

ERF 222

Semester Test 2 Notes

2025

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Chapter 5

Formalities of a Will

Introduction

- Name the formalities as stated in the Wills Act(5)

According to section 2(1)(a)

- The will must be signed at the end thereof by the testator himself or herself, or an amanuensis – someone who signs the will on behalf of the testator.
- If the will comprises more than one page, every page other than the last must be signed anywhere on the page by the testator or the amanuensis.
- The signature of the testator or the amanuensis must be made (or acknowledged) in the presence of two or more competent witnesses.
- Such witnesses must attest and sign the will in the presence of the testator and each other, and (where applicable) of the amanuensis.(s2(1)(a)(ii))
- Where the testator signs with a mark, or an amanuensis signs for the testator, a commissioner of must be present and certification formalities apply.
- Extra Aspects in relation to 2(1)(a)(v), where a commissioner of oaths is needed(4)
 - The Commissioner of Oaths is present when the will is signed by T with a mark, or another person signs on T's behalf; and
 - The certificate concerned is made as soon as possible after the will has been signed
 - If T dies before the certificate is made, it must be made as soon as possible thereafter. The certificate can be attached to any page of the will
 - If the will consists of more than one page, the Commissioner must also sign all the other pages, other than where the certificate appear, anywhere on the page.
- What is not required for the validity of a will?(2)
 - An attestation clause according to Thaker v Naran
 - Date and place of execution
- Discuss Sterban v Dixon
 - The attestation clause is at most a record of how T (and witnesses) intended to sign
 - Isn't proof of that parties in fact executed the will in accordance with the intention expressed in the clause
- A table that outlines the relationship between the method of execution and the persons present(6)

Method of execution	Persons Present
Testator signs with own signature	Testator and two witnesses
Testator signs with a mark	Testator, two witnesses and commissioner of oaths
Amanuensis signs for testator	Testator, amanuensis, two witnesses and commissioner of oaths

Requirement of a written document

- Discuss whether a will has to be an actual physical document(1)
 - This is an implied requirement because although s2(1)(a) does not expressly require a will to be written or printed, the other requirements such as signing and the references to pages implies that the will needs to be written
- Provides forms of acceptable writing(2)
 - Handwriting, typing, printing (or combinations) are all valid.
 - Even pencil is acceptable (though risky because of fraud concerns).
- Provide the forms of unacceptable formats(4)
 - **Oral wills** (spoken only) are invalid.
 - **Video/DVD recordings** are invalid.
 - **Electronic files** on a hard drive are invalid.
 - **SMS or cell phone texts** are invalid.
- Where are the considered unacceptable?(2)

The **signature requirement** cannot be met digitally because:

- The Act requires signatures in specific physical places (end of the will, each page).
- Electronic signatures cannot satisfy these formalities.

Meaning of ‘sign’ and ‘signature’, and the concept of a ‘mark’

- Define what it means to sign(1)

Includes the making of a mark, but it does not include the making of a mark in the case of a witness. The use of a mark was, therefore, reserved for the testator alone and when the testator used a mark, the Act required certification of the will by a commissioner of oaths.

- Does an initial qualify as a mark?(2)

In general if an initial qualifies as a mark then that means that the witnesses were not allowed to sign using the initials because a mark is only reserved for the testator. This matter caused issues to arise as now witnesses cannot sign using initials.

- What is the dictionary meaning of a “signature: (1)

A persons name written in a distinctive way as a form of identification

- **Discuss Harpur v Govindamall**

The court initially ruled that initials are a form of a mark thus a witness signing by using initials invalidates the will. Before this judgement was delivered Parliament amended the law. The definition of sign is “the making of initials and, only in the case of the testator, the making of a mark.” and a signature has the same meaning

- What are the practical consequences of the case(2)
 - Witnesses, testator, amanuensis, commissioner of oaths may sign with initials.
 - Testator may sign with a mark, but then a commissioner of oaths must certify the will.
- Discuss the forms of a signature(5)
 - No requirement that:
 - It must be the **ordinary/customary signature**.
 - It must be the **same on every page**.
 - It must be a **full name**.
 - But: Any writing that isn't a person's name is a **mark**, not signature.
- What are the forms of a mark(3)
 - Commonly: simple cross (X).
 - Acceptable: thumbprint (judicially approved).
 - Possible (but not recommended): unusual forms like “Your loving mother”.

The following table highlights the contrast between signing

Signing	Marking
Allowed by the testator and witnesses	Allowed by the testator only
Includes initials	Excludes initials
Includes names or surnames	Includes thumbprint or cross

Where must the testator sign?

- What is required by the Wills Act?(1)

The testator must sign at the end of the will. According to the interpretation of this it means that the testator must sign as close as reasonably to the concluding words of the will and failure to do will invalidate the will.

- Discuss **Kidwell v The master**(1)
 - This case dealt with what is considered as the end of the will in terms of **s2(1)(a)(i)** the T or person signing on their behalf... must sign at the end of the will.

- The Court had to consider the effect of a nine centimetre gap between the end of the writing and the testator's signature. It held that such a gap meant that the signature was not as close as reasonably possible to the concluding words of the will and that the will was invalid
- Single sheet, double-sided wills(2)

If a will is written on both sides of one sheet of paper:

- The back (last) side must be signed at the end of the will.
- The front side may be signed anywhere on that page.

Signature by an amanuensis

- Define amanuensis(1)

An amanuensis is someone who signs the will on behalf of the testator.

- How is this individual acknowledged by the Wills Act?(1)

Section 2(1)(a)(i) of the Act requires that the will be signed at the end by 'the testator or by some other person in his presence and by his direction

- How is this executed(2)

Since the amanuensis is simply the physical vehicle by which the testator executes the will, he or she should sign the testator's name, and not his or her own. This would avoid confusion as to the identity of the testator that may arise if the signature on the will is not the same as the testator's name recorded in the will. Where an amanuensis is used, the will must be signed in the presence of a commissioner of oaths in the presence of the usual witnesses, and the commissioner is required to certify the will.

- Discuss *Oosthuizen v Sharp and Ex parte Fourie*(2)

The wills that were signed with the testators' names by an amanuensis were held to have been correctly executed in terms of the formalities then applicable.

Who is required to witness a will?

- Define a competent witness

A competent witness is any person above the age of 14 years who is not incompetent to give evidence in a court of law

- What restriction under the Wills Act applies to the witnesses

Section 4A of the Wills Act stipulates that a witness to a will, and his or her spouse at the time of witnessing, lacks capacity to inherit under that will. The witness cannot receive any benefit unless they comply with certain exceptions.

The meaning of witnessing

- What are the two aspects of witnessing a will(2)
 - The physical presence while the testator, or amanuensis, signs (or the testator acknowledges his or her signature), and
 - The actual signing of the will by the witnesses themselves.
- Discuss the formalities in relation to the witnesses(6)
 - Two competent witnesses,
 - both present at the same time,
 - must be present when the testator, or amanuensis, signs each page of the will.
 - If an amanuensis signs, then the testator must be present too.
 - Alternatively, if one or both witnesses are not present when the testator signs, then the testator must acknowledge his or her signature in the presence of both witnesses after such signing.
 - In addition to being present, the witnesses themselves must sign the will.
 - Where the testator has executed a will comprising two or more pages as a single juristic act, the same two witnesses who attest and sign the last page of the will must be present as witnesses to the testator's signature of the earlier pages
- Discuss *Liebenberg v The master*
 - A case involving a one-page will which the witnesses had signed near the top of the page, the Court held that witnesses need not sign near or below the testator's signature, but may sign anywhere on the page.
 - However, the witnesses' signatures must not appear where the testator's signature ought to be at the end of the will because this would result in a failure by the testator to sign in the correct place.
- When must the witness sign?(3)
 - Witnesses must sign after the testator has signed because they cannot attest to a signature that has not yet taken place.
 - If a witness signs before the testator, the will is invalid.
 - The position of the witnesses' signatures on the page, higher or lower on the page than the testator's signature, does not prove when the witnesses signed.
- Discuss the word 'presence'(3)
 - This requirement was held to have been satisfied when the witness was in the same room as the testator and either actually saw him or her sign or could or might have done so.
 - In other words, it is not necessary to prove that the witness actually saw the act of signing if he or she was in a position to have seen it.
 - It has been held that it is not necessary for witnesses to know the contents of the will or even that the document being executed is a will.
 - The witnesses do not need to know that they are attesting and aligning a will

- When an amanuensis is used, the testator must also be present, as must a commissioner of oaths.

