABLE OF INHERITING: JURISTIC PERSONS

#### CASE: Study

- *Harris v Assumed Administrator Estate MacGregor* 1987 (3) SA 563 (A)

Today, the fundamental principle is that any person, whether natural or juristic, whether born or unborn, may be a **beneficiary** under a will. Under common law, however, certain persons (for example murderers – see par 7.4.1) are disqualified from inheriting from a testator, while the Wills Act 7 of 1953 also excludes certain persons (for example, those involved in the execution process – see par 7.4.3) from succession. All these categories of persons are discussed and your attention is also drawn to the position of adopted, illegitimate and unborn children, as well as that of persons of unsound mind.

### 2. Par 7.4 PERSONS DISQUALIFIED FROM INHERITING

#### CASES: Study

- *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T)
- *Gafin v Kavin* 1980 (3) SA 1104 (W)
- *L. Taylor v A.E. Pim* (1903) 24 NLR 484
- *Casey v The Master* 1992 (4) SA 505 (N)

A person who intentionally caused the death of the deceased is incapable of inheriting any benefit in the estate of the deceased according to the maxim *De bloody hand er neemt geen erfenis* (The bloody hand does not inherit). Thus, a murderer is incapable of inheriting any benefit from his victim (see *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T)). This is a principle of our common law which is derived from Roman law.

It is not a general unworthiness to inherit which attaches to a murderer, however, but only an unworthiness to inherit from his victim and from certain persons very closely related to his victim. Note that “general unworthiness” means that a person is unworthy to inherit from anybody at any time.

The fact that a person murdered someone does not make him unworthy to inherit from every one – it affects only his ability to inherit from certain persons. A murderer is able to inherit from persons other than his victim and thus can inherit from his victim’s heir since the latter was not his victim. If, for example, B had murdered C, B will be able to inherit from C’s friend D, who had been appointed as heir in C’s will.

This means that if Christopher had appointed Daniel to be his heir, and Daniel had appointed Ben to be his heir, Ben will not be disqualified from inheriting from Daniel because he murdered Christopher. This will only apply where the three men are not related.

Where they are related, the following applies:

In the case of **intestate succession**: Where a person's grandfather dies when his/her father is already deceased, he/she will normally inherit by representing his/her father. However, if a person whose father is dead, **murders** his/her grandfather, the murderer cannot inherit from his/her grandfather by representing his/her (the murderer's) predeceased father, since the murderer would be inheriting from his/her grandfather, whom he/she killed. You should contrast this situation with that in the *Steenkamp* case.

In the case of **testate as well as intestate succession**: The *Steenkamp* case also lay down that a person who murdered the deceased's **parent, child or spouse** may not inherit from the deceased. The reason is that murdering the parent, child or spouse of the deceased is regarded as a grave wrong to the deceased himself/herself, as well as to the victim. However, the prohibition does **not** extend further than parent, child or spouse. A person who murdered the deceased's grandparent or brother or grandchild is **not** automatically excluded by it.

He or she will, however, be excluded if the result of the murder is directly to his or her benefit, for **the law will not permit a person to reap an unfair advantage from an illegal act**. There must, however, be a clear causal relationship between the crime and the advantage. In *Ex parte Steenkamp*, the court held that the test of a causal relationship should be the same as that applied for delictual liability. The test that the court applied was the test of a usual, natural or reasonably foreseeable result. In the *Steenkamp* case, such a causal relationship was held to be absent.

The case of a beneficiary who murders a testator, in other words, who causes the death deliberately or **intentionally**, must be distinguished from that of a beneficiary who **negligently** causes such a death. According to our common law, a person who has negligently caused the testator's death is also incompetent to inherit from him (see *Taylor v Pim* (1903) 24 NLR 484).

It would, however, appear as if an extra requirement has developed when the negligent killer's capacity to inherit is judged. Van der Walt and Sonnekus 1981 TSAR 30 submit that a negligent killer will be disqualified from inheriting from his or her victim only if his or her **conduct is also morally reprehensible or unacceptable**. This means that a child who negligently causes his mother's death in a traffic accident will not be affected, while a person such as in *Taylor v Pim* (1903) 24 NLR 484 will be unable to inherit. See also *Casey v The Master* 1992 (4) SA 505 (N).

The Wills Act provides that certain persons who are involved in the execution of a will are also disqualified from inheriting in terms of that will. Section 4A, however, makes provision for **exceptions** to this rule – study par 7.4.3 with regard to these exceptions.

### 3. Par 7.5 CUSTOMARY LAW

This paragraph discusses the capacity of certain persons to inherit according to customary rules. The rules under testate and intestate succession law discussed above apply to customary law too, subject to a few more principles which may have an influence. These influences are discussed in this paragraph.



## Activity

### Scenario (1)

Mr Tandikwe made a will in which he made the following provisions:

- "(1) I leave my beach house to my sister, Susan.  
 (4) My BMW motorcycle goes to my friend, Dallas.  
 (5) My house in Waterkloof, I leave to my adopted son, Greg.  
 (6) The residue of my estate, I leave to my children in equal shares.  
 (7) To my wife, Mrs Tandikwe, who cheated on me, I leave nothing."

Mr Tandikwe signed the will with his own signature and his sister Susan, and his friend, Dallas, signed the will as witnesses. Mr Tandikwe was murdered in 2009 by his adopted son, Greg. He is survived by his wife, Mrs Tandikwe, his adopted son Greg, and two biological children, Ben and Charlie.

### What you have to do:

- (a) Discuss the capacity of the following beneficiaries to inherit:
  - (i) Mr Tandikwe's sister, Susan and his friend, Dallas.
  - (ii) His adopted son, Greg.
  - (iii) His wife, Mrs Tandikwe.
- (b) Discuss any possible claim that Mrs Tandikwe may institute against Mr Tandikwe's estate. (You will only be able to answer this question once you have studied the surviving spouses claim for maintenance – see Chapter 8.)
- (c) If Dallas refuses to inherit the motorcycle, how will this benefit devolve?

### Some guidelines before you start writing:

- (a) The capacity of certain beneficiaries to inherit:

#### (i) Mr Tandikwe's sister, Susan and his friend, Dallas

In terms of section 4A(1) of the Wills Act, a witness to a will, or the person who is the spouse of such person at the time of the execution of the will, is disqualified from receiving any benefit under the will.

However, in terms of section 4A(2), the court may declare such person or his/her spouse competent to receive a benefit under a will if the court is satisfied that that person or his/her spouse did not **defraud or unduly influence** the testator in the execution of the will. Susan and Dallas will have to apply for a court order declaring that they did not unduly influence the testator before they will be able to inherit.

In terms of section 4A(2), a person or his/her spouse will also not be disqualified from receiving a benefit under the will if he/she **would have inherited intestate** had the testator died intestate. However, such a person or his/her spouse is not entitled to receive more than he/she would have received intestate. In this case, there are other intestate heirs and Susan will not be an intestate heir.

#### (ii) His adopted son, Greg

Although Greg's adoption does not exclude him from inheriting, as adopted children are treated as own children, a person who intentionally caused the death of the deceased is incapable of inheriting any benefit in the estate of the

deceased. Thus a murderer (Greg) is incapable of inheriting any benefit from his victim (Tandikwe).

It is not a general unworthiness which attaches to a murderer, however, but only an unworthiness to inherit from his victim and from a deceased person if he has murdered certain persons very closely related to the deceased. A person who has murdered the deceased's parent, child or spouse, may also not inherit from the deceased (see *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T)).

**(iii) His wife, Mrs Tandikwe**

She is not disqualified from inheriting (i.e. she has capacity to inherit), but she has been disowned and therefore cannot inherit anything.

Although the surviving spouse has been disowned, she has a claim for maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (see the discussion in Chapter 8).

The benefit will fall into the residue of the estate to be divided according to the will. The testator provided that the residue will go to "my children". In terms of section 2D, this phrase includes those alive, or already conceived at the time of Mr Tandikwe's death and born alive after his death. This means that the residue, including the motorcycle, will be divided between Ben and Charlie. Greg would have been included, since adopted children inherit the same as own children, had he not been disqualified because of the murder he committed.

**Scenario (2)**

Tandi, a widower, asked his daughter-in-law, Sally, who is a law student to draft a will for him. In the will he provides that his estate is to be divided in equal shares among his three children, Bongani, Charlie and Dillon. (Sally is married to Bongani.) His son Charlie is nominated as the executor of Tom's deceased estate. After Sally had typed the will, Tandi signed the will in the presence of all his children and Fred and Gina. Fred and Gina then signed the will as witnesses. Gina is married to Tandi's son, Dillon and Fred is a friend of Tandi's.

**What you have to do:**

Answer the following questions:

- (a) Did the testator execute a valid will?
- (b) Will Bongani be able to inherit in terms of the will without further ado?
- (c) Will Charlie be able to inherit in terms of the will without further ado?
- (d) Will Dillon be able to inherit in terms of the will?

