Tutorial Letter 201/1/2020

Law of Succession

PVL2602

Semester 1

Department of Private Law

This tutorial letter contains important information about your module.

BARCODE

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Dear Student

1 INTRODUCTION

This tutorial letter provides the memorandum for Assignments 1 and 2 of Semester 1/2020 as well as information on the examination and an old examination paper. More old examination papers are available on myUnisa.

2 FEEDBACK ON ASSIGNMENTS

2.1 Assignment 1

SEMESTER 01

ASSIGNMENT 01

Please note: Submission of this assignment was compulsory for admission to the examination.

The assignment counts 50% towards your semester mark and 10% towards your final mark for this module. Please see TL 101/3/2020 for an explanation.

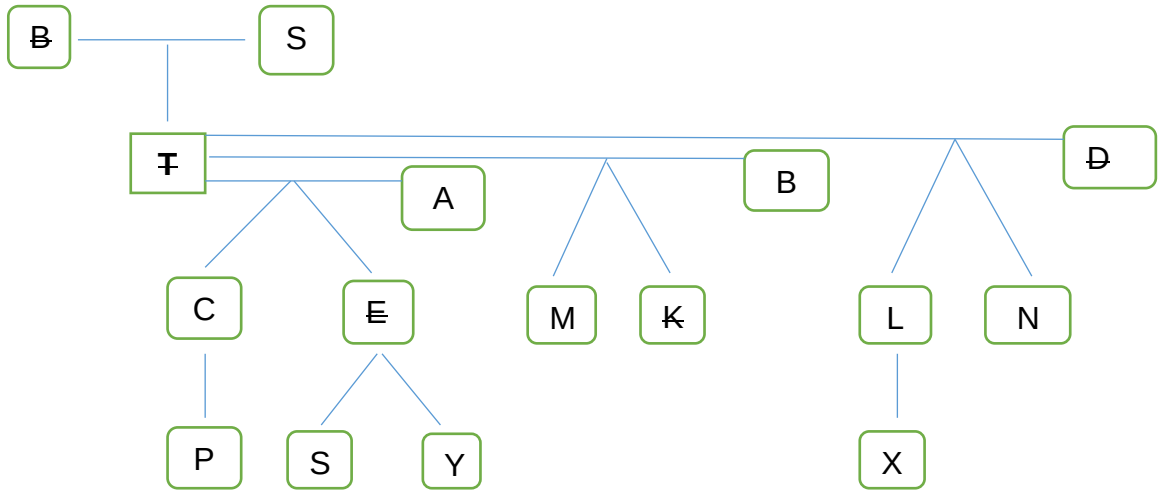
Question 1

Thabo died intestate in 2019 leaving behind the following relatives:

- His wives, Anna and Basetsana to whom he was married in terms of customary law. Thabo had also been married to Dinah in terms of customary law, but she died before him.
- His son, Cyril, born from his marriage with Anna. Cyril has a daughter, Phula.
- His grandchildren, Selo and Yvette, the children of a predeceased son, Ernest, born from the marriage to Anna.
- His daughter, Malefu, born from the marriage to Basetsana. He also had a son, Kabelo, with Basetsana, but Kabelo died as a teenager before the testator. Kabelo was killed by Cyril who served a jail term for the murder.
- His twin daughters, Lerato and Neo, born from his marriage to the predeceased Dinah.
- A grandson, Xilo, the child of Lerato.
- His mother, Sarah. His father, Ben, is predeceased.

The value of Thabo's estate is R2 100 000. Explain how his estate is going to devolve and calculate how much each person will receive. Give reasons for your calculations. Also, indicate which relatives will not inherit, giving reasons. (15)

Answer



(1) Thabo died intestate because he did not leave a will. All intestate estates, including the intestate estate of a person married according to customary law, are divided in terms of the Intestate Succession Act – see the *Bhe* case. [*Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC)].

(2) In terms of section 1(1)(c) of the Intestate Succession Act 81 of 1987, 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 of R250 000 of the intestate estate, whichever is the greater amount, and the descendants will inherit the residue.