Acknowledging a signature

- What is the general rule?(1)
 - The testator must **sign in the presence of two witnesses**.
- What is the exception?(2)
 - If the testator already signed the will before witnesses were present, they may acknowledge their signature in front of two witnesses.
 - This acknowledgement is treated the same as signing in their presence.
- What if it is a mark?(2)
 - If the testator signs by mark or if an amanuensis signs on their behalf:
 - The signature must be certified by a commissioner of oaths.
 - There is no provision for later acknowledgement in front of the commissioner (the commissioner must be present at the time of signing).
- Who qualifies as a commissioner of oaths?(4)
 - Attorneys
 - Magistrates
 - Advocates
 - Police officers
 - The Commissioner must make it clear that they act in their capacity as commissioners of oaths and not as attorneys/advocates even though they might be
- Where on the will must certification appear?(1)

Anywhere, except the last page

- When must the certificate be appended?
 - In terms of the Act, the certificate must be made 'as soon as possible' after T signed with a mark or someone signed on T's behalf
 - If T dies before certificate is appended, it must be done 'as soon as possible' thereafter
- When is the commissioner of oaths not required?(3)
 - If the testator signs in person with a normal signature and not a mark then no commissioner of oaths needed.
 - Commissioner only comes into play when:
 - Testator signs with a mark, or
 - An amanuensis signs on their behalf.

Must a will be dated or have an attestation clause?

- Define an attestation clause(1)

The attestation clause is the final paragraph of the will which records and provides evidence of the date and place of signature and that the testator and witnesses signed in each other's presence.

- Is it compulsory?(2)
 - The absence of an attestation clause does not invalidate the will, but the clause has evidential value.
 - Where appropriate, evidence may be adduced to contradict the information in the clause.
 - Note that it is not a requirement for validity that a will be dated.

Additional formalities associated with a mark or an amanuensis

- What is the general rule?(1)

When the testator signs with a mark, or when an amanuensis signs for the testator, the Act requires that the will be signed in the presence of a commissioner of oaths who must be present together with the two witnesses and the amanuensis if one is used

- What are the duties of the commissioner of oath?(5)
 - The commissioner of oaths must:
 - Satisfy himself or herself as to the identity of the testator Satisfy himself or herself that the will so signed is the will of the testator
 - Make a certificate on the will itself in which he or she certifies that he or she has so satisfied himself or herself
 - Record in the certificate that he or she has done so in his or her capacity as commissioner of oaths
 - Write the certificate on the will by hand, or type or print it on the will, or impress it on the will with a rubber stamp.
 - It is not necessary for the commissioner's certificate to follow the precise wording of the Act, or for the specimen certificate to be used, but the use of the specimen is advisable.
- Discuss **Radley v Stopforth**
 - In Radley v Stopforth, an administrative officer of the Transvaal Provincial Administration at Vereeniging Hospital who was, in fact, a commissioner of oaths, signed a certificate in which an imprint made on the page with a rubber stamp intimated that he was an administrative official of the hospital.
 - The will was held to be invalid because he had not stated his capacity as 'commissioner of oaths'.
- Discuss **Jeffrey v The Master**
 - Similarly, in Jeffrey v The Master, where an imprint made with a rubber stamp below the certifying officer's signature described him as a 'practising attorney', the will was invalid in spite of the fact that all practising attorneys are commissioners of oaths.

- The Court held that the certificate itself must indicate that the certifying officer was functioning in his capacity as a commissioner of oaths at the time he carried out his duties.
- Discuss **Section 2(3)** of the Will Act

This section allows a court to order that a defectively executed will be accepted as if it were validly executed, provided that the requirements of **section 2(3)** are satisfied

- Can the commissioner of oaths be a testator?(1)

This is not possible because the witnesses must sign in the presence of the commissioner of oaths.

- Discuss the case of **Rasley v Stopforth** in terms of the certificate
 - The case highlighted that certification must be completed before the death of the testator because certification forms part of the execution requirements themselves and execution must be completed by the testator during his or her lifetime.
 - The Act now provides, however, for the certificate to be made or completed after the death of the testator, provided that the commissioner acts as soon as possible.
 - The formulation ‘as soon as possible’ does not allow a great deal of leeway for delay and the commissioner of oaths should complete the execution of the will immediately it has been marked or signed

Formalities for the amendment of wills

- What are the principles for amending a will
 - T may change will at any time before death provided they have the necessary testamentary capacity to do so
 - A clause stating T will never amend his will can never be binding
 - Changes can be made by executing codicil, then formalities in **s2(1)(a)** must be complied with

OR

- Amendments can be made to an existing will by interfering with writing, then formalities in **s2(1)(b)** must be complied with
- In terms of the Wills Act which actions brings about an amendment and requires compliance with the formalities ?(4)
 - additions
 - alterations
 - interlineations (inserting new words between the lines of the will)
 - deletions, cancellations and obliterations in whatever manner effected except where they contemplate the revocation of the entire will.
- What is a pre-execution amendment?(1)

This is an amendment that occurs before the Will is signed. There are no formalities required but both the witnesses must still sign after

- What is the rebuttable presumption under the Wills Act?(3)
 - The Wills Act creates a rebuttable presumption that all amendments were made **after execution**.
 - Therefore, it is best practice that pre-execution amendments are **signed by the testator and both witnesses**.
 - Otherwise, after death, it may be impossible to prove that the amendment was pre-execution.
- What are post-execution amendments?(2)
 - These are the amendments to a will that has already been executed
 - It has to comply with the formalities under section 2(1)(b) of the Wills Act and failure to do so will result in it being inoperative
- What are the formal requirements of the post-executed will?(3)

S2(1)(b)(i)-(iv):

No amendment made in a will executed, shall be valid unless;

1. Amendment is **identified by signature of T or any other** person in his presence and direction (amanuensis)
 2. Such signature is made in the presence of T or by such other presence or is acknowledged by T or such other person in the presence of **two or more competent witnesses present at the same time**
 3. The amendment is further **identified by the signature of such witnesses** in the presence of T and each other (and amanuensis if applicable) (These witnesses do not have to be the same witnesses who signed the original will)
 4. If amendment is identified by a mark of the T or by the signature of some other person (in his presence and direction) then;
 - Certificate by commissioner of oaths is necessary-
 - Commissioner satisfies himself as to;
 7. The identity of T
 8. That the amendment has been made by or at the request of the Testator
- What is the meaning of identified(1)

Signature acknowledges that amendment is made according to T's wishes

- Where should T and witnesses identify (place their signatures)?
 - Not specifically dealt with in s2(1)(b) BUT must be as close as possible to the amendment
 - Otherwise ex facie identification of signatures must be clearly relevant to specific amendment
- What are the duties of the commissioner of oaths?(3)
 - The commissioner must sign the certificate.

- The Wills Act does not require the commissioner to sign all the other pages of the will or Identify the amendment with his/her own signature or certificate.
- The Act also does not prescribe where in the will the certificate should appear.

Section 2(3) of the Wills Act

- What is the effect of section 2(3)

Section 2(3) of the Act gives the High Court the power(power of condonation) to order the Master to accept a document which does not comply with the execution or amendment formalities as a valid will if it is satisfied that the testator intended the defectively executed document to be his or her will or an amendment to it. The requirement of the section can be satisfied on a balance of probabilities.

- State section 2(3)

If a court is satisfied that:

- A document or the amendment of a document
- Drafted or executed
- By a person who has died since the drafting or execution thereof
- Was intended to be his will or an amendment of his will,

The court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 (Act No. 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in (2(1)(a)(b))

- What is the aim of section 2(3)
 - To avoid the frustration of T's intention and inequitable results (Kidwell)
 - To obviate the problems which arose in interpreting s 2(1)
 - To eliminate injustice and inequity resulting from invalidity
- What are the implications of section 2(3) application
 - Additional costs
 - Delays
 - No guarantees that it will succeed
 - May fail if requirements are not met
- When is section 2(3) applicable?
 - The document doesn't comply with s 2(1)(a) (formalities for execution) or s 2(1)(b) (formalities for amendment), and
 - Someone asks the court to have that document accepted as the deceased's valid will.
- How is the application brought?(3)
 - It's done by motion proceedings (not a trial).
 - The applicant must file affidavits setting out the facts.

- The onus of proof is on the applicant to show the requirements are met on a balance of probabilities (i.e., more likely than not).
- Who decides?(2)
 - The High Court is the relevant court that considers the application.
 - If the court is satisfied that all the statutory requirements are met, it must order the Master of the High Court to accept the document as the deceased's valid will under the Administration of Estates Act 66 of 1965.
- **Discuss Webster v The Master**

The view that some degree of compliance is required originated in the judgment in which Magid J held that the section was not intended to validate a document that does not comply with any of the formalities of the Act. He reasoned that the history of the section showed that its purpose was to remedy technical non-compliance with the execution formalities, not to give effect to a completely unsigned document.

- Meaning of "draft"(2)

A draft refers to a document formulated or written down (even if dictated or typed) by:

- (a) The testator (T), or
 - (b) Someone else at the testator's instruction (i.e. T caused it to be drafted by someone else).
- To be condoned under **section 2(3)**, the document must:(1)

Have been drafted by a person who has since died (the deceased testator).

- Condonation is possible when(2)
 - If the document was drafted by another person (e.g. attorney, bank, etc.) and
 - The testator embarked on the process of execution (signed or began signing but didn't finish), then condonation under **s 2(3)** may be possible.
- What does partially executed mean?(1)

The process of complying with the formalities in **s 2(1)(a)** (writing, signature, witnesses) was started by the testator but not completed.