**Some guidelines before you start writing:**

- (a) Study Chapter 5 and determine whether the will is valid. Give reasons for your answer.
- (b) Bongani will be able to inherit, because he was not personally involved in the execution of the will. The fact that he was present is irrelevant as he did not sign the will in any capacity.
- (c) Charlie was not involved in the execution of the will despite his presence and he will, therefore, be able to inherit and act as executor of the estate. Had he signed as a witness to the will, or been involved in the execution in any other capacity, he would have been disqualified from receiving any benefit, such as acting as executor. [Note that the will would still have been valid, had he signed as witness, but he would have been disqualified from inheriting or receiving any benefit (such as the executorship).]

- (d) As Dillon is married to one of the witnesses, he will be disqualified from inheriting, unless one of the exceptions of section 4A of the Wills Act applies. In this case, he will automatically be able to inherit, but he will not inherit more than he would have inherited in terms of the law of intestate succession. He may also apply to the court for an order declaring that he did not unduly influence the testator, in which case he will be entitled to his full share as provided for in the will.
- .....

## SUMMARY

In this learning unit we saw that beneficiaries mentioned in a will or determined by the law of intestate succession may sometimes be disqualified from inheriting. It is important to note that this is not a general unworthiness. Carefully study the rules regarding unworthiness, both when intestate succession and testate succession apply.

In order to refresh your memory, make a list of circumstances in which beneficiaries will be disqualified and be sure to distinguish between intestate and testate succession.

In the next learning unit, we are going to study a testator's freedom of testation.

# Learning unit 8

## Freedom of testation

### OVERVIEW

In this learning unit, freedom of testation is discussed.

Before you begin to study this learning unit, you must ensure that you have studied the learning unit on **testamentary capacity** – the unit which deals with the capacity of a person to make a will. You will remember that testamentary capacity is a prerequisite for making a will. Testamentary capacity should not be confused with **freedom of testation** which refers to the freedom of a person to make any provision he or she wants to make in a will and the right to have his or her estate divided in whatever manner he or she wishes.

The purpose of this learning unit is to enable you to:

- explain the principle “freedom of testation”
- discuss the recognition of the principle of *voluntas testatoris servanda est* in South African law
- explain the limitations on freedom of testation
- explain whether a testator may disinherit close relatives such as a spouse or children
- discuss *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) with reference to the courts’ power to change the provisions of a will based on its common law power not to enforce conditions in a will that are seen as *contra bonos mores*
- discuss *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) to illustrate how the Constitution could have a direct impact on a testator’s freedom of testation
- discuss *Levy v Schwartz* 1948 (4) SA 930 (W), *Ex parte Swanevelder* 1949 (1) SA 733 (O) and *Barclays Bank DC & O v Anderson* 1959 (2) SA 478 (T) with reference to the validity of conditions in a will that interfere with a beneficiary’s marital relationship
- discuss *Aronson v Estate Hart* 1950 (1) SA 539 (A) with reference to the validity of so-called “faith clauses”
- discuss the validity of conditions which limit a beneficiary’s freedom of movement
- explain the maintenance claims that a child and a spouse may have against the estate of the deceased
- explain the meaning of the word “spouse” and “survivor” as used in the Maintenance of Surviving Spouses Act 27 of 1990 with reference to *Daniels v Campbell* 2004 (5) SA 331 (CC), *Hassam v Jacobs* 2009 (5) SA 572 (CC), *Volks v Robinson* 2005 5 SA 446 (CC) and the Civil Union Act 17 of 2006
- explain the meaning of the term “power of appointment” and explain when a testator may delegate his or her power of appointment
- apply the above principles to factual scenarios

# LEARNING MATERIAL

## CHAPTER 8: FREEDOM OF TESTATION



Study the following from *J&R*

- **Par 8.1–8.4**

## CONTENT OF THIS CHAPTER

### 1. Par 8.1 INTRODUCTION

The first paragraph explains the concept of freedom of testation and what that implies in practice. You will see that freedom of testation refers to the freedom that a person has to execute a valid will to govern the transmission and use of property and to regulate the activities and lives of others after his or her death. Some of the implications of this are that a testator may disinherit close relatives in favour of friends or acquaintances and that a Court may not change the binding clauses of a will, even if all the beneficiaries of the will agree to it.

### 2. Par 8.2 LIMITATIONS ON FREEDOM OF TESTATION

#### CASES: Study

- *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C)
- *Levy v Schwartz* 1948 (4) SA 930 (W)
- *Ex parte Swanevelder* 1949 (1) SA 733 (O)
- *Barclays Bank DC & O v Anderson* 1959 (2) SA 478 (T)
- *Aronson v Estate Hart* 1950 (1) SA 539 (A)
- *Daniels v Campbell* 2004 (5) SA 331 (CC)
- *Hassam v Jacobs* 2009 (5) SA 572 (CC) (discussed in this guide in Chapter 2)
- *Volks v Robinson* 2005 5 SA 446 (CC)

This paragraph discusses the limitations that exist in our law on freedom of testation. A distinction is drawn between statutory limitations, common law limitations, constitutional limitations and indirect limitations.

“Statutory limitations” refer to limitations imposed by statutory provisions, such as the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 which limits the duration of *fideicommissa* over immovable property.

“Common law limitations” refer to the fact that our Courts will not give effect to provisions in a will which is considered to be against public policy (*contra bonos mores*). Two examples of such provisions are discussed, namely conditions that interfere with a beneficiary’s marital relationship and conditions that limit a beneficiary’s freedom of movement.

“Constitutional limitations” refer to the fact that certain conditions in a will may be declared invalid (in effect limiting the testator’s freedom of testation) because it contravenes a provision of the Constitution, such as the provision that no person may be discriminated against unfairly. For example, should a person include a condition in his will that only persons of a certain race may inherit, the Courts may declare such a provision invalid. In this regard you should study *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C). This case is discussed in learning unit 11 (par 11.5).

The paragraph discussing indirect limitations on freedom of testation refers to the fact that maintenance claims of children and spouses against a deceased’s estate may indirectly limit a testator’s freedom of testation. Even though a testator may disinherit his or her children or spouse, they may still be entitled to claim maintenance from the deceased’s estate. One can therefore consider maintenance claims as imposing an indirect limitation on a testator’s freedom of testation.

An important development has taken place in case law over the last few years with regard to the interpretation of the word “spouse” and “survivor” when used in connection with the Maintenance of Surviving Spouses Act, as well as in regards to the Intestate Succession Act which is discussed in learning unit 2. Study the prescribed cases carefully. **In terms of case law, the words “spouse” and “survivor” are now interpreted to include a surviving partner to a Muslim marriage and a surviving partner in a same-sex life partnership.** However, at this point in time, a surviving partner in a heterosexual life partnership is not included. You should reflect on the fairness of this situation and form your own opinion after reading the relevant case law.

The Civil Union Act has also influenced the interpretation of the word “spouse”, since it provides that spouse may include a “civil union partner”.

### **3. Par 8.3 POWER OF APPOINTMENT**

#### **CASE: Study**

*Braun v Blann and Botha* 1984 (2) SA 850 (A)

This topic deals with the power of appointment. This refers to the power of a testator to appoint his or her beneficiaries (his or her testamentary power). You will note that the general rule is that testators must appoint their beneficiaries themselves. As a result, a provision in a will such as the following will not be valid: “My heirs will be whoever my friend John will decide my heirs must be”. This is an invalid delegation of his testamentary power and will not be given effect to.

There are certain exceptions to this general rule which are discussed in this paragraph. You should study these exceptions. Also note that *Braun v Blann and Botha* 1984 (2) SA 850 (A) should be studied in connection with the special power of appointment.

### **4. Par 8.4 CUSTOMARY LAW**

This paragraph looks at the relationship between customary law and freedom of testation. Take particular note of the “Pause for Reflection” box in par 8.4.



## Activity

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**Short scenario:** A testator made a will in which he provided that the residue of his estate should be held in trust. He further provided that the administrators of his estate are to use the income from the trust to provide bursaries for “Unisa students with limited or no means that are of European descent only”.

**What you have to do:** Fully discuss whether this provision will be given effect to by our Courts.

**Some guidelines before you start writing:** The question relates to freedom of testation and the circumstances when a court may interfere with the provisions made by a testator in a will. You will have to discuss relevant case law. You will then have to come to a conclusion as to the validity of this provision in the will and provide a reason for your opinion.

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## SUMMARY

In this learning unit you learnt that a testator has very wide freedom of testation but that the law imposes certain limitations on the testator’s freedom to appoint beneficiaries and to provide for the devolution of property after his or her death.

Do you know what these limitations are after studying this unit?

To refresh your memory and to contribute to your understanding, write a few notes on the following:

- what “freedom of testation” means
- the limitations that are imposed on freedom of testation
- the validity of conditions that interfere with a beneficiary’s marital relationship
- the surviving spouse’s claim for maintenance against a deceased estate
- the meaning of the word “spouse” with reference to recent case law
- the general rule with regard to the granting of power of appointment and the exceptions to this general rule

In the next learning unit, we deal with certain types of provisions that may be found in a will, namely absolute bequests, conditions, the modus and estate massing.