(3) To calculate a child's share/portion, the value of the estate is divided by the number of children who have either survived the deceased,

(4) or who have predeceased the deceased but are survived by their descendants,

(5) plus the number of spouses left by the deceased (see section 1(4)(f)).
In order to determine the child's share we must decide which children qualify to be counted:

(6) Children who have survived Thabo: (1) Cyril, (2) Malefu, (3) Lerato, (4) Neo. He also has a child who has predeceased him but has left descendants (Selo and Yvette), namely (5) Ernest.

(7) A child's share is therefore calculated by dividing the value of the estate by 7 (5 children plus 2 wives). [Dinah is predeceased and cannot inherit.]

(8) R 2 100 000 ÷ 7 = R 300 000. A child's share is therefore R 300 000.

(9) A child's share is more than the statutory amount of R250 000 and the wives (Anna and Basetsana) will therefore each inherit R300 000.

(10) The residue of R 1 500 000 (R 2 100 000 - R 600 000 = R 1 500 000) is divided between the descendants Cyril, Malefu, Lerato, Neo and Ernest's descendants who represent him (Selo and Yvette).

(11) Cyril, Malefu, Lerato, and Neo inherit R 300 000 each

(12) and Ernest's children represent him and share Ernest's R 300 000 each inheriting R 150 000.

(13) However, Cyril murdered a *coniunctissimus* (spouse, parent or child) of the deceased (Thabo) and is therefore disqualified to inherit from Thabo. [See *Ex parte Steenkamp and Steenkamp* 1952 (1) SA 744 (T) or *Casey v The Master* 1992 (4) SA 505 (N).]

(14) Cyril's child, Phula, will inherit Cyril's share in terms of section 1(7) of the Intestate Succession Act.
(15) Xilo, the child of his daughter Lerato, cannot inherit because he cannot represent his parent who is still alive.
(16) His mother, Sarah does not inherit because she is excluded by the spouses and children in terms of section 1(1)(c).

[15]

Question 2

Mr Smith, a widower, asks his attorney to draw up a will for him in which he leaves his whole estate to his girlfriend, Miss Bell, thus disinheriting his two adult children. Being a very busy businessman, he goes to the attorney's office after hours to sign the will. Since there was no one available to sign as witnesses, the attorney offered to have his two secretaries sign as witnesses the next day. Mr Smith agrees to this. After his death a few years later, the attorney informed the children about the circumstances surrounding the signing of the will.

(a) Does this will comply with the prescribed formality requirements found in section 2(1)(a) of the Wills Act 7 of 1953? Discuss by referring to all the formalities required in this scenario. (4)

(1) The will must be signed at the end thereof by the testator himself.
(2) The signature of the testator must be made (or acknowledged) in the presence of two or more competent witnesses.
(3) Such witnesses must attest and sign the will in the presence of the testator and each other.
(4) In this instance, the witnesses were not present when the testator signed and he was not present when they signed. He also did not acknowledge the signature in the presence of both witnesses. The will is therefore not valid.

(4)

(b) Assume the Master accepts the will as valid and the children then approach the court for an order declaring the will invalid because of the non-compliance with formalities. What can Ms Bell do to ensure that she inherits in terms of the will? Discuss in detail with reference to relevant case law. (11)

(1) She has to approach the court for an order in terms of section 2(3) of the Wills Act.
(2) In terms of section 2(3) the court is empowered to order the Master to accept a document as a valid will although it does not comply with all the formalities for the execution of wills
(3) if the court is satisfied that the document concerned was drafted or executed by a person,
(4) who has since died and
(5) who intended that document to be his or her will.
(6) The Court has no discretion but must make an order directing the Master to accept the document as a valid will if the requirements are met.

(7) Mr Smith executed the will by signing it, therefore the fact that he did not draft it personally is not an issue. [Section 2(3) states that will has to be drafted **or** executed by the deceased. The testator signing the will is considered to meet the requirement of "executed" by him.]
(8) The requirement that the testator must personally draft the will was stated in *Bekker v Naude* 2003 (5) SA 173 (SCA).
(9) The most important requirement which has to be satisfied before a court will grant an order in terms of section 2(3) is the requirement that the court has to be satisfied that the testator intended the document to be his will.
(10) The facts of each case must be considered to ascertain the testator's intention.
(11) See *Van Wetten v Bosch* 2004 (1) SA 348 (SCA).
(12) In this scenario it is clear that it was his intention that the document should be his will because he signed it as the testator. Ms Bell will therefore be entitled to the order declaring the will valid and she will therefore inherit in terms of the will.