- Discuss the principles associated with intention(4)
 1. Specific document must be intended to be will (**Maurice; Van Wetten**)
 2. If document was intended to be instruction this is not sufficient(**Maurice**)
 3. Intention must exist at the time of the drafting or the execution and thus can not be formed at later stage
 4. It is determined by looking at document and surrounding circumstances

Unsigned documents

- **Discuss Webster v The Master**

Facts:

- The strict approach was followed by Magid J in *Webster v The Master*.
- The testator's will had not been signed personally by the testator but had been drafted by someone else, namely the testator's attorney.
- The question was whether **section 2(3)** of the Wills Act could apply to a document not drafted personally by the deceased, but by another person at their instruction.

Judgment:

- Magid J held that the words of **section 2(3)** refer to a document drafted or executed by a person who has died, meaning the testator personally.
 - Therefore, the legislature did not intend to endow an unsigned document drafted by someone other than the testator, even an attorney, with the status of a will.
 - Magid J contrasted **section 2A** (which permits revocation through an act the testator has caused to be done, i.e., via an agent) with **section 2(3)**, which refers specifically to a document drafted or executed by the person who has died.
 - He concluded that this difference in wording means **section 2(3)** requires the testator's personal conduct and does not encompass conduct through an agent.
- **Discuss Back v Master of the Supreme Court**

Facts:

- The flexible approach to **section 2(3)** was followed in *Back v Master of the Supreme Court*.
- The testator's attorney drafted the will, which was read to and approved by the testator.
- The testator delayed signing the document pending counsel's opinion on its tax consequences.
- The testator died before signing the will.

Judgment:

- Van Zyl J disagreed with the strict approach adopted by Magid J in *Webster v The Master*.
- He held that the difference in wording between **sections 2(3)** and **2A** was not relevant because the two provisions deal with different matters.
- The requirement of a document "drafted by the deceased" should be interpreted flexibly, in light of the purpose of **section 2(3)**—to prevent the testator's wishes from being nullified by technical formalities.
- Because the testator had approved the draft to its finest detail, his acceptance of the document was tantamount to having drafted it himself.

- Therefore, a **section 2(3)** order should be granted, validating the document as the testator's will.
- **Discuss Bekker v Naudé**

Facts:

- The Court considered whether to grant an order in terms of **section 2(3)** for a will drafted by a bank official at the request of the deceased.
- The will had been posted to the deceased, but he died before executing it.
- The key issue was whether the document could be said to have been drafted by the deceased within the meaning of **section 2(3)**.

Judgment:

- Olivier JA, delivering the judgment of the Court, reviewed the strict and flexible interpretations of **section 2(3)**.
- He found it unnecessary to revisit all prior arguments because, in his view, the strict interpretation was clearly correct.
- He applied the ordinary, grammatical meaning of "drafted" unless this leads to absurdity, inconsistency, or hardship, which was not the case here.
- Thus, approval of a document drafted by another is not equivalent to drafting it oneself.
- His conclusion was reinforced by the contrast between **sections 2(3)** and **2A**, indicating that personal drafting by the testator was required.
- The Court held that this requirement was included deliberately and unambiguously, to ensure reliability and clear evidence of the testator's personal intention.
- **Discuss Mokgoro v The Master**

Facts:

- The 2021 will appeared to bear electronic signatures instead of handwritten (ink) signatures by the deceased and the witnesses.
- It was further alleged that the testatrix did not sign in the presence of the two witnesses, and that the witnesses did not sign in each other's or the deceased's presence.
- The applicant argued that there was sufficient evidence to show the deceased intended the 2021 document to be her last will and testament, and therefore applied for condonation under **section 2(3)** of the Wills Act.
- It was also argued that the 2021 will existed, was drawn up by the third respondent under the deceased's direction, and that it was clearly intended to be her final will.

Judgment:

- The Court noted that although the facts differed from those in *Bekker v Naudé*, the requirement that the deceased personally “drafted” the document had not been sufficiently established.
- Consequently, the application in terms of **section 2(3)** could not succeed, as the element of personal drafting or execution by the deceased was missing.

- **Discuss Raubenheimer v Raubenheimer (SCA)**

- It dealt with the matter of partial compliance
- Document drafted by financial advisor, but T signs without 2 witnesses being present
- Can consider condonation based on **s 2(3)**

The ‘executed’ requirement of section 2(3)

- **Discuss McDonald v The Master**

Facts:

- The deceased typed his will on his office computer and saved it as a computer file without ever printing it.
- He later committed suicide and left a note directing his family to the computer file containing his will.
- In the presence of the police, his wife accessed the file, which was then printed and deleted from the computer.
- The security arrangements around the deceased’s computer were such that there was no doubt that the computer file had been drafted by the deceased himself.

Judgment:

- Hattingh J adopted the liberal (flexible) approach and granted an order in terms of **section 2(3)** of the Wills Act.
- The Court held that the deceased’s will was indeed a document stored in his computer in accordance with his own instructions.
- On a flexible interpretation of **section 2(3)**, the file could be regarded as having been drafted personally by the deceased.
- In doing so, the Court avoided debate over whether, at the time of death, there was a “document” in existence in the ordinary, physical sense of the word.

- **Discuss Van der Merwe v The Master**

- The deceased had written an email that contained his will and had sent it to his friend who was to be his sole beneficiary, but he never actually executed the will before he died.
- The Supreme Court of Appeal was persuaded that he intended the email to be his will and it made an order in terms of [section 2\(3\)](#).
- Unfortunately, the judgment does not discuss the fact that the will was in the form of a data file.
- The focus of the judgment was on issues that are not relevant to this point.

Intention requirement of section 2(3)

- What type of documents represent the actual will in terms of intention?(1)

The document must be the testator's *final* expression of their testamentary wishes, not something provisional, conditional, or preparatory.

- **Discuss Ex parte Maurice**

- The testator had written out a draft will after exhaustive discussions with his wife as to what the contents of their joint will should be and had sent the document to a friend who had experience in the drafting of wills with the request that the friend 'knock it into shape'.
- When the testator died before the will could be finalised, it was held that a [section 2\(3\)](#) order could not be made with respect to the draft prepared by the testator because the testator had envisaged that the document might well be changed on the basis of his friend's advice and, therefore, he had not intended it to be the final expression of his wishes.

This judgement indicated that

- Specific document must have been intended to be will
- Only when there is a defect in the formality requirements on the "final" document will court intervene
- If intended to only convey information about T's wishes then it will not be sufficient
- **Discuss Van Wetten v Bosch**
 - A [section 2\(3\)](#) order was granted with respect to a letter addressed to the testator's attorney containing instructions for the drafting of a will.
 - What distinguished this case from *Ex parte Maurice* was that the testator had left the letter in the possession of a friend with instructions that the letter was only to be given to the testator's attorney if something should happen to the testator, which the Court interpreted as a reference to the testator's death.
 - Since it would be futile to give instructions for the drafting of a will after one's death, the Court concluded that the letter itself was intended to function as the final expression of the testator's wishes, notwithstanding that it was in the form of a letter of instructions.
- **Discuss Smith v Parsons**

- A similar approach was taken in *Smith v Parsons* where the Court made a **section 2(3)** order in respect of a letter written by the deceased to his domestic partner before he committed suicide.
- Despite the informal wording of the document and it being in the form of a farewell note, the Court was persuaded that the deceased had intended it to be an amendment to his will.
- It has been held that it is the testator's intention at the time he or she made the document that is relevant.
- A subsequent change of intention is irrelevant unless it is manifested in a testamentary document, or in one of the recognised methods of revoking a will, or part of a will
- **Discuss Webster v The Master (1993 (2) SA 232 (N))**
 - Here, the testator approved a draft will appointing his children as heirs and instructed his attorney to add a legacy. Before the new will was completed, he died.
 - The court refused to give effect to the draft under **section 2(3)**, reasoning that it was not the testator's complete and final expression of his testamentary wishes.
 - Since the testator had intended further changes, the draft was regarded as incomplete and therefore could not qualify as a will under **section 2(3)**.

Chapter 6

Revocation and revival of wills

Introduction

- Define revocation(1)

Revocation is the act by which a testator cancels a will, or part of a will, so that it is no longer applicable. Revocation is the only way in which a will can be undone by a testator

- Define partial revocation(1)

It is possible for a testator to revoke only part of his or her will, leaving the remainder of the will valid and effective. This is referred to as partial revocation

- Define oral revocation(1)

Oral revocation of a will is not recognised and will be ineffective.

- What is the general rule?(2)
 - A testator is free to revoke his or her will at any time during his or her lifetime.
 - Any agreement that attempts to restrict this freedom is unenforceable
- What are the two exceptions to this general rule?(2)
 - Where a mutual will establishes estate massing, the surviving testator who accepts the benefit of the massing cannot subsequently alter the testamentary disposition of the massed assets stipulated in the mutual will.
 - Testamentary provisions contained in a duly registered antenuptial contract cannot be unilaterally departed from or altered.
- What are the two essential elements in terms of the revocation of the Will?(2)
 - An intention to revoke (*animus revocandi*)
 - A legally recognised act by which this intention is manifested
 - (If the intention to revoke is present but is not manifested in a legally recognised act of revocation, then it may be possible for the court to order that the will be revoked in terms of **section 2A** of the Wills Act.)