# Learning unit 9

## Content of wills – absolute bequests, conditions, the *modus* and estate massing

### OVERVIEW

In this learning unit the content of wills is discussed. In other words, the typical provisions one can expect in a will are analysed.

Before you begin to study this learning unit, you must ensure that you have first studied the learning unit on freedom of testation, which refers to the freedom of a person to make any provision he or she wants to make in a will, and the right to have his or her estate divided in whatever manner he or she wishes. Because testators in South African law enjoy almost unlimited freedom of testation, the content of wills may vary greatly.

The purpose of this learning unit is to enable you to:

- identify, name and define legal concepts/terms relevant to wills, such as absolute bequests, conditions, time clauses, *modus* and estate massing
- discuss the requirements and consequences of these legal concepts
- explain the moments of *dies cedit* and *dies venit* in connection with the vesting of rights
- explain the difference between a legacy and an inheritance and between a legatee and an heir
- discuss the difference between a time clause and a condition
- discuss the difference between a resolutive time clause and a suspensive time clause and between a resolutive condition and a suspensive condition
- distinguish between a condition and a *modus* and explain how a *modus* can manifest in a will
- explain a *nudum praeceptum* and its consequences
- explain estate massing and its consequences
- explain the doctrine of election and why it is relevant in estate massing
- discuss *Rhode v Stubbs* 2005 (5) SA 104 (SCA) with reference to estate massing

### LEARNING MATERIAL

#### **CHAPTER 9: CONTENT OF WILLS – ABSOLUTE BEQUESTS, CONDITIONS, THE MODUS AND ESTATE MASSING**



Study the following from *J&R*

- **Par 9.1–9.7**

**NB: Chapters 9, 10 and 11 cover the essence of testate succession and are therefore very important.** It is also important to understand the vesting of rights and the moments *dies cedit* and *dies venit* (see Chapter 1) as the types of bequests discussed in these chapters, go hand in hand with the vesting of beneficiaries' rights.

## CONTENT OF THIS CHAPTER

### 1. Par 9.1 INTRODUCTION

This paragraph explains that certain concepts which have recurred repeatedly in wills over many years have been identified by our courts and legal writers and the consequences of these concepts have been established. Therefore, when drafting a will, care should be taken when using terms such as “condition” or “usufruct” since these terms refer to specific concepts with a specific meaning in our law and specific consequences are attached to them.

### 2. Par 9.2 VESTING OF RIGHTS

#### CASE: Study

- *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A)

This paragraph deals with the vesting of a right. When a right vests in a person, that person becomes the holder of the right. It is also explained that in the law of succession, vesting consists of two moments, namely *dies cedit* and *dies venit*. It is very important that you understand the difference between these two moments and that you are able to apply these two moments to different situations. For example, you should be able to explain when a usufructuary gets a vested right or when *dies cedit* and *dies venit* takes place in a conditional bequest or in any other legal concept employed by a testator.

The effects of the vesting of a right are also discussed and should be studied carefully.

Also study *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A). In this case, the court explained the effect of the process of administration of estates on the passing of benefits to beneficiaries.

### 3. Par 9.3 BEQUESTS

Bequests are made in a will. A testator bequeaths a benefit to a **beneficiary**. A beneficiary may be either a **legatee** or an **heir**. The difference between these two types of beneficiaries is explained in this paragraph and should be studied. You should also be able to explain what is meant by the statement that “legacies enjoy preference over inheritances”. Furthermore, it is pointed out that the difference between heirs and legatees are important for the purpose of collation. Collation is discussed in chapter 12 and you will fully understand

this concept only after studying chapter 12. Remember to return to this chapter once you have studied chapter 12.

The terms “pre-legacy” and “residue of the estate” are discussed in par 9.3.1 and are very important for your study of the law of succession.

Par 9.3.1.1 discusses five situations when a legacy will fail. You should be able to mention **and** discuss these five situations and you should also be able to explain what will happen to the benefit involved in each case of failure of the legacy. The first situation in which a legacy will lapse or fail is called “ademption”. You should be able to recognise if, in a specific set of facts, ademption will take place and be able to discuss what the effect of such ademption will be. In other words, you should be able to explain what will happen to the benefit involved if ademption takes place.

A bequest may either be absolute or conditional. You should be able to recognise the different types from any given example. An unconditional bequest may also contain a time clause. A bequest that is dependent on whether an **uncertain**, future event takes place or not, is conditional. A bequest that is subject to a **certain**, future event (in the sense that it will certainly take place) is subject to a time clause.

Time clauses are discussed in par 9.3.1.2. Note that there are two types of time clauses, namely suspensive time clauses and terminative (or resolutive) time clauses. You should be able to distinguish between these two types of time clauses when they appear in a practical situation.

Conditional bequests are discussed in par 9.3.2. Once more, a distinction is made between suspensive and terminative (resolutive) conditions and you should be able to distinguish between these two types of conditions when they appear in a practical situation. You should be able to explain the effect of the different types of conditions on the vesting of the rights of each party involved.

**It should be noted that where a suspensive condition is present there must also be a corresponding resolutive condition somewhere.** This means that if a benefit is left to X on condition that he does not, for example, permanently leave the country (an uncertain future event), there must also be someone else specified who will receive the benefit if X does leave the country. In other words, there must be a gift over of the benefit to another person, for example Y. If there is no gift over, the condition is a *nudum praeceptum* and it will not be legally binding (see below). The bequest to X is subject to a resolutive condition, and the bequest to Y is subject to a corresponding suspensive condition. The provision that Y receives the benefit after X if X leaves the country is called a *fideicommissum* (see the next learning unit for more information on the *fideicommissum*).

#### **4. Par 9.4 NUDUM PRAECEPTUM**

As we have said above, if someone is prohibited from dealing with property in a certain way, the will must state who will receive the property if the prohibition is not complied with – there must be a valid gift over to someone else, otherwise the prohibition will be ineffective. You should be able to explain and give an example of what a *nudum praeceptum* or nude prohibition is.

## 5. Par 9.5 MODUS OR OBLIGATION

If a testator obliges a beneficiary to apply a bequest, or the proceeds of it, for a particular purpose, it is said that the bequest is subject to a *modus*. The important aspect of a *modus* to remember is that compliance with the *modus* does not affect the vesting of the beneficiary's rights. That is because a *modus* does not make the bequest conditional. The *modus* only imposes a personal obligation on the beneficiary to comply with the burden.

The reasons why a testator may impose a *modus* may vary. Generally, the objects of a *modus* may be threefold – they are discussed in par 9.5.1. Note that not all of them are enforceable in our law. Also note the difference between a *modus* and a suspensive condition on the one hand, and a *modus* and a terminative condition on the other hand (par 9.5.2).

## 6. Par 9.6 ESTATE MASSING

### CASE: Study

- *Rhode v Stubbs* 2005 (5) SA 104 (SCA)

Estate massing (also referred to as “massing”) is often found in wills in South Africa, particularly in joint or mutual wills of couples married in community of property. However, estate massing is not limited to such wills and the persons whose estates are “massed” for purposes of testamentary disposition need not be married to each other.

It is easiest to explain this concept by means of an example. An example of a provision in a will aimed at accomplishing massing is where a husband and wife provide that they leave their farm to their son with a right of usufruct to the surviving spouse. During their lifetimes, each spouse is the co-owner of half of the farm. However, in the will the first dying spouse disposes not only of his or her half of the farm, but of the whole farm. In other words, he or she also disposes of the surviving spouse's half share of the farm. By disposing of the whole farm, a portion of each of their estates is “massed”. In exchange for giving up his or her ownership over half of the farm, the surviving spouse receives a usufruct over the whole farm. For massing to take place in this situation, the surviving spouse must accept the benefit. That is, he or she must accept the usufruct over the farm in exchange for his or her half share of the farm. If the survivor refuses the usufruct and chooses (or elects) to keep his or her half share of the farm, massing will **not** be accomplished.

The three requirements for massing and the role that the doctrine of election plays in estate massing are discussed in par 9.6 and should be studied. In par 9.6.1 it is explained that estate massing can be effected by means of various legal institutions (such as usufruct, *fideicommissum* and trust) and that the rights of the beneficiaries will depend on the legal institution used.

In the past, common law determined that the ultimate beneficiaries were not entitled to claim any real rights in that part of the massed estate which the survivor had contributed. They had only personal rights against the survivor. If the survivor was sequestered after having accepted benefits under the will creating the estate massing, the ultimate

beneficiaries had only concurrent claims in the property contributed by the survivor. The legislature was of the opinion that this was an unsatisfactory state of affairs and therefore introduced section 37 of the Administration of Estates Act to regulate estate massing and its legal effects. This section is discussed in par 9.6.2.

The consequences of massing are discussed in par 9.6.3 and should be studied carefully.

You should also study *Rhode v Stubbs* 2005 (5) SA 104 (SCA) and be able to explain its importance for the law of succession. Since this case is not in the prescribed case book, we will discuss it briefly. **You need not memorise the facts of the case, but you should be able to discuss the importance of the decision for the law of succession.**

Note that this decision emphasises that there is a **presumption against massing**. The facts of this case provide an interesting example of the difficulty in establishing whether, in a specific instance, massing took place or not.