(11)
[15]

Total for assignment 1: [30]

2.2 Assignment 2

SEMESTER 01 **ASSIGNMENT 02**
The assignment counts 50% towards your year mark and 10% towards your final mark for this module. Please see Tutorial Letter 101/3/2020 for more information.

This assignment covers the whole textbook and the information in Tutorial Letter 101.
Select only **one** answer per question. Each answer counts two marks.

The correct answers are indicated in bold.

Question 1

1 Which one of the following persons will **not** be able to claim maintenance from the deceased in terms of the Maintenance of Surviving Spouses Act 27 of 1990?

[1] The deceased's wife in a monogamous Muslim marriage.
[2] The deceased's wife in a polygamous Muslim marriage.
[3] The deceased's heterosexual life partner.
[4] The deceased's homosexual life partner in a civil union. (2)

2 Mr X dies intestate and is survived by his grandparents, P and Q on his father's side and his uncle Z on his mother's side only. How will his estate devolve?

[1] Z will inherit one half of the estate and P and Q will share the other half of the estate.
[2] P, Q and Z will each inherit one-third of the estate.
[3] The uncle, Z will inherit the whole estate.
[4] The grandparents, P and Q, will inherit the whole estate. (2)

3 According to *Du Plessis v Strauss* 1988 (2) SA 105 (A) …

[1] In South African law, no presumptions arise from the coupling of a *si sine liberis decesserit* clause to a conditional fideicommissum in a will.
[2] In a will, a *si sine liberis decesserit* clause coupled with a conditional fideicommissum always gives rise to a presumption that a tacit *fideicommissum* was created in favour of the children mentioned in the clause.
[3] In a will, a *si sine liberis decesserit* clause coupled with a conditional fideicommissum gives rise to a presumption that a tacit *fideicommissum* was created in favour of the children mentioned in the clause, but only if they were descendants of the testator.
[4] In a will, a *si sine liberis decesserit* clause coupled with a conditional fideicommissum will never create a tacit *fideicommissum* in favour of the children mentioned in the clause, if the children were related to the testator through a sibling. (2)

4 T provides in his will:

"I leave R 20 000 to my daughter, F. She must receive this amount before any other benefit is paid out."

The bequest to F is called …

[1] a modus.
[2] a prelegacy.
[3] an inheritance.
[4] a bequest price. (2)

5 When interpreting a will, which of the following sources may **not** be used?

[1] The will itself.
[2] Armchair evidence.
[3] Extrinsic evidence to identify a beneficiary.
[4] Evidence as to a statement made by the testator himself or herself as to what he or she intended. (2)

6 The Master may dispense with the appointment of an executor if ....

[1] the deceased died intestate.
[2] the value of the estate is less than R250 000.
[3] the beneficiaries apply to the Master not to appoint an executor.
[4] the value of the estate is less than R125 000. (2)

7 Which one of the following bequests provides an example of a joinder *re et verbis?*

[1] "I bequeath my farm to John and Peter. John is to get the portion which lies north of the river, while Peter is to get the portion which lies south of the river."
[2] "I bequeath my farm to John and Peter."
[3] "I bequeath my farm to John and Peter in equal shares."
[4] "I bequeath my farm to John and my car to Peter." (2)

8 Which one of the following provisions in a will creates a fideicommissary substitution?

[1] "I bequeath my farm to my son, John. If John predeceases me, my son Peter should inherit the farm."
[2] "I bequeath my farm to my sons, John and Peter, in equal shares."
[3] "I bequeath my farm to my son, John. If John dies without children, the farm must go to my son Peter."
[4] "I bequeath the residue of my estate in trust to my sons, John and Peter." (2)

9 Testator T provides as follows in his will:

> "I leave my estate in trust to my trustee, Mr X. My wife, W, must receive the income from the trust during her lifetime. At her death, my children P and J must receive the capital of the trust."