Methods of revoking a will

- What are the 4 methods of revocation as recognised by common law?(4)
 - Destruction of the whole will
 - Destruction of part of a will
 - Express revocation (including informal revocation)
 - Implied revocation.
- Discuss express revocation(4)

By execution of a subsequent valid document, such as:

- A valid will (complying with **s 2(1)(a)** of the Wills Act) that includes a revocation clause, e.g.

"I hereby revoke all previous wills and codicils made by me."
- A valid codicil (also complying with **s 2(1)(a)**) containing a revocation clause.
- A valid antenuptial contract (in terms of s 87 of the Deeds Registries Act 47 of 1937) that contains a revocation clause.
- A mere "revocatory document", a document that has no testamentary provisions other than the testator's clear intention to revoke a previous will, provided it meets the formalities under **s 2(1)(a)**.
- Discuss implied revocation(5)
 - Person can leave behind several wills If last will does not expressly revoke earlier will, then wills must be read together
 - If wills contain conflicting provisions? The later will is regarded as operative will tacitly revoking the earlier will
 - If uncertainty which will is last will? Evidence admissible

- If not possible to determine latest one? All of them regarded as impossible to carry out, since intention not clear-intestate
- But: earlier will only regarded as revoked in as far as it is irreconcilable with the latter: Later will can thus revoke earlier will entirely or partially.
- What if the will is already invalid?(3)
 - If the subsequent will is invalid, the revocation it attempts is also ineffective.
 - However, the court may condone the invalid will under s 2(3) of the Wills Act, in which case the revocation may become valid.
 - Additionally, s 2A gives the court power to condone an act of revocation that is not one of the recognised common law methods, provided the testator intended to revoke.
- What is the effective date of revocation?(1)

Revocation takes effect **immediately** once the valid act and intention coincide.

Destruction of the whole will

- What is the general rule?(1)

Destruction of the whole will *animo revocandi* (with intention to revoke) revokes the will and no formalities are required

- What are the 2 ways of destruction?(2)
 - physical destruction → Tearing up, burning, cutting etc
 - symbolic destruction → Defacing document in some way, eg by erasing own signature or that of witnesses; or cancelled (Lines drawn through it; words to that effect written across the face of the will)
- Can accidental destruction revoke a will?(3)
 - Accidental destruction of the will does not revoke it because the intention to revoke is absent and, in spite of its physical destruction, effect will be given to the provisions of the destroyed will.
 - Evidence would have to be led as to the contents of the will. Such evidence may be available from persons who have read the will or from the attorney who prepared it.
- Provide examples of these types of revocation(3)
 - Defacing the writing of the will by drawing lines across i writing the words 'cancelled' or 'revoked' across the face of the will
 - Destroying the testator's signature on the will
 - Destroying the signature of a witness on the will.
- Must the signature also be damaged for this revocation to be effective?(2)
 - Because a testator is required to sign the end of a will as well as all the other pages, destruction of his or her signature at the end of the will would revoke the will.
 - However, destruction of the testator's signature on an earlier page of a multiple paged will is problematic because the testator may have merely intended to

revoke that particular page and, if so, the partial revocation will not be recognised unless the rules for the partial amendment of wills were satisfied.

- Does the inclusion of revocative words in the will enough to revoke it?(1)

According to Corbett *et al*, merely writing the words 'cancelled' or 'revoked' in any of the four margins of the will would not constitute destruction of the will and would not revoke it because there would be no interference with the words of the will.

Destruction of part of a will

- How is the act of partial destruction regulated?(4)
 - A will can also be partially revoked by destruction of the relevant part *animo revocandi*.
 - Examples include drawing lines across a paragraph of the will, cutting a paragraph out of the will with scissors or drawing lines through the name of one of the heirs appointed in the will.
 - Partial destruction constitutes an amendment of the will and, as a result, the formalities for the amendment of wills must be complied with otherwise the revocation will not be effective.
 - However, where the revocation is not effective, the possible application of **section 2A** should be kept in mind

Express revocation (including informal revocation)

- What qualifies as an express revocation?(3)
 - A testator can revoke a previous will or wills by including an appropriate revocation clause in a duly executed will, or in a document that is executed as a will but contains only a revocation clause.
 - Executing a new will without including a revocation clause does not revoke previous wills
 - Where a revocation clause has been inserted in a signed will without the knowledge of the testator, evidence is admissible to establish the true intentions of the testator and the court will order that the revocation clause be treated as *pro non scripto*
- Define a *pro non scripto*(1)

Pro non scripto means as if it had not been written.

Implied revocation

- What is the general rule?(1)

The execution of a new will does not automatically revoke the testator's previous wills. As far as possible, the wills in force at the testator's death must be read together.

- What if the wills conflict?(3)

- It may be, however, that the provisions of a more recent will conflict irreconcilably with the provisions of an earlier will.
- In this case, the provisions of the earlier will are impliedly revoked in so far as they are inconsistent with the later will or cannot stand together with any provision in the later will.
- This is referred to as implied or tacit revocation.
- What is revocation by ademption?(3)
 - Revocation by ademption occurs where a testator voluntarily alienates a particular asset which he or she has given to a beneficiary in a legacy in the testator's will.
 - Alienate is a broad term that covers all modes of disposing of an asset, for example selling or donating. The testator is rebuttably presumed to have revoked the bequest of the asset.
 - A bequest which is revoked in this way is said to have lapsed by ademption.

Presumptions concerning the revocation of wills

- What is the presumption?(1)

If a will is found in the testator's possession in a damaged state, such as would be sufficient to revoke the will if done with *animus revocandi*, then it is rebuttably presumed that the damage was done by the testator with such intention and the will is accordingly revoked.

- Discuss the possible presumptions(5)
 - If will was in possession of T and cannot be found after death: Presumption he destroyed it with necessary animusrevocandi
 - If T was in possession of “duplicate original”(a 2nd originally executed will), same presumption as above
 - If T was in possession of both the original and the duplicate original (both properly executed will) and only one of the wills is found after his death, then the presumption that the will was destroyed animo revocandi does not apply
 - But: If T was only in possession of “copy” (photostat copy of originally signed will) and this copy cannot be found after his death, then there is no such presumption. However, depending on circumstances, destruction of a copy of a will could amount to revocation. The presumption that this occurred animo revocandi will just not apply. He who alleges must prove.
 - The presumptions can be rebutted by evidence (direct or circumstantial)If the presumption is rebutted, the contents of the destroyed will can be proved by oral evidence or by duplicate or copy.
- Discuss Sansole v Neube
 - The testator (T) was married to X and had made a will in her favour.
 - After their divorce, T requested the return of his original will from his attorney.
 - However, the attorney mistakenly sent him only a copy instead of the original.

- Believing it to be the original, T destroyed the copy. Upon T's death, the court held that, in these circumstances, it was clear that the testator had intended to revoke the will, and therefore, the destruction of the copy was sufficient to constitute a valid revocation.
- Can a will be revoked orally?

No, this was stated in *Louw v Engelbrecht*

- **Discuss *Le Roux v Le Roux***
 - This presumption as to missing wills is illustrated by the decision in *Le Roux v Le Roux* in which the evidence was that a will made by the testator in January 1960 had been seen on his desk at home later that year, but could not be found after his death in 1961.
 - There was no other evidence as to what had become of the will and it was presumed to have been revoked.
- Discuss *Ex parte Warren*
 - It was stated that the rationale behind the presumption is the probability that a testator would usually take steps to preserve his or her will, and that if it is lost or accidentally destroyed, then he or she would be aware of it and take steps to make a new one.

Doctrine of dependent relative revocation

- Discuss the essential requirement(1)

An essential requirement for a valid revocation is that the testator must have had *animus revocandi*.

- What is conditional revocation?(1)

Revocation only effective if condition fulfilled(1)

- **Discuss *Le Roux v Le Roux***

The testator destroyed his second will in the mistaken belief that this would revive an earlier will. The second will was held not to have been revoked

- Discuss *Prinsloo v The Master of the Supreme Court (OFS)*
 - The testatrix destroyed her first will with the intention of executing a new will to replace it. For some reason, she never actually executed a new will and the destroyed will remained in force in spite of the fact that she had destroyed it. If the testator wants the destroyed will to be revoked even though he or she is acting on the basis of some supposition that is false, the testator's revocatory intention is absolute even though it is informed by a false supposition and the will is, therefore, revoked.

Revival of wills

- When does the revival of a will occur?(1)

Revival of a will occurs when a previously revoked or lapsed will is given legal force again. Before we look at how revival can be brought about, it should be re-emphasised that the destruction of a will that expressly or impliedly revoked an earlier will does not bring about the revival of the earlier revoked will.

- Discuss the revival of a revoked will(2)

“Revival” means that the revoked will regains legal effect.