### ***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 Mentoore (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. 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 Lettie (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 there was no massing in the first place, 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 herself, or also with regard to the other testator. 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* 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.

To summarise, the importance of this case for the law of succession is the following:

- 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/herself of his/her power to make a will, but if there is any uncertainty about his/her 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.
- For massing to take place, it is necessary for one testator to dispose of either 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.



### Activity

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#### Short scenario:

Testator T provides as follows in his will:

I leave my farm to my daughter, Daisy, but should she leave South Africa permanently within the next 5 years, the farm must go to my son, John.

#### What you have to do:

- Identify the concept (type of condition or time clause) and discuss the rights and duties of both the parties concerned.
- Answer the following question: If the testator had not provided that John must receive the farm should Daisy permanently leave South Africa, what would have happened to the farm in the event of Daisy emigrating within five years?

#### Some guidelines before you start writing:

The question relates to whether the testator imposed a condition or a time clause on the beneficiary/ies. To decide this, you have to ask whether Daisy's emigrating is a certain or uncertain event. The rights and duties of both Daisy and John depend on whether this is a condition or a time clause.

As to the second question, namely what the situation would be if there were no gift over to John, you must refer back to the paragraph on a *nudum praeceptum*.

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## SUMMARY

In this learning unit, you learned that certain types of bequests have crystallised in the law of succession and have become known by certain names. Through time, certain consequences have also been attached to these concepts. Some of these concepts include conditions, time clauses, and *modus*.

Can you explain what the consequences of these concepts are on the vesting of the rights of the beneficiaries involved?

You have also learnt that estate massing can take place in certain specified circumstances. Can you recall what the provisions of section 37 of the Administration of Estates Act provide in regard to the consequences of massing?

To refresh your memory and to contribute to your understanding, do the following:

(a) Write a few notes on:

- an absolute bequest
- a condition
- a time clause
- a *modus*
- estate massing
- a legatee
- an heir
- ademption
- *nudum praeceptum*

(b) Explain:

- What do *dies cedit* and *dies venit* mean?
- What effect does a suspensive condition have on the vesting of a beneficiary's rights?
- What does a beneficiary acquire at the death of a testator? (Refer to *Greenberg v Estate Greenberg*.)

(c) Write short paragraphs on:

- the difference between a condition and a time clause
- the difference between the terms "suspensive" and "resolutive" when used in the law of succession
- a *modus* and how it manifests (add a few examples)
- estate massing and its consequences
- the doctrine of election and how it is relevant in estate massing

(d) Discuss the importance of the decision in *Rhode v Stubbs* 2005 (5) SA 104 (SCA) with reference to estate massing.

In the next learning unit, we continue the discussion on the content of a will and deal with the following types of provisions that may be found in wills: substitution, usufruct and accrual.

# Learning unit 10

## Content of wills – substitution, usufruct and accrual

### OVERVIEW

In this learning unit, we continue the discussion on the content of a will and deal with substitution (which includes a discussion of the fideicommissum), usufruct and accrual.

Before you begin to study this learning unit, you must ensure that you have first studied the previous learning unit dealing with the vesting of rights, *dies cedit*, *dies venit*, conditions and a *nudum praeceptum*. You will not be able to understand the discussion in this learning unit if you do not have a thorough understanding of the concepts dealt with in the previous chapter. Also refer back to learning unit 8 to refresh your memory on a special power of appointment.

The purpose of this learning unit is to enable you to:

- identify, name, define, discuss and distinguish between legal concepts relevant to wills, such as direct substitution, fideicommissary substitution, usufruct and accrual
- explain when *dies cedit* and *dies venit* will occur for beneficiaries involved in a direct substitution, a fideicommissum and a usufruct
- explain when direct substitution *ex lege* will occur
- discuss the rights and duties of the parties involved in a fideicommissum
- recognise and discuss a fideicommissum *residui* and a fideicommissum *tacitum*
- discuss the consequences of a *si sine liberis decesserit* clause in a will and explain the decision in *Du Plessis v Strauss* 1988 (2) SA 105 (A) in this regard
- explain what a special power of appointment is and how it can find application in the context of a fideicommissum
- explain what was held in *Van Zyl v Van Zyl* 1951 (3) SA 288 (A) as regards the presumption against a fideicommissum that exists in our law
- discuss the provisions of section 6 of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 and how it impacts on fideicommissa created over immovable property
- explain the right to accrual and its consequences in the law of succession
- explain what is meant by a joinder *re*, joinder *re et verbis* and joinder *verbis tantum* and what the effect of these different forms of joinder are when deciding whether accrual should take place or not
- discuss the importance of *Lello v Dales* 1971 (2) SA 330 (A) for the right of accrual
- explain when accrual will be excluded by the operation of section 2C of the Wills Act

## LEARNING MATERIAL

### CHAPTER 10: CONTENT OF WILLS – SUBSTITUTION, USUFRUCT AND ACCRUAL



Study the following from *J&R*

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- Par 10.1–10.10

## CONTENT OF THIS CHAPTER

### 1. Par 10.1 INTRODUCTION

In the previous learning unit, we studied various legal concepts which a testator may include in the provisions of his or her will. We looked at a time clause, a condition and a *modus*. In this chapter we are going to study a further concept, namely substitution, which can take one of two forms: it can be either a direct or a fideicommissary substitution. We will also look at a usufruct and the common law right to accrual.

Study figure 10.1 which illustrate the different types of substitution.

### 2. Par 10.2 SUBSTITUTION

This paragraph explains the concept of substitution. You will note that substitution takes place when a testator appoints a beneficiary to inherit a benefit and, at the same time, appoints another beneficiary to take the place of the first-mentioned heir or legatee.

Two types of substitution may occur. First of all, substitution may take place where **one beneficiary is appointed as an alternative** for another beneficiary, in other words **either one beneficiary or the other** beneficiary inherit. This is called **direct substitution**. An example will be when a testator appoints John as his heir, but provides that if John predeceases him (the testator), then Peter must inherit. Either John or Peter will inherit. Once John has inherited, Peter no longer has any hope of inheriting.

The second type of substitution is called a **fideicommissary substitution**. In this case one beneficiary inherits, and then later on another beneficiary inherits the same benefit. In this case the **beneficiaries inherit one after the other**. An example of this type of substitution will be when a testator leaves his farm to his son and provides that the farm must go to his grandson after the son's death. The son inherits the farm and after the son's death the next beneficiary, the grandson, inherits as originally provided for in the testator's will.

**By using a fideicommissary substitution, one creates a legal concept called a fideicommissum.**

Please note that any condition or time clause may be added to a fideicommissum – in other words, a fideicommissum does not only apply if the testator provides for a gift over in the event of the first beneficiary's death. See the discussion below. This legal institution and the legal position of the parties involved will be dealt with in more detail later on.

### 3. Par 10.3 DIRECT SUBSTITUTION

#### Two types of direct substitution

The previous paragraphs explained what a direct substitution is and how it differs from a fideicommissary substitution. This paragraph explains that two types of direct substitution may occur. First of all, the testator may provide for it in his or her will – this is called **express direct substitution**. The reason why it is called **express direct substitution** is because the testator has expressly instituted it – it is not implied by law.

Secondly, direct substitution may be **implied** by law. This is referred to as **direct substitution ex lege** because it is read into a will by law – the testator did not include it expressly in his will. There is one instance of implied direct substitution (or direct substitution *ex lege*) in our law and this is created by section 2C of the Wills Act.

You should carefully study the discussion of section 2C in par 10.3.2. Unfortunately it is a rather difficult section and you should ensure that you fully understand the implications of sections 2C(1) and 2C(2). Read through the discussion in the textbook and then return to the current discussion. We will try to clarify these two subsections by giving some background information.

Note that these two subsections do not occur simultaneously. You must decide whether, in the particular facts involved, section 2C(1) is applicable or whether 2C(2) is applicable. Study the useful table (Table 10.1) which sets out the differences and commonalities between sections 2C(1) and 2C(2).

#### Reason for adoption of section 2C(1)

It might be easier for you to remember the differences if you keep in mind that the underlying principle or **rationale for section 2C(1) was to make it possible for a child to renounce (repudiate) his or her benefit under a will in order to benefit his or her surviving parent**. The legislature reasoned that, in many instances, children do not want to inherit from their first dying parent, but that they prefer that the surviving parent inherit everything. The reason for this may often be that a child is already a self-reliant adult with his/her own income while the surviving parent may be a pensioner with no steady income.

Before the advent of section 2C, if a child renounced his or her benefit, it was not necessarily the case that the surviving spouse would inherit that benefit. It would all have depended on the wording of the will. Therefore the legislature introduced section 2C(1) and provided that, if a child was nominated as a beneficiary in a will and the deceased's surviving spouse was also nominated in the will, then if the child renounces (repudiates) his or her benefit, the surviving spouse will inherit the child's benefit. It can be said that **statutory accrual**

takes place – the benefit that the child would have received accrues to the wife. (Accrual will be discussed in more detail later on in this learning unit.)