Who is the owner of the trust property after T's death?

[1] W
[2] X
[3] P and J
[4] W, P and J. (2)

10 What is the principle called according to which 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?

[1] Bequest price
[2] Ademption
[3] Collation
[4] Prelagacy (2)

11 What is the process called where a court adds, deletes or changes something in a will because the testator had made a mistake when making the will and the will does not reflect his intention correctly?

[1] Rectification
[2] Deletion
[3] Alteration
[4] Ratification (2)

12 B and C were married in 2010. Shortly thereafter, they made a mutual will, indicating that the survivor will inherit everything. Two children, D and S, were born from the marriage. In January 2018 they were divorced and in February 2018 B married W. Two weeks later B died in a car accident without changing his will. Who will inherit B's estate?

[1] C
[2] W
[3] D and S
[4] W, D and S (2)

13 Testator Sam made a valid will, but at a later stage decided that he wanted to revoke the will. Which of the following methods would **NOT** constitute a valid revocation of the will?

[1] Sam declared before witnesses that he was revoking his will.
[2] Sam drew a line through all the pages of the will.
[3] Sam made a new will in which he included a clause revoking the previous will.
[4] Sam made a new will the provisions of which were completely contrary to the provisions of the first will.

(2)

14 A *donatio mortis causa*...

[1] is invalid in our law.
[2] may not be revoked by the donor.
[3] restricts the freedom of testation of the donor.
[4] is valid if it complies with testamentary formalities. (2)

15 Testator Tom provided as follows in his will:

> "I leave my house to my wife, Wendy. The residue of my estate I bequeath to my sisters, Mary and Nina."

Tom and Wendy were killed in the same car accident. Tom's only surviving relatives were his sisters, Mary and Nina, and his brother Ben. Wendy was survived by her sister, Susan.

Who inherited Tom's house?

[1] Wendy, since that was what Tom provided in his will.
[2] Susan, since she inherited the house from Wendy.
[3] Mary and Nina, since they are Tom's testate heirs.
[4] Mary, Nina and Ben, since they are Tom's intestate heirs. (2)

TOTAL: [30]

3 INFORMATION ABOUT THE EXAMINATION

To assist you with your preparation for the examination, we provide you with an old examination paper which should be viewed purely as **a guide to the types of questions** that could be asked. Please note that this does not necessarily mean that the same topics will be covered again in this semester's examination paper. Also, note that this paper was set on tutorial material that became outdated and was replaced by new tutorial material. **In short, do not rely on the previous examination paper or any of the older examination papers provided on *myUnisa* as an indication of what will be asked in this examination.**

Please take note of the following:

The COVID-19 pandemic has led to the National State of Disaster requiring social distancing as a means to avoid its spread. To this end the management of Unisa took a decision that there will be no face-to-face contact activities during the first semester, including examinations. As such, the examination of this module, like all other semester 1 modules at Unisa, will be conducted online.

The examination for PVL2602 will consist of Multiple-Choice Questions only. **A tutorial letter, TL202/1/2020, will be provided with instructions on how to upload and complete the examination paper. Please ensure that you read it carefully.**

3.1 Study material

The study material which you have to study for this examination consists of:

- the prescribed textbook: Jamneck, Rautenbach, Paleker, Van der Linde, Wood-Bodley *The Law of Succession in South Africa 3rd ed* (2017) Oxford University Press Cape Town [Prescribed sections are indicated in your study guide.]

- the prescribed cases, with the relevant notes in the *Casebook on the Law of Succession* – see the list of cases in Tutorial letter 101/2020.

- Tutorial Letters 101, 201 and 202. **Tutorial letter 202 supplies the information for the online examination. It is very important that you familiarise yourself with the instructions in Tutorial Letter 202 and follow them carefully.**

PLEASE NOTE:

- Please **do not phone to ask us if you can leave anything out, since there is nothing that you may leave out!** All the information in your Law of Succession study material forms a unit and the prescribed sections are indicated in the study guide. You have to know and understand **everything** to be able to answer problem type questions.