However:

- A revoked will does not automatically revive upon the destruction of the subsequent will; and
 - It cannot be revived merely by an oral statement expressing that intention.
- **Discuss Moses v Abinader**

Facts:

- The bench agreed that there had been no revival of the will in that particular case.
 - However, there was a difference of opinion among the judges regarding why revival had not taken place and, specifically, whether it was possible to revive a will by referring to it in a subsequent document that is executed as a will.

Judgment:

- Van den Heever JA held that this method of revival would be unlawful in South Africa because the pages of the old will are not signed together with the pages of the new will, but are only referred to in the new will.
 - He viewed this as a form of incorporation by reference, which constitutes an attempt to evade the execution formalities required by the Wills Act.
 - Schreiner JA, on the other hand, distinguished between revival and incorporation by reference.
 - He held that if the required intention to revive was clearly present, it would be permissible to revive a will by referring to it in a later validly executed will.
- What are the requirements for the revival of a will(4)
 1. Original will must still exist
 2. T can revive it through a valid “reviving document”
 3. Which is properly executed

4. Showing the intention to revive

- **Discuss Wessels v Die Meester**

Facts:

- The testator's will of 18 January 2002 lapsed on the death of his wife because there was no provision in the will for the devolution of his estate if he survived her.
- The provisions of the 2002 will were all predicated on the testator predeceasing his wife.
- In May 2003, the testator executed a short will, describing itself as a codicil to his 2002 will.
- The codicil modified one of the bequests in the 2002 will and concluded with the words "the rest of my will remains unaltered."
- It was held that this showed the testator had executed the 2003 codicil in the mistaken belief that the 2002 will was still in force, which excluded an intention to revive it (since one cannot intend to revive what one does not know is dead).
- The testator therefore died intestate.

Judgment:

- The Supreme Court of Appeal, in a unanimous judgment, ruled that it is permissible to revive a lapsed or revoked will by referring to it in a subsequent, validly executed will, because effect must be given to a testator's wishes expressed in a duly executed document.
- The Court further held that revival in this way is not equivalent to ineffective incorporation by reference, since the fact that a will has been revoked or lapsed does not mean it was improperly executed—the original valid execution remains a historic fact.
- Accordingly, the Court held that revival of a lapsed or revoked will will take place if the following three requirements are satisfied:
 1. There must be a reference to the earlier will in a subsequent, validly executed will.
 2. There must be a clear intention to revive the earlier will.
 3. The earlier will must have been properly executed in accordance with the Wills Act.
- How must the intention requirement be?(1)

Regarding the intention requirement, it must be shown that when the testator executed the new will, he or she knew that the will that it was meant to revive was no longer in force. If the testator believed that the original will was still in force, it is impossible to establish that he or she intended to revive the will

Revocation by the court: section 2A

- Discuss **section 2(3)**

The Wills Act makes provision for a court to order that a defectively executed will be treated as if it were a valid will, provided, among other things, that the court is satisfied that the defective will was intended by the testator to be his or her will.

- Discuss **section 2A**

Section 2A is a parallel provision that empowers a court to complete a defective attempt by a testator to revoke his or her will. **Section 2A** reads as follows:

If a court is satisfied that a testator has –

(a) made a written indication on his will or before his death caused such indication to be made;

(b) performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face of the will; or

(c) drafted another document or before his death caused such document to be drafted, by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked

Once a court is satisfied that the requirements of this section have been satisfied, it is obliged to make an order revoking the will, or part of the will, as the case may be. Because the section is peremptory and involves a court in undoing the testator's (original) wishes, it has been held that courts must adopt a cautious approach in determining that the testator intended to revoke his or her will

- Discuss **section 2B**

Automatic Lapsing of a Will or Provisions in a Will

- If a testator (T) dies within 3 months after the dissolution of a marriage by divorce or annulment, and T executed a will before such dissolution benefiting the former spouse, then:
 - The will is interpreted as if the former spouse had died before the testator (i.e., the benefit lapses).
 - Exception: The benefit will not lapse if it appears from the wording of the will that the testator intended to still benefit the former spouse despite the dissolution of the marriage.
- Discuss **Henwick v The Master**

Section 2A order was refused because there was insufficient proof that a bank that had drafted a codicil revoking part of the testator's will had done so on the instructions of the testator, rather than on those of his wife.

N.B

section 2A cannot be used to give legal effect to an oral revocation.

Discuss Webster v The Master

Facts:

- The testator had marked up changes to his will on a copy of it to show his attorney the deletions that he wanted to implement.

Judgment:

- It was held that the will could not be revoked by the Court in terms of section **2A(a)** because the writing was on a copy of the will and not the original.
- However, the Court held that the will could be revoked in terms of section **2A(b)**.
- The decision is difficult to understand because subsection **(b)** requires the “other act” referred to there to be apparent from the face of the ‘will’.
- The Act would seem to require that for the purposes of both sections **2A(a)** and **(b)**, conduct on the original will is required.

Chapter 8

Freedom of Testation

Introduction

- Define freedom of testation(1)

Freedom of testation is the freedom of a person to dispose of his or her estate as he or she pleases.

- What power does the High court have in terms of the will of the testator(3)
 - The High Court has no general authority to consent to alterations to a testator's will against his or her express intention.
 - The Court may only rectify a will in certain specified cases.
 - Even if all the beneficiaries agree to it, the Court may not change the binding clauses of a will.

- Discuss *Snetler v Die Meester*

Snetler v Die Meester 4 gives a sad but appropriate example of a testator's freedom of testation. After making several bequests to his brother and other parties, the testator provided:

‘To my children, Wilna, Ronel and Simon whom I loved dearly and who have forgotten me totally, I have forgotten them too.’

- What are the restrictions of freedom of testation?(3)

The court will not give effect to bequests that are:

- Illegal
- Against public policy
- That are too vague or uncertain to be enforced
- Which acts also limits the freedom of testation?(2)
 - Immovable Property (Removal or Modification of Restrictions) Act: Prevents a testator from imposing unreasonable restrictions on the alienation (sale/transfer) of immovable property.
 - Constitution: Prohibits discriminatory clauses in wills (e.g., disinheriting based on race, gender, etc.). Certain clauses will be invalid and unenforceable especially where clause/bequest is linked to grounds listed in s9(3) read and in light of 9(4) and 9(5); the presumption of unfair discrimination.
- Discuss maintenance claims as a limitation(2)
 - Children: Even if disinherited, they can claim maintenance from the estate if financially dependent.
 - Surviving spouse: Protected by the Maintenance of Surviving Spouses Act, which allows the spouse to claim reasonable maintenance from the estate.
- Can the testator delegate someone to have their freedom of testation?
 - General rule: A testator must decide on beneficiaries personally (cannot delegate the decision).
 - Exceptions:
 - Bequests for charitable purposes (e.g., allowing trustees to decide which charities benefit).
 - Authorising the holder of an interim right (like a usufructuary or fiduciary) to nominate the final beneficiaries.

Limitations on freedom of testation

Statutory limitations

- Discuss the effect of the Immovable Property (Removal or Modification of Restrictions) Act(3)

- In terms of this Act, a testator cannot prevent the alienation of land by means of long-term fideicommissa or other long-term provisions in his or her will.
- Sections 6, 7 and 8 of this Act provide that such long-term provisions are restricted to two fideicommissaries.
- Sections 2 and 3 of the Act also indirectly restrict the testator's freedom by providing that the court may, on application from the beneficiaries, remove any restrictions on immovable property if such a removal will be to the advantage of the person entitled to the property

Common law limitations

- What is the general rule?(1)
 - The courts will not enforce conditions in a will that are seen as contra bonos mores or against public policy.
 - Public policy or that which the community sees as immoral does, however, change with the times.
- Discuss **Minister of Education v Syfrets Trust Ltd**

Facts:

- Trust created from 1920 will Made provision for bursaries to study at UCT for persons of European decent.
- Specifically excluded women and people of Jewish decent
- Minister applied to court to have provisions removed on grounds of being contra bones mores/against public policy

Court:

- Freedom of testation protected by s25 of Constitution but it's not absolute
- It is necessary to weigh up interests
- Public policy today is rooted in the Constitution and the values it enshrines; importantly, public policy of today not public policy in 1920 when will was executed.
- S9 no one may be unfairly discriminated directly or indirectly (see s9(3) grounds)If provisions amount to unfair discrimination then they are also against public policy
- Here, indirect discrimination is present on basis of race & direct discrimination on basis of gender and religion S9(5) presumption of unfair discrimination
- Provisions amount to unfair discrimination and therefore against publicpolicy (access to funding for education denied to previously disadvantaged groups on basis of race religion, gender)
- NOTE: judgement in Syfrets does not mean freedom of testation now negated but rather present conditions(circumstances of this case) amounted to unfair discrimination and therefore invalid based on public policy
- Discuss **Emma Smith Educational Trust v University of KwaZulu-Natal (SCA)**

Facts:

- A charitable educational trust was created by a 1938 will.
- The trust limited eligibility for bursaries to poor European girls who were of British or Dutch South African parentage and who resided in Durban.
- The University of KwaZulu-Natal (UKZN), as the trustee, approached the court for guidance on whether these racially restrictive provisions were valid in light of the Constitution.