Note that it is only if the child **renounces** his or her benefit that section 2C(1) will be applied. **If the child is predeceased (died before the testator) or is disqualified from inheriting, then section 2C(1) is not applicable.** The section is also not applicable if the child is a minor or if the child is mentally ill. The reason for this is that the surviving spouse may unduly influence a minor child or a mentally ill child to renounce his or her benefit in favour of the spouse.

### **Reason for adoption of section 2C(2)**

**Section 2C(2)**, on the other hand, was introduced to make it possible for a beneficiary in a will, who must be a descendant of the testator, to be represented by his or her children if the beneficiary **dies before the testator, or if the beneficiary is disqualified** and cannot inherit from the testator. It can therefore be said that section 2C(2) provides for **statutory representation**.

Section 2C(2) can also apply where the descendant **renounces** or repudiates his or her benefit, but only if section 2C(1) is not applicable (in other words, if there is no surviving spouse who also benefits under the will).

If the descendant repudiates and there is a surviving spouse who was nominated in the will as a beneficiary, then **section 2C(1) excludes the working of section 2C(2)**. This means that if the descendant renounces or repudiates his or her benefit and there is a surviving spouse to whom the benefit can accrue, then the surviving spouse receives the benefit. However, if the descendant renounces or repudiates his or her benefit and there is no surviving spouse to whom the benefit can accrue, then the descendant will be represented by his or her children and they will receive the benefit in the descendant's place.

Also note that, although section 2C(2) is applicable where the beneficiary predeceases the testator, the **beneficiary must nevertheless have been alive when the will was made**. This is because the descendant may only be represented if he or she would have become entitled to a benefit if he or she survived the deceased. If the descendant died before the will was made, he or she would never have been entitled to a benefit under the will and therefore section 2C(2) will not be applicable.

### **Section 2C applies only to descendants**

It is also important to remember that where the beneficiaries involved are not descendants (but, for example, they are the brothers and sisters of the deceased) then section 2C is not applicable. This section applies only where the beneficiaries involved are descendants of the testator. Study the examples in par 10.3.2 carefully.

### **Direct substitution excludes accrual**

We will discuss the common law right to accrual later on in this learning unit. At this point in time, you should remember that express and implied direct substitution (in terms of section 2C) both exclude the application of the right to accrual.

## Section 2C is similar to section 1(6) and (7) of Intestate Succession Act

You might have noted the similarities between section 2C(1) and 2C(2) on the one hand and section 1(6) and 1(7) of the Intestate Succession Act on the other hand. (Section 1(6) and 1(7) is discussed in learning unit 2.) Section 1(6) and 1(7) apply where a deceased has died without a will, whereas section 2C(1) and 2C(2) is applicable where the deceased left a valid will.

### 4. Par 10.4 FIDEICOMMISSARY SUBSTITUTION (FIDEICOMMISSUM)

#### CASE: Study

- *Du Plessis v Strauss* 1988 (2) SA 105 (A)

This paragraph explains the working of a simple fideicommissum created by a fideicommissary substitution. The fideicommissum is a subject which can be studied extensively, but our discussion will be very elementary and limited to a few important aspects. We will focus on the fideicommissum *mortis causa* which is found in wills. (A fideicommissum can also be created *inter vivos* in contracts of purchase and sale, contracts of donation and antenuptial contracts.)

Fideicommissa may be divided into several subgroups, namely conditional fideicommissa, fideicommissa with the *si sine liberis* clause, and fideicommissa *residui*, each of which has its own rules. All of them, however, share the common **characteristic of a succession of owners**.

A broad distinction is drawn between fideicommissa that are created expressly by a testator in his or her will (par 10.4.1.1) and fideicommissa that are implied by law (par 10.4.1.2).

Paragraph 10.4.1.1 discusses conditional fideicommissa, which can be subdivided into a fideicommissum *conditionale* (a fideicommissum coupled with a condition) and a fideicommissum *in diem* (a fideicommissum coupled to a time clause). An example of a fideicommissum *conditionale* is the following:

“I leave my farm to my wife. If she should remarry, the farm is to go to my son.”

We are here concerned with a condition, since the possible remarriage of the testator’s wife is an uncertain future event. In other words, the second beneficiary, the fideicommissary, cannot be certain whether he will ever become the owner of the property. This will depend on whether the fiduciary’s (i.e. the wife’s) ownership is terminated by the fulfilment of the fideicommissary condition. Neither *dies cedit* nor *dies venit* arrives for the fideicommissary until this condition is fulfilled. At the same time, the fiduciary has ownership, which continues unless the condition is fulfilled – that is, from the fiduciary’s point of view he/she has ownership subject to a resolutive or terminative condition.

In most cases, however, a fideicommissary bequest will take the following form (for example):

“I leave my farm to my son, Andrew. On his death (after mine) it is to go to his eldest son, Ben.”

*Prima facie* there is no condition, since it is certain that Andrew will die. There is, however, also a hidden condition in this provision. There is namely a **tacit condition of survivorship; in other words, the fideicommissary has to be alive when the day arrives when the fideicommissary property has to be handed over to him or her.**

Par 10.4.1.1.2 discusses a fideicommissum where the fiduciary is granted a **special power of appointment**. Refer back to learning unit 8 to refresh your memory on the power of appointment.

Par 10.4.1.1.3 discusses a **fideicommissum residui**. You will note that the fideicommissum *residui* constitutes an exception to the general rule that the fiduciary may not alienate the fideicommissary property. In this type of fideicommissum, the **fiduciary may alienate ¾ of the fideicommissary property during his or her lifetime**. The fideicommissum only relates to that part of the property which the fiduciary leaves unconsumed and unalienated.

Sometimes a fideicommissum is read into a will, even though the testator has not expressly provided for it. This is called a **tacit or implied fideicommissum** and it is discussed in par 10.4.1.2. A tacit fideicommissum can be created by the introduction of a ***si sine liberis decesserit*-clause** in a will (see par 10.4.1.2.1 and 10.4.1.2.2). Study *Du Plessis v Strauss* 1988 (2) SA 105 (A) in conjunction with these paragraphs.

## **5. Par 10.5 STATUTORY RESTRICTION ON THE FIDEICOMMISSUM**

It is possible to impose a fideicommissum into infinity (*ad infinitum*). Hence a testator may, for example, provide:

“I leave my farm to my son. On his death it is to go to his eldest son. On his death it is to go to his eldest son, and so on, forever and ever.”

Until the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 was passed, this type of bequest would have been completely valid and binding. This was radically changed by Act 94 of 1965, which effectively **restricts all fideicommissa of immovables to a maximum of two substitutions** after the original fiduciary has become owner. Note that this Act **applies only to immovable property (e.g. land or a home)**, and does not apply to movables (e.g. a car, jewellery, or a piano). A testator may therefore leave jewellery to his wife and impose an obligation on her to pass it on to her daughter, who must pass it on to her daughter, who must pass it on to her daughter and so on, forever and ever.

## **6. Par 10.6 LEGAL POSITIONS OF THE PARTIES TO A FIDEICOMMISSUM**

Study the legal positions of the parties by referring to Table 10.2. The legal position of the parties can be understood only if one keeps in mind the **nature of the bequest: there is a succession of owners and ownership is conditional**. The first owner (fiduciary) may therefore not alienate or destroy the property; the second owner (fideicommissary) does not have a vested right to inherit whilst the fiduciary is alive, since he or she has to survive the fiduciary before vesting will take place.

## 7. Par 10.7 PRESUMPTION AGAINST FIDEICOMMISSUM

### CASE: Study

- *Van Zyl v Van Zyl* 1951 (3) SA 288 (A)

The nature of fideicommissa is **burdensome**, since they limit the ownership of the fiduciary as well as that of all the fideicommissaries except that of the eventual (last) one. For this reason, our common law is not in favour of fideicommissa which it considers as placing unnecessary burdens on the beneficiaries of a testator. A presumption against fideicommissary substitution consequently developed, but it must be noted that this presumption exists only where there is doubt as to whether a testator intended direct or fideicommissary substitution. It does not exist where there is doubt as to whether he/she intended a fideicommissum or a usufruct as both are equally burdensome on the beneficiaries (see the discussion below).

Study *Van Zyl v Van Zyl* 1951 (3) SA 288 (A) on this topic.

## 8. Par 10.8 USUSFRUCT

A usufruct is a **personal servitude (i.e. a limited real right)** and occurs where a testator bequeaths ownership of a thing to one person (the *dominus* or “remainder man”), and the right to use the thing, to take its fruits and to enjoy the thing, to someone else (the usufructuary).

A straightforward example is:

“I leave my farm to my son. However, my wife is to have the lifelong usufruct of the farm.”

In this case the son gets a vested right to the farm (*dies cedit*) – he is entitled to the ownership. However, he is not entitled to enjoy the farm (e.g. keep cattle on it) – *dies venit* is postponed – until the testator’s wife dies. If the son dies while the testator’s wife is still alive, the ownership of the farm will pass to the son’s heirs. The son’s ownership is unconditional, although it is bare ownership – bare of the right of enjoyment – *nudum dominium*.