- No particular part of the work is more important than any other part. In other words, **do not try to "spot" for the examination**! Furthermore, **do not underestimate the volume of material that you have to study for this module. Do not think that it will be possible to answer the questions without studying because you will have your books at hand. Please note that you will not be able to answer all the questions within the time limit if you do not KNOW your work.**

- **Study the prescribed cases (and the Casebook's notes thereon)** as there may be direct questions on the cases in the examination. Many students who did not pass the examination in previous years admitted afterwards that they did not really study the cases. Do not make the same mistake!

3.2 Format of examination

Note the following information on the examination:

(1) The examination lasts **2 hours** and it counts **100 marks**.

(2) The paper consists of **multiple-choice questions only**.

(3) **Please see TL202/1/2020 for instructions on how to obtain and how to complete the examination paper online.**

(4) You are allowed to use a **pocket calculator** to do the calculations for the intestate succession questions but please note that you have to KNOW the intestate succession rules in order to answer the questions quickly and efficiently.

4 OLD EXAMINATION PAPER AND MEMORANDUM

The reason why we include an old examination paper here is for you to see the **type of questions** that you can expect in the examination. Please note however, that the paper for this semester consists only of multiple-choice questions but the same topics covered in this old examination paper may be covered in those questions. We suggest that w**hen preparing for the examination, you first answer the questions without looking at the answers.**

SECTION A

1 Mr X made a will in which he appointed his wife, Mrs X, as his sole heir. He also appointed her as the executor of the estate. Which one of the following statements regarding Mrs X's position is correct?

[1] Mrs X may only inherit in terms of the will if she rejects her appointment as executor.

[2] Mrs X may only inherit in terms of the will if she would have been an intestate heir had Mr X died without a will.

[3] Mrs X may inherit in terms of the will because her appointment as executor has no influence on her capacity to benefit under the will.

[4] Mrs X may only inherit in terms of the will if she brings an application to this effect before the High Court and the Court finds in her favour. (2)

2 *Animus testandi* refers to ...

[1] the testator's intention to make a will.

[2] the testator's capacity to make a will.

[3] the testator's freedom to make any provision, whatever he or she pleases, i/n a will.

[4] the testator's right to exercise his or her testamentary capacity freely in a will. (2)

3 Which of the following statements regarding estate massing are correct?

(a) In order for estate massing to take place, the testators must intend to consolidate their estates, or part thereof.

(b) The testators involved in the estate massing must be married in community of property.

(c) The first-dying testator must have disposed of the survivor's share of the massed estate as well as of his or her own share.

(d) The survivor must adiate the massing.

(e) If the survivor adiates, he or she loses his or her freedom of testation regarding his or her share of the massed estate.

[1] All of the statements.

[2] Only (a), (c), (d), and (e).

[3] Only (a), (b), (c) and (d).

[4] Only (a), (c) and (d). (2)

4 Which of the following statements regarding the legal position of the fiduciary are correct?

(a) The fiduciary is the owner of the fideicommisssary property.

(b) The ownership of the fiduciary is subject to a suspensive condition.

(c) The fiduciary's ownership is limited in duration.

(d) The fiduciary may only alienate or mortgage the fideicommissary property with the cooperation of the fideicommissary.

(e) The fiduciary is not liable to the fideicommissary for damage caused by him or her to the fiduciary property.

[1] Only (b) and (e).

[2] Only (a), (c) and (d).

[3] Only (a), (b) and (c).

[4] All the statements. (2)

5 In his will testator T provided:

"I leave my estate to the children of my daughter, Emma."

At the testator's death, Emma was married to Sam. She was pregnant with a child of which she was a surrogate mother in terms of a valid surrogacy agreement with Mr and Mrs Smith. Emma and Sam had a daughter, Brenda an adopted son Carel. Emma also had an adult daughter, Anna, who was born out of wedlock from a relationship she had before she married her husband Sam.

Who will inherit T's estate?

[1] Brenda, Carel, Anna and the unborn child, provided he/she is born alive.