Judgment:

- The Supreme Court of Appeal (SCA) held that, in the public sphere, there can be no question that racially discriminatory testamentary dispositions are unconstitutional and cannot pass constitutional scrutiny.
- The Court therefore ordered the deletion of the racial restrictions from the clause.
- However, it did not delete the gender restriction (limiting eligibility to girls) or the geographical restriction (residence in Durban), nor the restriction relating to the field of study.

Reasoning

- Some restrictions may be lawful where they are aimed at achieving a legitimate objective such as redressing past injustices based on gender and race
- **Discuss Re Heydenrych Testamentary Trust**

Facts:

- Trust limited bursaries to European boys of the Protestant faith, with at least half of British descent.

Judgment:

- The Court held that the trust provisions amounted to:
 - Direct unfair discrimination on the grounds of ethnic origin, culture, birth, and gender, and
 - Indirect unfair discrimination on the grounds of race and colour.
- Consequently, the trust was contrary to public policy and prohibited by **sections 9(3) and 9(4)** of the Constitution.
- The Court did not delete the provision regarding the Protestant faith, leaving open the possibility that bursaries may be limited to a particular religion/faith.
- **Discuss Re BOE Trust Ltd (SCA)**

Facts:

- 2002 will created a charitable trust providing bursaries to white South African students with an MSc in organic chemistry to study for a doctorate in Europe.
- The testator included substitution clauses for cases where it was “impossible for trustees to carry out provisions,” allowing other charitable organizations to benefit.

Judgment:

- The Court distinguished this case from Emma Smith because:
 - Evidence showed the testator knew the bequest might be impossible to carry out due to unlawfulness and therefore included substitutions.
 - The Court emphasised that freedom of testation should prevail; therefore, the substitute beneficiaries should receive the benefits.
 - Emma Smith remains relevant where no substitutions are made.
 - All cases discussed involve public charitable trusts administered by publicly funded institutions, which are subject to scrutiny.
- **Discuss King v De Jager (CC)**

Facts:

- Fideicommissum limited inheritance to male descendants of two of the testator’s children.
- A female descendant challenged her exclusion, alleging gender discrimination under s 9.

High Court Judgment:

- Held that freedom of testation must prevail.
- Public policy had not progressed to allow courts to override a testator’s private will, even if unfairly discriminatory.
- Distinction made between private and public testamentary bequests; public trusts are more heavily scrutinized.

Constitutional Court Judgment:

- Overturned the High Court decision.
- Minority: Common law needed development to protect private inheritance— clause unconstitutional, against public policy, and unenforceable.
- Majority: Directly applied Constitution (s 9, read with Equality Act s 8)— clause amounted to unfair discrimination on gender grounds (s 9(3), 9(4), presumption s 9(5)).
- No distinction between public and private trusts/wills for unfair discrimination purposes.
- Notably, T does not have to treat family equally; only unfair discrimination (contrary to public policy) is prohibited.
- Clause deemed to be without condition due to invalidity.

- Discuss *Harvey v Crawford* (SCA)

Facts:

- Trust deed limited beneficiaries to legal descendants.
- Testator aware that one child contemplated adoption, who was therefore excluded.
- Application to include adopted child.

Judgment:

- Court followed reasoning of High Court in *King v De Jager*.
 - This was a private trust deed affecting no one in the public sphere.
 - No one has a right to inherit; therefore, freedom of testation prevails.
- Discuss *Wilkinson v Crawford* (CC)

Facts:

- Appeal from *Harvey v Crawford*.
- Question whether trust deed exclusion of adopted children amounted to unfair discrimination.

Judgment:

- Public trusts are subject to stricter scrutiny, but even private trusts are subject to public policy.
- Court held that the exclusion of adopted children was unfair discrimination, unlawful, and unenforceable.
- Differentiation based on birth falls under s 9(3), and unfair discrimination is presumed under s 9(5).

Principle on Freedom of Testation:

- Freedom of testation is not totally negated.
 - It cannot override constitutional protections; provisions that are unconstitutional and against public policy amount to unfair discrimination and cannot be enforced.
 - This applies to both public and private trusts/wills.
- What are the three restriction as set out by common law and statutes?(3)

Public policy: Courts will refuse to give effect to a testator's directions that are contrary to public policy. This concept changes over time as social conditions change. In South Africa today, public policy is rooted in the Constitution and the fundamental values it protects.

Equality: According to section 9 of the Constitution, no one may unfairly discriminate directly or indirectly against anyone on the basis of race, gender, sex, religion or several other factors.

Unfair discrimination: In terms of section 9(5), these provisions are presumed to be unfair discrimination unless the contrary is proved.

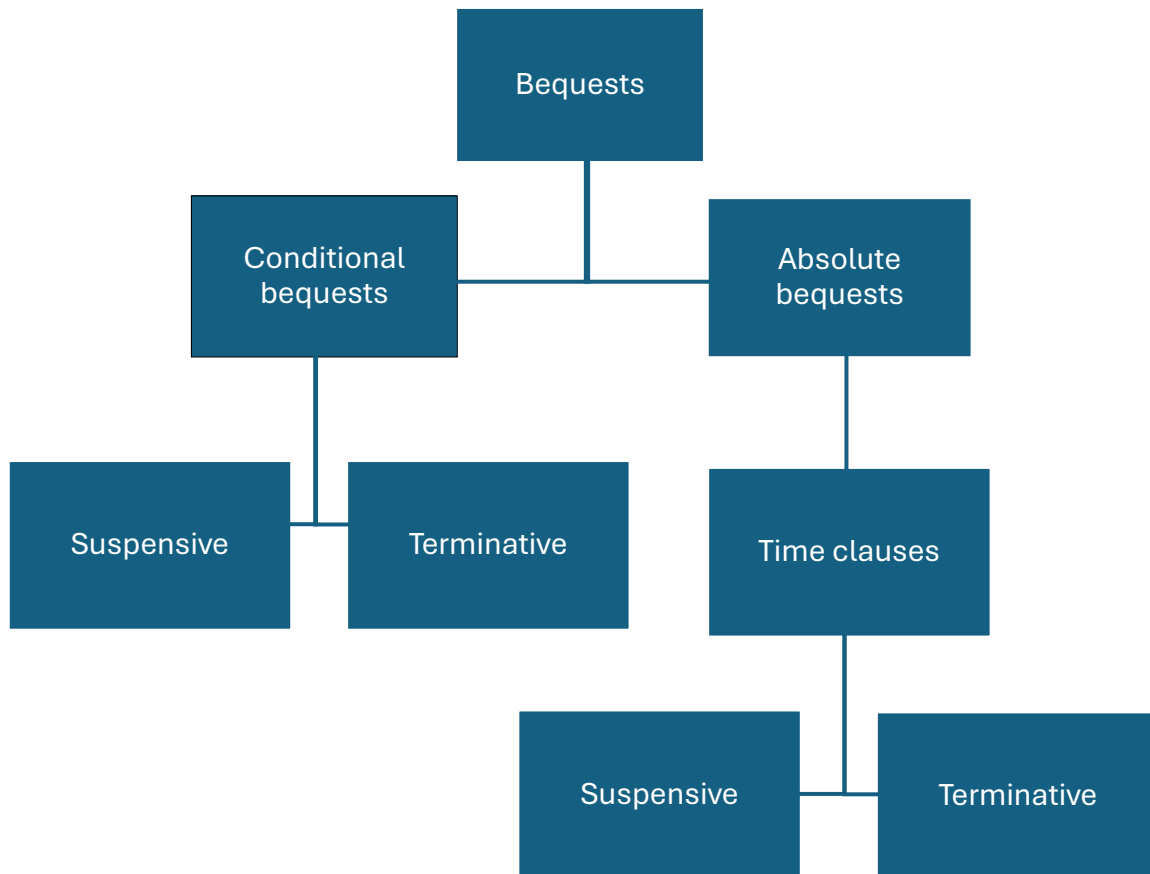
- There are two types of conditions which have frequently been challenged in our courts as possibly being contra bonos mores:
 - Conditions that interfere with a beneficiary's marital relationship
 - Conditions limiting a beneficiary's freedom of movement.

Chapter 9

Contents of wills: absolute bequests, conditions, the modus and estate massing.

Bequests

The following is the way in which a testator may make a bequests



Absolute bequests

- Define an absolute bequests(1)

An absolute bequest is a bequest which does not contain any conditions. It is the simplest way of making a bequest and the effect of such a bequest is that vesting normally takes place on the testator's death.

- The following is an example of an absolute bequests

‘I leave my house to my daughter, Donna.’

In this example, there are no conditions attached to the bequest and the beneficiary's rights vest immediately on the death of the testator. Both *dies cedit* and *dies venit* take place at the same time and the beneficiary becomes owner of the benefit. There is also no possibility that the benefit left to Donna will perhaps cease to be hers in future if a

specific uncertain event takes place. It is an absolute bequest and, as such, the subject matter of the bequest forms part of the estate of Donna and will pass on to her heirs.