For the testator’s wife, *dies cedit* and *dies venit* occur on the death of the testator in respect of the limited real right. She gets a vested right in the usufruct over the farm (although the farm belongs to someone else – ownership rests in someone else), and she also gets the right to use the fruits of, and to enjoy, the farm until her death.

Study par 10.8.1 “Influence on *dies cedit* and *dies venit*” carefully. Also study par 10.8.2 detailing the difference between a usufruct and a *fideicommissum*. Remember that the usufructuary, in contrast to a *fideicommissarius*, never obtains ownership of the property involved.

## 9. Par 10.9 COMMON LAW ACCRUAL

### CASE: Study

- *Lello v Dales* 1971 (2) SA 330 (A)

The common law right of accrual (*ius accrescendi, reg van aanwas*) 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.

An uncomplicated example is:

“I leave my farm to A and B.”

If A should predecease the testator, B will inherit the farm unless a contrary intention is apparent from the will. The farm consequently accrues to B.

Study par 10.9 in detail. Note the specific circumstances when accrual might be applicable.

Take note of the fact that **substitution** (both express and implied) will **exclude** the application of **the right to accrual**. (Refer back to par 10.3 above in this regard.) In other words, if the testator provided for a substitute to inherit should the first beneficiary not be able to inherit, or if substitution is implied by law, then accrual cannot take place between the co-beneficiaries, but the substitute will inherit. Study the examples given in par 10.9. Also note what will happen to the benefit where the right to accrual does not operate.

Study par 10.9.1 and note that the primary question is always whether the testator intended accrual to take place or not. Where the testator did not make his or her intention quite clear, the law must decide whether or not accrual will take place. To do this, the law relies on certain guidelines or indications (in the language of the will itself or in the surrounding circumstances) which help to establish in each case what the testator's probable intention was, or would have been had he or she thought about the problem. These guidelines are discussed in par 10.9.2 and should be studied. **It should be emphasised that these guidelines can serve only to indicate the probable intention of the testator – they are not absolute rules which explicitly dictate whether accrual should take place or not.**

You will note that the most important indication is **the wording** which the testator used in appointing the beneficiaries in his or her will. Where the testator **joined together the bequests to various beneficiaries in some way**, the manner in which the interests were joined can indicate whether the testator intended accrual to take place or not. There are basically three possible ways in which bequests to beneficiaries may be joined together, and these are called joinder *re*, joinder *re et verbis*, and joinder *verbis tantum*.

Study the effect of these joinders on the right to accrual as discussed in par 10.9.2. Also study the case of *Lello v Dales* 1971 (2) SA 330 (A) in conjunction with this paragraph.

## 10. Par 10.10 CUSTOMARY LAW

Take particular note of the question re Constitutionality in the “Pause for Reflection” box under par 10.10.



### Activity

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#### Short scenario (1):

The following provisions appear in three different wills:

- (a) “I bequeath the residue of my estate to my wife and children in equal shares.”

Son Abraham (an adult) repudiates his benefit. Abraham has a son Izak.

- (b) “I bequeath my house to my son Abraham and wife Venetia.”

Abraham (an adult) is disqualified from inheriting. Abraham has a son Izak.

- (c) “I bequeath R10 000 to my son Abraham and R10 000 to my wife Venetia.”

Abraham (an adult) repudiates his benefit. Abraham has a son Izak.

**What you have to do:** Discuss the devolution of the testator’s assets in each of the provisions.

**Some guidelines before you start writing:** Section 2C(1) and (2) are relevant to these answers. Study these sections carefully to answer these questions and indicate which subsection is applicable in each case. Explain your reasons.

#### Short scenario (2):

A clause in a will stipulates as follows:

“I leave my house to my son Xanor. If he dies childless, the house must go to my daughter Yolandi.”

**What you have to do:** With reference to case law, discuss the question whether a *tacit fideicommissum* is created in favour of Xanor’s children, should he have any.

**Some guidelines before you start writing:** Study the decision of *Du Plessis v Strauss* 1988 (2) SA 105 (A) and the discussion in chapter 10. Give a short summary of the facts and discuss the decision.

.....

## SUMMARY

In this learning unit, we further discussed the content of a will and dealt with direct substitution and fideicommissary substitution (including the fideicommissum), usufruct and accrual.

In the next learning unit, we continue the discussion on the content of a will and focus on trusts.

# Learning unit 11

## Content of wills – trusts

### OVERVIEW

In the previous chapters, we studied certain legal concepts that may appear in wills, such as conditions, fideicommissa and usufructs. In this chapter, we are going to study the trust, which differs considerably from the concepts studied so far. One reason for the difference is that the concept of a trust originated in Germanic law but underwent extensive development in English law before it was accepted into our law. Another reason is that trusts are regulated by legislation, as opposed to the other concepts which are regulated by common law. Consequently, the principles of trusts are clearly set out and we are able to study them in the relevant legislation.

You will notice in this chapter that the emphasis has shifted from identifying a concept and achieving a basic understanding of the different concepts, to studying the principles of trusts and the rights and duties of the parties involved in a trust. The rationale for this is that it is easy to identify a trust in a will and that one then has to apply the relevant legislation.

The purpose of this learning unit is to enable you to:

- define the following concepts:
  - a trust *mortis causa*
  - a trust *inter vivos*
  - a *bewind* trust
  - a trust as defined in the Trust Property Control Act
  - a trust for an impersonal purpose
- discuss the legal nature of a testamentary trust with reference to *Braun v Blann and Botha* 1984 (2) SA 850 (A)
- explain the differences between a trustee and a fiduciary
- name the anomalies where trusts are treated as juristic persons in legislation or by the courts, even though a trust does not have legal personality
- discuss the requirements for the establishment of a valid trust
- discuss when a testator may delegate his testamentary power (grant a power of appointment) to a trustee of a testamentary trust
- write a note on the influence of the Constitution on the freedom of testation of a testator when providing for a testamentary trust, with reference to *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C)
- identify and discuss the core elements of a trust
- discuss the nomination and appointment of trustees

- indicate when the Master will appoint a trustee
- discuss the duties of trustees
- write a note on the breach of the fiduciary duty of a trustee, explaining what the legal consequences thereof are
- discuss the powers of a trustee
- explain how and when a trustee's services may be terminated
- discuss the nomination and qualifications of a trust beneficiary
- discuss the rights of the different types of trust beneficiaries
- discuss the amendment or variation of trust provisions by the court
- explain how a trust may be terminated

## LEARNING MATERIAL

### CHAPTER 11: CONTENT OF WILLS – TRUSTS



Study the following from *J&R*

- **Par 11.1–11.2**
- **Par 11.3**
- **You do not have to study the long definition of a trust as provided in section 1 of the Trust Property Control Act. You can study the shorter version – the “summary” provided here and in chapter 1 (see the definitions table).**
- **Par 11.4–11.10**
  - Read par 11.11

## CONTENT OF THIS CHAPTER

### 1. Par 11.1 INTRODUCTION

This paragraph distinguishes between a testamentary trust (**trust *mortis causa***) and a trust made during the lifetime of the founder of the trust (**trust *inter vivos***). A few examples of how a trust can be used by a testator for the benefit of trust beneficiaries are also given. Lastly, the **treuhand principle** is explained – this principle is the basic idea behind the trust and it is very important that you understand it.

### 2. Par 11.2 BRIEF HISTORICAL PERSPECTIVE

This paragraph explains the origin and development of trust law from a historical perspective. Also refer back to the “Overview” above.

### 3. Par 11.3 DEFINING A TRUST

It is indicated that a trust can be understood as a wide or as a narrow concept. Figure 11.1 tabulates the difference between the trust in the wide and the narrow sense. In this module, we are concerned with a trust in the narrow sense and, more specifically, with a trust created in a will (trust *mortis causa*).

The testamentary trust is further divided between the ***bewind* trust** and the **ownership trust**. The most common form of testamentary trust is the ownership trust, where the ownership of the trust property is left to the trustee. In the *bewind* trust, on the other hand, the beneficiary receives the ownership of the trust property and the trustee only administers or controls the trust property.

You will note that the ownership trust is further delineated between a discretionary trust (where the trustee has the discretion to appoint the beneficiaries from a certain group) and a non-discretionary trust where the trust beneficiaries and their respective benefits are determined in the trust instrument (the will).

#### 4. Par 11.4 LEGAL NATURE OF THE TESTAMENTARY TRUST

##### CASE: Study

- *Braun v Blann and Botha* 1984 (2) SA 850 (A)

This paragraph explains that, although the **trust is fiduciary in nature** in that the trustee has a fiduciary duty towards the beneficiaries, it is not a *fideicommissum* but **a *sui generis* legal concept**, that is, a separate legal concept with its own set of rules. Study the differences between a trustee and a fiduciary in Table 11.1.

The trust is also **not a juristic person**, although it is sometimes treated as such by the legislature and even in case law. Study *Braun v Blann and Botha* 1984 (2) SA 850 (A) in connection with this topic. Also study the anomalies mentioned by De Waal 1993 *THRHR* 1 where trusts are treated as juristic persons in legislation or by the courts, even though a trust does not have legal personality (see the Counter Point box on p181).