[2] Brenda and Carel.

[3] Brenda.

[4] Brenda, Carel and Anna. (2)

6 The capacity given to an existing trustee to appoint an additional trustee is called:

[1] Power of appointment

[2] Substitution

[3] Power of assumption

[4] Treuhand (2)

7 Which of the following statements are recognised principles in our law that can be used when interpreting a will?

(a) Words should be given their usual grammatical meaning.

(b) Technical terms should be given their legal-technical meaning.

(c) If a person has drafted a will, there is a presumption that he or she intended to deal with his or her entire estate.

(d) There is a presumption that the testator wanted to treat his or her children equally.

(e) When interpreting a will, no evidence of any nature should be taken into consideration – only the wording of the will should be looked at.

[1] All the statements.

[2] Only (a), (b) and (c).

[3] Only (a), (b), (d) and (e).

[4] Only (a), (b), (c), and (d). (2)

8 Which one of the following statements reflects the decision of the court in *Lello v Dales* 1971 (2) SA 330 (A) the most accurately?

[1] Depending on the intention of the testator, accrual could take place between beneficiaries, despite the fact that the beneficiaries were joined *verbis tantum.*

[2] Where beneficiaries are to inherit the estate of a testator "in equal shares", such beneficiaries are not joined *verbis tantum* and consequently accrual may take place between them.

[3] When co-heirs are joined *verbis tantum*, accrual can never take place between them.

[4] In the case of joinder *re*, *re et verbis* or *verbis tantum* there are always a presumption in favour of accrual. (2)

9 In which of the following situations, taking into account the common law and section 2A of the Wills Act 7 of 1953, had T's will validly been revoked?

(a) T told his attorney (X) that he wanted her (the attorney) to destroy the original copy of the will in her (X's) possession, because he wanted to revoke the will. X thereupon destroyed the will.

(b) T told his family that he wanted to revoke his will which was in his attorney's possession. T did not give any instruction to his attorney in this regard.

(c) T wrote "cancelled" on all the pages of his will.

(d) T had intentionally torn up the only copy of his will.

(e) T had the original copy of his will in his possession, as well as a photocopy of the will. After his death, only the original will was found amongst his papers.

[1] In all the situations.

[2] Only in (a), (b), (c) and (d).

[3] Only in (a), (c), and (d).

[4] Only in (c) and (d). (2)

10 In terms of section 18(3) of the Administration of Estates Act 66 of 1965, the Master may dispense with the appointment of an executor if ....

[1] the surviving spouse has taken over the estate.

[2] the value of the estate does not exceed R250 000.

[3] the beneficiaries concluded a redistribution agreement.

[4] all the beneficiaries and creditors have agreed thereto. (2)

11 An agreement between two parties purporting to regulate the devolution of the estate of one or both of them after the death of such a party, is called a ....

[1] *pactum sucessorium*

[2] *donatio mortis causa*

[3] *fideicommissum residui*

[4] *si sine liberis decesserit* clause (2)

12 Which of the following statements regarding a trust are correct?

(a) A trust is a special form of *fideicommissum*.

(b) A trust is a juristic person.

(c) A trust will come to an end when the only trustee resigns.

(d) A trust must have a lawful purpose.

(e) A trust may be created for an impersonal purpose.

[1] Only (d) and (e).

[2] Only (b) and (d).

[3] Only (b), (c) and (d).

[4] All the statements. (2)

13 Testator T provided as follows in his will:

> "I leave my farm to my son, James. If James does not want to inherit the farm, my son Peter must inherit the farm."

This provision provides an example of a ...

[1] tacit *fideicommissum*.

[2] *si sine liberis decesserit* clause.

[3] fideicommissary substitution.

[4] direct subsititution. (2)

14 Which of the following persons will be able to claim maintenance from the deceased in terms of the Maintenance of Surviving Spouses Act 27 of 1990?

(a) The deceased's wife in a monogamous Muslim marriage.

(b) The deceased's wife in a polygamous Muslim marriage.

(c) The deceased's heterosexual life partner.

(d) The deceased's homosexual life partner in a civil union.