- Define a legacy and legatee(1)

Where the testator leaves a specific asset to a beneficiary, such as a house, a farm or amount of money, the bequest is known as a **legacy**. The beneficiary of a legacy is **legatee**. A legatee always inherits a specific asset or a specific sum of money.

- Define a pre legacy(1)

Legacy that takes precedence over all other legacies and inheritances according to T's intentions.

- Define inheritance, heir and sole heir(1)

Where a testator leaves his or her entire estate, a portion thereof or the residue thereof to a certain beneficiary, such a bequest is called an **inheritance** and the beneficiary is called an **heir**. If a testator leaves his or her entire estate to a single person, the beneficiary is called a **sole heir**.

- What is the procedure of transferring the estate?(1)

After the executor has paid the testator's debts, he or she must first transfer the legacies to the legatees before transferring inheritances to heirs. If the legacies are of equal value to the value of the estate after the creditors have been paid, nothing will be left for the heirs.

- Define a pre-legacy(1)

It is also possible to create a pre-legacy in a will. Such a pre-legacy has precedence over all other legacies and inheritances.

Example of a pre-legacy

'I leave R1 million to my wife, Marcia, which has to be paid to her before all other beneficiaries receive their bequests.'

With this provision, the testator can ensure that his wife receives her legacy before any of the other legatees receive theirs.

- Define residue(1)

The residue of an estate (or **residuary estate**) refers to that part of the deceased's estate after the payment of funeral expenses, all debts, taxes, administrative fees and

other administration costs, maintenance claims and all legacies have been paid out. The residue is what is left in the estate after everything has been paid out or transferred and it includes all bequests that have failed or lapsed.

- Discuss the effect of collation(1)

Heirs may be compelled to collate certain benefits (in other words, to account for the benefits they received during the testator's lifetime), while legatees are not obliged to collate

When does a legacy lapse?

- What is the general rule?(1)

If, for some reason or other, effect cannot be given to a legacy, it depends on the intention of the testator whether the legacy will fail or not

- A legacy will lapse or fail in the following circumstances:(4)

Ademption:

Ademption is a form of tacit revocation of a legacy. If a testator voluntarily alienates the object of a legacy during his or her lifetime, the legacy fails. If a testator therefore sells the object of a legacy solely for reasons of convenience, ademption takes place.

If, however, the alienation of the bequeathed asset was not voluntary, for example if the testator sold the asset because he or she had pressing debts to discharge or because of some similar necessity, the bequest will not be revoked.

Executor is obliged to purchase the asset for the estate to implement the legacy or to pay the legatee the value of the asset if impossible

Barrow v The Master

The testator had bequeathed a half-share of the farm, Longridge, to his son who managed the farm. Because of the considerable distances that his son had to travel each day to reach Longridge, the testator later sold that farm and purchased the farm Patchwood in its place. The testator did not alter his will to refer to Patchwood and, on his death, it was held that the legacy of a half-share of Longridge had lapsed by ademption. The son's argument that the sale had been made out of necessity because of the impracticality of travelling the considerable distance to Longridge was rejected. The sale was seen as a matter of convenience, not necessity. This conclusion was strengthened by the fact that the testator had been able to put off selling until he could obtain the price that he had set.

Legatee dies before the legacy vests in him or her:

This is obvious in light of the ground rule that a beneficiary must be alive in order to inherit. If **section 2C** of the Wills Act applies, the legatee will be substituted *ex lege* (by virtue of law) and the legacy will not fail.

- T might make provision for substitution in the will
- If no substitution then possible statutory substitution (**s2C(2)**) or statutory accrual (**s2C(1)**)
- If **s2C(1) &(2)** not applicable then possible common law accrual
- If common law accrual is also not applicable then legacy forms part of residue if T made provision for residue
- If no residue: the legacy devolves intestate

Legatee repudiates the legacy:

If a legatee repudiates the legacy and a substitute has not been named in the will, and if **section 2C** of the Wills Act does not apply, the legacy will fall into the residue of the estate to be shared by the residuary heirs. If section 2C applies then:

- If no substitution then possible statutory substitution (**s2C(2)**) or statutory accrual (**s2C(1)**)
- If **s2C(1) &(2)** not applicable then possible common law accrual
- If common law accrual is not applicable then legacy forms part of residue if T made provision for residue
- If no residue: the legacy devolves intestate

Legatee is incapable of inheriting:

If a legatee is incapable of inheriting, for example because he murdered the testator, and neither substitution nor accrual is possible, the legacy will fall into the residue of the estate.

Bequeathed object is destroyed:

If the object of the legacy is destroyed and there is nothing which can be inherited, it is assumed that the testator revoked the bequest.

Testator's estate is insolvent:

If the testator's estate is insolvent, there can be no transfer of legacies to the legatees because all the assets of the estate must be used to repay the creditors of the estate.

Time clauses

- Define a time clause(1)

If a bequest is subject to a time clause, it is subject to an event that will certainly happen in the future, although it may be certain or uncertain when it will arrive.

- Define a suspensive time clause(1)

A bequest subject to a suspensive time clause is a bequest from which the beneficiary will receive the benefit only at a certain future time. A bequest subject to a suspensive time clause is thus a bequest where the beneficiary will have to wait (he or she is kept in suspense) until a certain time to receive the benefit

- Define a resolute time clause(1)

A bequest subject to a resolute (terminative) time clause is one where the beneficiary's rights are terminated when a certain time arrives. According to a terminative time clause, a beneficiary's already established rights terminate when a certain time arrives.

Conditional bequests

- What is a conditional bequests?(5)
 - A conditional bequest is a bequest that depends on a future event which is uncertain in the sense that it may or may not occur.
 - Conditional bequests often contain words such as 'if' or 'should'. To be valid, a condition must be clear and possible.
 - In addition, it may not be illegal or *contra bonos mores*.
 - If a condition fails in one of these respects, it is invalid and void, and held to be *pro non scripto*.
 - This means that the condition falls away and the bequest becomes unconditional
- What are the two types of a conditional bequests?(2)
 - Suspensive condition
 - Resolute condition

Suspensive conditions

- Define a bequest subject to a suspensive condition(1)
 - The beneficiary does not obtain a vested, finally established right to the benefit unless and until a particular uncertain future event takes ****place.
 - The vesting of the beneficiary's rights is therefore suspended (postponed) until the uncertain future event occurs.
 - Until the condition is fulfilled, the beneficiary has no transmissible right that would form an asset in his or her estate on death or insolvency
 - It's effect is that it postpones dies cedit

- What is the difference between a suspensive and a resolutive condition?(3)
 - The effect of a suspensive condition is usually to postpone *dies cedit* while a resolutive condition does not do so.
 - However, the possibility does exist for a beneficiary to lose his or her vested right to a bequest if a resolutive condition is fulfilled.
 - A suspensive condition usually has a corresponding resolutive condition.

Modus or obligation

- Define a modus(2)
 - If a testator makes a bequest subject to a burden or obligation, this provision is called a modus.
 - A modus is a qualification added to a gift or testamentary disposition which requires the beneficiary to devote the property he or she received (or the value thereof) in whole or in part to a specific purpose.
- What is the difference between a modus and a suspensive condition?(3)
 - When a modus is used, vesting of the beneficiary's rights is not postponed, but takes place immediately on the testator's death.
 - When a suspensive condition is used, however, vesting is postponed.
 - The modus also does not affect the beneficiary's rights if he or she does not comply with it although the beneficiary does, in certain circumstances, render himself or herself liable to a personal action if he or she does not comply with the modus.

Types of modus

- The testator may have different objectives for adding a modus to a bequest:(3)

The modus may be in the interest of the beneficiary.

- The beneficiary is not obliged to carry out the modus and no one will enforce it. He or she simply has a moral obligation to comply with the modus, but non-compliance will not affect his or her rights to the bequeathed benefit

The modus may be in the interest of a third person.

- This form of modus is often used where a testator has fixed assets but not much other capital and wishes to benefit all his or her children without dividing the assets.
- The beneficiary in whose favour the testator has made the modus then has a personal right against the beneficiary on whom the modus rests.
- Performance, in other words, the execution of the modus, may be demanded from the burdened beneficiary by the testator's executor, the Master or by the person in whose favour the modus was made.
- The executor may reclaim the bequeathed benefit from the beneficiary concerned if the latter refuses to carry out the modus. This takes place in the

same way that a property is attached in an execution process – the benefit is attached following the enforcement of the third party's personal right. It is even possible for those persons in whose favour the modus was made to ask for security to be furnished by the beneficiary for performance of the modus.

The modus may be for the furtherance of an impersonal object.