#### 5. Par 11.5 REQUIREMENTS (OR *ESSENTIALIA*) FOR THE CREATION OF A VALID TRUST

##### CASES: Study

- *Braun v Blann and Botha* 1984 (2) SA 850 (A)
- *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C)

Study the requirements for the creation of a trust carefully. You will note that there are six requirements, namely that:

- (1) The trust founder (that is the testator) must have intended to create a trust.
- (2) This intention must have been expressed in a manner that created a binding obligation to create a trust – precatory words are not sufficient.
- (3) Since the trust *mortis causa* is created in a will, the formalities for a will must have been complied with.
- (4) The trust property must be clearly identified.
- (5) The trust object or purpose must be clear.
- (6) The trust object must be lawful.

As regards the requirement that the **trust object must be clear**, study *Braun v Blann and Botha* 1984 (2) SA 850 (A) which held that a special power of appointment may be granted to a trustee.

As regards the requirement that the **trust object must be lawful**, study *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C). This case is discussed in par 8.2.2.

## 6. Par 11.6 CORE ELEMENTS OF A TRUST

This paragraph refers to those elements of a trust that explain the true nature and characteristics of a trust. **Study them carefully.**

## 7. Par 11.7 TRUSTEES

In paragraph 11.7.1, the appointment and authorisation of trustees is discussed. Note that trustees do not have a general power to appoint an additional trustee or a trustee in a vacant position. They may do so only if duly authorised to do so by the will or trust document. This power to appoint such a trustee, is called the **power of assumption**.

Par 11.7.2 discusses the trustees' duties and paragraph 11.7.3 discusses the breach of their fiduciary duty.

Paragraph 11.7.4 deals with the powers of a trustee and paragraph 11.7.3 discusses the termination of trusteeship. **These paragraphs are self-explanatory and should be studied in detail.**

## 8. Par 11.8 BENEFICIARIES

The next topic that is dealt with is the beneficiaries. Their nomination and qualification (par 11.8.1) and their rights (par 11.8.2) are dealt with. Once more, these paragraphs are self-explanatory and should be studied in detail.

## 9. Par 11.9 AMENDMENT OF TRUST PROVISIONS

### CASE: Study

- *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C)

The court has a limited power to vary trust provisions. It may amend trust provisions in terms of common law in very limited circumstances only (par 11.9.1). Also study *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C). In this regard refer back to par 11.5 and par 8.2.2.

The court may also vary trust provisions in terms of section 13 of the Trust Property Control Act, provided the circumstances fall within the specific provisions of the section (par 11.9.2).

The question whether a trustee may be granted the authority by the trust founder to amend the provisions of a trust, is addressed in par 11.9.3.

## 10. Par 11.10 TERMINATION OF A TRUST

Study the factors that can lead to the termination of a trust carefully.



## Activity

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### Short scenario (1):

- (a) "I hereby bequeath R20 000 to my trustee, Mr Xanadu. The income beneficiary is my wife Vinny during her lifetime. Upon her death, Mr Xanadu can decide who the capital beneficiary must be."
- (b) "I hereby bequeath R100 000 to my trustee Mr Xanadu. The income beneficiary is my wife Vinny until her death. Upon her death I empower Mr Xanadu to create a new trust upon such terms and governed by such constitution and for such period as he may deem fit."

**What you have to do:** Discuss the validity (or not) of the above clauses in a will.

**Some guidelines before you start writing:** The question relates to the delegation of testamentary power. Discuss the case of *Braun v Blann and Botha* 1984 (2) SA 850 (A).

### Short scenario (2):

- (a) "I bequeath the residue of my assets in trust to my trustee Mr Xanadu, to be applied as a bursary fund for needy white female nursing students."
- (b) "I bequeath R100 000 to my trustee, Mr Xanadu, in trust to be applied as a bursary fund to enable children of the ABC faith to attend an ABC day school."

**What you have to do:** Discuss the validity (or not) of the above clauses in a will.

**Some guidelines before you start writing:** Discuss the decision and importance of *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C).

.....

## SUMMARY

In this learning unit, we discussed the trust as a legal institution within the context of the law of succession (that is, the testamentary trust or trust *mortis causa*). We have seen that the trust figure has its own set of rules and that it is regulated by the Trust Property Control Act. This brings us to the end of the discussion on the content of wills.

In the next learning unit, we will discuss the common law concept of collation.

# Learning unit 12

## Collation

### OVERVIEW

In the previous three learning units, we studied the content of wills. In this learning unit we are going to look at a principle that may become relevant when an executor administers an estate (administration of estates is discussed in learning unit 16), namely the principle of collation. According to this principle the executor of an estate must under certain circumstances take benefits given to certain heirs by the deceased during his or her lifetime into account when distributing the estate among certain beneficiaries.

The purpose of this learning unit is to enable you to:

- explain collation
- indicate who must collate
- indicate who is entitled to collation
- indicate which benefits have to be collated

### LEARNING MATERIAL



Study the following from *J&R*

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- **Par 12.1–12.3**
  - Ignore par 12.4–12.5

### CONTENT OF THIS CHAPTER

#### 1. Par 12.1 INTRODUCTION

**Read** through **par 12.1**. From this paragraph, we expect you to **know** only the paragraph on p218, just before the example, starting with “The rationale behind collation ... scheme devised by the deceased for the devolution of his or her estate amongst his or her descendants” (middle of p218).

We do **not** expect you to be able to do a collation calculation, but work through the example in Table 12.1 at least once so that you understand how it works and what collation is all about.

## 2. Par 12.2 WHO PARTICIPATES IN COLLATION?

**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? The basic rule is that the obligation to collate rests on the deceased's **descendants** if they are **heirs** of the deceased, whether testate or intestate, provided that testate heirs are obliged to collate **only if they would have inherited *ab intestato*** from the deceased if the deceased had died intestate.

Who may benefit from collation? The only persons who are entitled to enforce collation are descendants who themselves have a duty to collate.

Study paragraph 12.2 and make sure that you understand the examples.

## 3. Par 12.3 WHAT BENEFITS ARE COLLATABLE?

**Study** the examples of benefits that have been identified as collatable and those that have been identified as not subject to collation.



### Activity

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Tsepo died in 2004 and left his entire estate in equal shares to his son, John, his daughter, Sally and his sister, Paula. During his lifetime, Tsepo gave R20 000 to John to start a computer business. Tsepo's sister, Paula, feels that she is not receiving a fair share of the estate.

**What you have to do:** Discuss the position with regard to collation in these facts.

**Some guidelines before you start writing:** You have to establish who are obliged to collate and what has to be collated. In this estate John, Sally and Paula are heirs of the estate as the entire estate has been left to them in equal shares. The deceased's descendants, if they are heirs, are obliged to collate, provided that testate heirs are obliged to collate only if they would have inherited *ab intestato* from the deceased if the deceased had died intestate. John is therefore obliged to collate as he received a benefit for the promotion of his occupation or business (one of the benefits which have to be collated). However, the only persons who are entitled to collation are descendants who themselves have a duty to collate. Paula, Tsepo's sister, is not a descendant and therefore has no duty to collate, nor any right to insist upon collation. The only person who may insist that John collate the R20 000 that he had received during Tsepo's lifetime, is Sally.

.....

## SUMMARY

In this learning unit, we have studied collation, a principle that is taken into account when an estate is divided.

In the next learning unit, we will look at how to interpret a will.

# Learning unit 13

## Interpretation of wills

### OVERVIEW

In this learning unit, we are going to study the interpretation of a will. As we have seen, a will is a unilateral legal act which consists of the testator's declaration of intention. After the testator's death it may become necessary to interpret his/her will if he/she did not express himself/herself clearly. The trouble is that the testator himself/herself is not available to explain what his/her exact intentions were. It is then the task of the court to interpret the will in order to determine the testator's intention as expressed in the words used in the will.

The purpose of this learning unit is to enable you to:

- know what the golden rule is when interpreting wills
- discuss the statutory rules of interpretation that may be relevant when interpreting a will
- explain the common law rules of interpretation used by the courts to interpret wills
- discuss the difference between armchair evidence and extrinsic evidence
- explain when a provision may be implied in a will
- mention the legal presumptions that a court may use when interpreting a will
- discuss the variation of wills
- explain the rectification of wills

### LEARNING MATERIAL



Study the following from *J&R*

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- **Par 13.1–13.7**

### CONTENT OF THIS CHAPTER

#### 1. Par 13.1 INTRODUCTION

Read the paragraph carefully.

## 2. Par 13.2 GOLDEN RULE

This paragraph explains the golden rule to follow when interpreting a will, as well as when one can deviate from such wording. The golden rule is to always find the testator's intention as expressed in the wording of the will. The ordinary meaning of the words may be deviated from if it is clear that the testator did not intend to use those words or had intended the words to mean something other than the ordinary meaning.

## 3. Par 13.3 STATUTORY RULES OF INTERPRETATION

The Law of Succession Amendment Act 43 of 1992 introduced a few rules of interpretation into the Wills Act. They are contained in section 2B and 2D.