(e) The deceased heterosexual life partner in a civil union.

[1] Only (a) and (e).

[2] Only (a), (b) and (d).

[3] Only (a), (b), (d) and (e).

[4] Only (d) and (e). (2)

15 T provided as follows in his will:

> "I leave my farm to my brother, B and I bequeath the residue of my estate to my two sisters, M and N."

T leaves behind his mother, his brother B and his sisters M and N. B refuses to inherit. Who will inherit the farm and why?

[1] The mother, because of section 2C(1) of the Wills Act 7 of 1953.

[2] The sisters because they are the heirs of the residue.

[3] The sisters because accrual takes place.

[4] The mother and the sisters in terms of intestate succession. (2)

TOTAL SECTION A: [30]

SECTION B:

1 X dies intestate in February 2016 and is survived by the following relatives:

- B, C and D, his wives to whom he was married according to Muslim rites. He had also been married to J according to Muslim rites but she died in 2010.
- X and B had two children, E and F. F is still alive but E died in a car accident in 2007 and is survived by a daughter, Y.
- X and C had two children, G and H. H is still alive but G also died in the accident in 2007 and is survived by her adopted son, Z.
- X and J had one child – a daughter, K.
- X's parents, M and P, are still alive as is his brother, S.

X's estate amounts to R800 000. Calculate how X's estate will devolve and give reasons for your calculations. Remember that your reasons are as important as your calculations.

(10)

Answer

[Please note:

(a) In this instance X is married out of community of property, since he cannot have a joint estate with more than one wife. Consequently, students who divided the estate into halves as for a joint estate in a marriage in community of property or into equal shares for the wives and then continued with an intestate division, received 0 (zero) marks for the entire question.

(b) Students who counted the predeceased spouse for any calculation, received 0 (zero) marks for the entire question as they do not understand the basic principle that a person should be alive in order to inherit.]

(1) In *Hassam v Jacobs* (1)

(2) the court held that the word "spouse or survivor" as used in the Intestate Succession Act 81 of 1987, includes a surviving partner to a polygynous Muslim marriage. As a result **all** the spouses are entitled to inherit. (1)

(3) The deceased is survived by spouses and children - section 1(1)(c) of the Wills Actis applicable and provides that the spouses will inherit either a child's portion or R250 000, whichever is greater. (1)

(4) A child's portion is calculated by dividing the value of the intestate estate by the number of the children of the deceased who have either survived him, (1)

(5) or have predeceased him but are survived by their descendants,(1)

(6) plus the number of surviving spouses.(1)

(7) Therefore, in this case, a child's portion equals R800 000 ÷ 8 = R100 000 (K, F, H, E G plus B, C and D). (1)

(8) Since a child's portion of R100 000 is less than the statutory minimum amount of R250 000, each wife will receive R250 000. (1)

(9) The value of the remaining estate is R800 000 – R750 000 (R250 000 x 3) = R50 000 (1)

(10) The residue of R50 000 will be shared by the descendants: Y (representing E) and Z (representing G), F, H and K. (1) R50 000 ÷ 5 = R10 000

(11) M and P do not inherit as they are ascendants and are thus excluded by the descendants. (1)

(12) S does not inherit as he is a collateral and descendants exclude collaterals. (1) **(Max 10)**

2 Discuss the meaning of the terms "spouse" and "survivor" in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 as decided by the court in *Hassam v Jacobs NO* 2009 (5) SA 572 (CC). You need not include a summary of the facts of the case. (10)

Answer:

The Interpretation of the words "spouse" and "survivor" as referred to in the Intestate Succession Act 81 of 1987 as well as the Maintenance of Surviving Spouses Act 27 of 1990 were interpreted by our courts against the background of the Constitution.