- Example: 'I leave R200 000 to my cousin, PJ, to be used for the decoration of my grave.'
- In practice, the problem with this type of modus is that there is nobody to supervise the beneficiaries and make sure that they perform as required.
- It is impossible for either the Master or the executor the obligation as they have no rights, personal or otherwise, that may be used to force the beneficiary to carry out the modus
- It is just a moral obligation

Difference between a modus and a condition

Modus	Suspensive condition
Does not suspend or postpone vesting of rights.	Postpones vesting of rights until the condition is fulfilled.
If the beneficiary dies before performing the modus, the benefit still forms part of their estate and devolves to their heirs.	If the beneficiary dies before fulfilment, no rights vest and their heirs get nothing.
The third party with a right under the modus can enforce it as a personal right against the beneficiary's estate.	

The difference between a modus and a resolutive condition

Modus	Resolutive condition
Rights vest in both the burdened beneficiary and the third party immediately upon the testator's death.	The beneficiary's rights are vested but are subject to termination if the condition is fulfilled.
Even if the beneficiary fails to carry out the modus, their vested rights remain intact.	Once the condition occurs, the vested rights are lost.
The third party's remedy is a personal action to enforce performance.	

- Discuss Webb v Davis(SCA)

Facts:

- The testator (T) bequeathed a trading station to his son R.
- The will included the wording: "...on condition that R pays his brother G R70 000 in instalments of R10 000 per annum and that R register a bond as security for this payment."
- R paid for 3 years and then died.
- G argued that the bequest was subject to a suspensive condition which had not been fully met, and therefore R never vested ownership. Accordingly, the trading station could not pass to R's heirs, including his wife.

Judgment:

- The Court held that the intention of the testator must be ascertained from the terms of the will, not merely the use of the word "condition."
- Despite the wording, the Court found that T intended the obligation to be a duty rather than a suspensive condition.
- The Court reasoned that given the lengthy repayment period and requirement to take transfer, it was unlikely that T intended R to have only mere hope until full payment was made.
- Therefore, the property vested in R and could now pass to his heirs.
- The bequest was held to be an obligation/modus, not a condition.

Estate massing

- Define estate massing(1)

Estate massing is a popular concept used in joint or mutual wills in South Africa. The basic idea is that two or more testators (usually two spouses) mass the whole or parts of their estates into one consolidated economic unit for the purpose of testamentary disposal and the disposal becomes effective on the death of the first-dying spouse.

- Discuss Estate Koopmans v Estate De Wet

The parties who consolidated their estates were sisters. The requirements for estate massing to take place are:

- The intention of the parties to consolidate their estates
- The first-dying testator must have disposed of the survivor's share of the joint estate as well as of his or her own. (Where a testator has disposed of his or her own estate only in a will, there can never be any question of estate massing, Rhodes v Stubbs)
- The surviving testator must adiate the massing(Survivor loses ownership in their assets forming part of consolidated unit but will get some form of limited interest in return)

- What are the options that the beneficiary has?(2)
 - To adiate both the benefit and the burden or obligation
 - To repudiate the benefit and burden or obligation attached to the benefit.
- What burden does estate massing are on the survivor?(5)
 - Estate massing imposes a burden on the survivor because the estate of the survivor will also devolve in terms of the mutual will while he or she is still alive.
 - This means that the survivor loses his or her freedom of testation regarding his or her own estate, forming part of the “consolidated unit”, in another way byway of a new will. Provisions are therefore onerous to the survivor and requires formal adiation in writing
 - To accept the benefits left to him or her, the survivor must give effect to the mutual will.
 - If the survivor changes his or her mind and no longer wants estate massing to take place, he or she may repudiate the bequest and not accept any benefit under the will.
 - He or she then retains his or her own property and may do with it as he or she pleases
- What is the purpose of estate massing?(1)
 - To protect survivor/children against possible insolvency
 - To ensure legal certainty
 - An to provide peace of mind

How can estate massing be effected?

- How can it be affected?(2)
 - Estate massing can be effected through the use of different legal institutions.
 - The rights of the survivor and the rights of the beneficiaries of the first-dying testator, in all instances, depend on the legal institution used, namely a usufruct, a fideicommissum or a trust
- Examples of estate massing using different legal institutions (or concepts)

Usufruct: Anna and Bill mass their estates and stipulate that on the death of the first-dying, the whole massed estate will go to their son, Charlie, subject to a lifelong usufruct in favour of the surviving spouse.

Fideicommissum: Corne and Delilah mass their estates and stipulate that on the death of the first- dying, the massed estate will go to the survivor, and on the death of the survivor, to their children in equal shares. In this example, a fideicommissum is created, with the survivor as fiduciary and the children as fideicommissaries. Fiduciary’s rights are always subject to a resolutive and suspensive condition. The suspensive condition is Corne and Delilah dying and then the resolutive condition is the survivor dying.

Trust: Elise and Frank mass their estates and stipulate that on the death of the first-dying, the massed estate shall be transferred to a trust to be administered by an

appointed trustee. During the lifetime of the survivor, he or she receives an income (in other words, he or she is an income beneficiary), and following the death of the survivor, the trust capital (corpus) goes to their children in equal shares.

Unlimited rights: Gita and Husani mass their estates and stipulate that the family home will go to the survivor and the rest of the estate property to the children in equal shares.

In all 4 instances the survivor:

- Will merely have a limited interest of some kind over the massed estate
 - The survivor (upon adiation) loses ownership (or full ownership in the event of the fideicommissum), in his/her contribution to the massed estate, but receives in return, some kind of limited interest over the massed estate.
 - It is possible that the value of the limited interest over the entire massed estate the survivor receives in return, may be worth more than what he/she contributed to the massed estate
- Common law massing(3)
 - H and W, married in community of property, stipulate in joint mutual will:
 - “We provide that upon the death of the 1st dying of us, our respective estates (share in the joint estate) be massed for purposes of testamentary disposal into a consolidated economic unit. The massed estate is bequeathed as follows: The survivor receives the house. Our daughter receives the residue.”
 - If H dies first and W adiates then W will receive an unlimited right (full ownership) in the house but loses ownership of her half of the residue (therefore onerous provision)

Section 37 of the Administration of Estates Act

- State the requirements of estate massing under this section?(5)

There must be a mutual will.

- **Section 37** will not apply to estate massing in an antenuptial contract or in a will of a sole testator, although there is no logical reason why the ultimate beneficiaries should be in a better position merely because their benefits are contained in a mutual will.

There must be two or more persons who are parties to the mutual will

- They need not be married to each other. Some or all of the property of each testator must be consolidated into a single mass and this mass, or part of it, must be disposed of by the mutual will.

The mutual will must give the survivor ‘a limited interest in respect of any property in the massed estate’.

- Such limited interest may be in the form of various legal institutions, such as usufruct, fideicommissum or trust.

The survivor must adiate the bequest.

- **In Rhode v Stubbs**, it was made clear that estate massing only takes effect once the survivor has accepted the benefit.

The disposition must take place at some time on or after the death of the first-dying.

- Although **section 37** specifically refers to ‘after’ the death of the first-dying, it probably includes a disposition taking place on the death of the first-dying.
- Difference between **s37** and common law?(2)
 - Upon common law massing survivor gets full ownership with certain property and lose ownership in others-
 - S37 massing causes survivor to lose ownership of contribution to massed estate but receives limited interest

Consequences of adiation

- Discuss the consequences of adiation(4)
 - Survivor bound to provisions of mutual will and cannot amend or revoke will in the future
 - Survivor not competent to make subsequent conflicting will
 - Can dispose of newly acquired assets after massing has occurred that therefore do not form part of massed state
 - Survivor and other beneficiaries allowed to calims from executor. Eg: survivor claims usufruct over massed estate or fiduciary interest or rights wrt trust income. Other beneficiaries claim e.g. full (nude) ownership in case of usufruct, fideicommissary interest or rights with trust capital
- **Discuss Rhode v Stubbs**

The Court also makes it clear that the fact that testators who were married in community of property made a mutual will does not mean that they intended to effect estate massing. According to the common law rules of interpretation, when interpreting a joint or mutual will of parties married in community of property, one has to start off with the premise that one is dealing with two separate wills of the parties until the contrary becomes clear.

- Discuss the rights of the ultimate beneficiaries under common law.(3)
 - Ultimate beneficiaries (e.g., children) had only personal rights against the survivor.
 - They did not have dominium (ownership) in the survivor’s share of the massed estate.
 - Ownership only vested on the death of the survivor.

- If the survivor was sequestrated, the children only had a concurrent claim, like ordinary creditors, against that part of the estate.

Consequences of repudiation

- If, on the death of the first-dying testator, the survivor elects not to take any benefit under the will, are as follows:(3)
 - The surviving testator may not receive any benefit whatsoever under the will from the estate of the first- dying testator.
 - The surviving testator retains his or her own estate and may dispose of it in any way he or she wishes.
 - The mutual will, as the will of the first-dying testator, relates to the estate of the first-dying testator only, subject to the provision that the surviving testator may not receive any benefit from the estate of the first- dying testator.
- Discuss the principles as discussed in **Rhode v Stubbs**

It is clear that the principles of estate massing are difficult to apply and that if there is any reasonable doubt as to the testators' intention, the Court would rather steer clear of estate massing.