Section 2B should be studied carefully. The effect of this section is that if a person dies within three months after his or her marriage was dissolved by a divorce or annulment, the previous spouse who was a beneficiary in his or her will, will be excluded from inheriting under the will. This exclusion of the previous spouse is only for a period of three months. The rationale for this provision is that a testator should have a grace period after a divorce or an annulment in which to change his or her will and to remove the ex-spouse as a beneficiary. If the will is not changed in this period, the previous spouse will be entitled to inherit under the will after the three months are over.

Also study section 2D. The effect of section 2D(1)(a) and (b) is to wipe out any distinction between the right to inherit of biological and adopted children and children born out of wedlock. Section 2D(d) deals with bequests to a class of beneficiaries and unborn children. Study in detail.

## 4. Par 13.4 COMMON LAW RULES OF INTERPRETATION

In par 13.4.1–13.4.5 the principles that are to be followed when interpreting a will are discussed. Memorise these principles. Ensure that you know what armchair evidence and extrinsic evidence are and what the difference between them is. You should also know when they can be used to interpret a will. Memorise the legal presumptions that may be used when interpreting a will.

## 5. Par 13.5 VARIATION OF WILLS

As a general rule, a court may not vary the provisions of a will but must give effect to the intention of the testator. However, our courts have in the past allowed the variation of a will in specific circumstances which are discussed in this paragraph.

## 6. Par 13.6 RECTIFICATION OF WILLS

### CASE: Study

- *Rens v Esselen* 1957 (4) SA 8 (T)

The rectification of a will should not be confused with the variation of a will. When a will is rectified, it means that a mistake is corrected **by the court**. A distinction is drawn between three types of rectification: correction of clerical mistakes, the insertion of words that

were left out by mistake and the deletion of words that were inserted by mistake. Take note of what will have to be proved before a rectification will be allowed by the court.

## 7. Par 13.7 CUSTOMARY LAW

The same rules of interpretation may apply to certain wills of testators living under customary law. The practical situation may, however, differ and our courts' ruling in these situations is still awaited.



### Activity

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With reference to case law, write a note in which you discuss the difference between variation and rectification of wills.

**What you have to do:** Study the principles relating to rectification and variation carefully.

**Some guidelines before you start writing:** Remember that rectification can be done only by a court and that variation has certain formalities attached. Now write your note and include a discussion of *Rens v Esselen* 1957 (4) SA 8 (T).

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## SUMMARY

In this learning unit, the interpretation, variation and rectification of a will were discussed. In the next learning unit, the topic for discussion is succession by contract, in other words by means of a bilateral juristic act.

# Learning unit 14

## Succession by contract (*pactum successorium*)

### OVERVIEW

In the previous learning unit, we discussed the interpretation of wills. In this learning unit we are going to look at succession by virtue of an agreement or a contract. Such a contract is known as a *pactum successorium*.

The purpose of this learning unit is to enable you to:

- identify a *pactum successorium*
- explain why *pacta successoria* are generally not allowed in our law
- name the types of *pacta successoria* that are allowed in our law

### LEARNING MATERIAL

#### LEARNING UNIT 14: SUCCESSION BY CONTRACT (*pactum successorium*)



Study the following from *J&R*

You only need to READ this chapter very carefully for assignment purposes. You do not need to study it in detail for the examination, but **you do need to know the content of this study guide** in this regard.

Read the following:

- **Par 14.1–14.4**

### CONTENT OF THIS CHAPTER

**For purposes of the examination, you need know only the following information on succession by contract:**

As regards succession in terms of a contract, we must distinguish between two types of contract, namely a *pactum successorium* and a *donatio mortis causa*.

#### (a) **A *pactum successorium***

A *pactum successorium* is an agreement between two parties purporting to regulate the devolution of the estate (or part of it) of one or both of them after the death of such a party.

In general, *pacta successoria* are invalid in our law, for two reasons:

- (i) They restrict a person's freedom of testation.
- (ii) They evade the formality requirements for wills.

An exception is allowed, however, in that a *pactum successorium* in an antenuptial contract is valid (*Ex parte Executors Estate Everard* 1938 TPD 190).

### **(b) A *donatio mortis causa***

A *donatio mortis causa* is a donation made in contemplation of the death of the donor.

Such a donation is valid in our law because it does not restrict the donor's freedom of testation since it may always be revoked before the donor's death.

However, it must be executed with the same formalities as required for a will in order to be valid.



#### Activity

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Read through Chapter 14 and make sure that you understand what a *pactum successorium* is. Study the few rules above.

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## SUMMARY

In this learning unit, succession by contract was briefly explored. In the next learning unit, we are going to take a closer look at the Reform of Customary Law of Succession Act.

# Learning unit 15

## Customary law and the Reform of Customary Law of Succession Act

### OVERVIEW

In the previous learning units, we have studied both intestate and testate succession and we have seen that the customary law is also recognised. In this unit, a closer look is taken at the Reform of Customary Law of Succession Act 11 of 2009, or RCLSA, which came into operation on 20 September 2010.

### LEARNING MATERIAL

We want you to gain an overview of the RCLSA. Study this chapter in order to gain insight into the provisions of the Act. Pay close attention to the definition of "descendant" in this Act.



Study the following from *J&R*

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- **Par 15.1–15.3**

### SUMMARY

The most important outcomes of the RCLSA are that anyone may make a will, regardless of the system that he or she is living under and that intestate succession takes place in terms of the Intestate Succession Act 81 of 1987 (refer back to Chapter 2).

In the next (and last) learning unit, we are going to study the process of the administration of estates.

# Learning unit 16

## Administration of estates

### OVERVIEW

In the previous learning units, we studied the law of intestate succession, testate succession, how to make a will and how to interpret a will. We also briefly looked at succession by virtue of a contract.

In this, the last learning unit, we are going to see what happens once the testator dies – in other words, we take a brief look at how his/her estate is administered, regardless of whether he/she died testate or intestate. You must also refer back to learning unit 12 on collation, since collation may be applicable when an estate is wound up.

The purpose of this learning unit is to enable you to:

- discuss the basic procedure for the administration of an estate
- discuss the duties of an executor when administering an estate

### LEARNING MATERIAL

We only want you to gain a basic knowledge of how the process of administration works and we therefore do not expect you to know more than the uniform rules of administration (see below).



Study the following from *J&R*

- **Par 16.1:** Study the first paragraph from “In South Africa ... and donations tax that should be kept in mind.”
  - Ignore the list of acts given after the first paragraph.
- **Study par 16.1 again after the list of acts,** from “The process of the administration or winding-up of estates starts the day the testator dies” until the end of the paragraph.
  - Ignore par 16.2

#### Also study the following:

- Par 16.3 Uniform Rules for the administration of deceased estates
- Par 16.3.1 Basic concepts of administration of estates
- Par 16.3.1.1 Estate
- Par 16.3.1.2 Executor

(If you have an older print of the textbook, note that the amount of the gross value of the estate in terms of section 18(3) has been amended to R250 000 and is no longer only R125 000.)

- Par 16.3.1.3 Master
- Par 16.3.2 The administration process
  - Ignore the rest of Chapter 16 – from par 16.3.3

## CONTENT OF THIS CHAPTER

### 1. Par 16.1 INTRODUCTION

You will note that the Administration of Estates Act 66 of 1965 deals with and regulates the administration of deceased estates. The **parties involved** are the executor who liquidates the estate and winds it up and the Master of the High Court who supervises the process.

### 2. Par 16.3 UNIFORM RULES FOR THE ADMINISTRATION OF DECEASED ESTATES

**Study par 16.3.1** which deals with the basic concepts of administration of estates.

After studying this paragraph, you should be able to:

- define what an estate is for purposes of the Administration of Estates Act

#### **Study par 16.3.1.2.**

After studying this paragraph, you should be able to:

- write a note on the position of executors
- explain how executors are nominated and appointed
- explain what powers executors have
- explain in what circumstances executors must provide security regarding the proper performance of their duties
- explain how executors are remunerated.

**Study par 16.3.1.3** which deals with the position of the Master and the calculation of the Master's fee that is payable in regard to certain estates.

**Study par 16.3.2** on the administration process.

After studying this paragraph, you should be able to:

- understand and know what the duties of the executor are in all three phases of the process of winding up the deceased estate
- explain what concepts such as "partial sale", "total sale", "taking over of the estate by the surviving spouse" and "redistribution agreement" means and when they may be used in the administration process



## Activity

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Answer the following questions on administration of estates:

- (a) What are the first steps which must be taken after a person dies and leaves assets?
- (b) Give a brief overview of an executor's functions pertaining to the administration of a deceased estate.
- (c) What does the expression "methods of liquidation" mean?
- (d) Name the five methods of liquidation and give a brief explanation of what each method entails.

These are only a few examples of questions from this learning unit. Ensure that you study all the paragraphs as indicated above.

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## SUMMARY

In this learning unit, we took a brief look at how a deceased estate is administered after the death of the testator.

# CONCLUSION

This concludes our study of the basic principles of the law of succession. We trust that you have enjoyed this module and we wish you best of luck with the rest of your studies.

Prof J Jamneck

Prof A Roos

Mr PO Matsemela