(1) In *Hassam v Jacobs* 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 claiming maintenance or inheriting in terms of intestate succession from the estate of the deceased spouse.(1)

(2) The court *a quo* (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 unconstitutionality was referred to the Constitutional Court for confirmation as required by the Constitution. (1)

(3) 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. (1)

(4) It held further that the Act violates the applicant's (the wife's) right to equality. (1)

(5) 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,(1)

(6) marital status (1)

(7) and gender.(1)

(8) This exclusion is not justifiable in a society guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.(1)

(9) 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." (1)

(10) As to the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act 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;(1)

(11) (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; (1) and

(12) (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. (1)

(13) The order was made with retrospective effect from 27 April 1994 (when South Africa’s first Constitution came into operation), subject to the proviso that estates that had already been finally wound up would not be affected by the order.(1)

(Max 10)

3 THIS QUESTION CONTAINS A WILL WHICH STARTS ON THE NEXT PAGE. THE QUESTIONS ON THE WILL APPEAR AFTER THIS DOCUMENT.

LAST WILL AND TESTAMENT

This is the last will and testament of

JUDY SIMEON

(ID NR 640806 0067 083)

Currently residing at:

333 Jeremy Street, Randjiesfontein

1. REVOCATION

I revoke all wills and codicils previously made by me.

2. EXECUTORS AND ADMINISTRATORS

2.1 I nominate as executor of my estate **Daniel Poggenpoel** of the firm **Combrink & Poggenpoel Attorneys** of Pretoria with the power of assumption.

2.2 I exempt every executor and trustee, whether appointed under this will or assumed or substituted, from the furnishing of security to the satisfaction of the Master for the due and faithful performance of his/her duties as such.

3. BEQUESTS

3.1 To my daughter, **Samantha**, my jewellery as indicated in the photographs attached hereto. The rest of the jewellery is to go to my granddaughter, **Gesina**.

AS WITNESSES:

1. Samantha Simeon

JSimeon

JUDY SIMEON : TESTATRIX

2. B Muhle

3.2 The antique grandfather clock that belonged to my grandfather, to my son, **Bertus**, on condition that it must always go to the eldest son for 99 generations.

3.3 To my son, **Kobus**, my farm Sandfontein. At his death the farm must go to my grandson, **Koos**, and so to the eldest son for 99 generations.

3.4 To my daughter **Kathryn**, my beach house in Ballito.

3.5 The residue of my estate to my husband, **Emil** SIMEON.

3.6 If my husband and I should die simultaneously or within 30 (Thirty) days of each other, I bequeath my estate to my 4 children in equal shares.

3.7 Should my mentioned husband be predeceased at my death, I leave the residue of my estate to my children **Samantha and Bertus** in equal shares.

SIGNED by me at PRETORIA on this 2nd day of February 2014 in the presence of the undersigned witnesses who signed in my presence and in the presence of each other, all being present at the same time.

AS WITNESSES:

1. Samantha Simeon

JSimeon

JUDY SIMEON : TESTATRIX

2. B Muhle

3.1 Assume that all signatures on this will were made by hand and in pen ink.

Write a note on the validity of this will. (5)

Answer

(1) On the face of it, this will complies with all the formalities. (1)

(2) It was signed by the testatrix and two witnesses (1)

(3) and it was also signed on all the pages by the testator. (1)

(4) It could, however, be argued that it was not signed at the "end" as there is a big space between the last paragraph and the attestation. (1)

(5) See *Kidwell v The Master.* (1)

(6) It was therefore not signed at the end of the last paragraph as required and is therefore invalid. (1)

(Max 5)

3.2 Why should the testatrix and witnesses sign the photographs of the jewellery? (5)

Answer

(1) The photographs must also comply with the formalities as it identifies the object of the bequest. (1)

(2) In *Ex Parte Davies* (1) the court held that a testamentary writing which has to comply with the formalities may contain any one of the following elements:

(3) (a) The object (as in this case – the jewellery) (1)

(4) (b) The beneficiary (1)

(5) (c) The extent of the benefit bequeathed. (1)

(5)

3.3 Assume the Master accepts the will. Write a note on Samantha's capacity to inherit in terms of the will. (3)

Answer

(1) Samantha signed the will as a witness and can therefore not benefit in terms of the will unless one of the exceptions under s4A of the Wills Act applies, (1)

(2) namely if she gets a court order that she didn't unduly influence the testatrix,(1)

(3) or if she inherits as much as she would have inherited intestate, (1)

(4) or if two other competent witnesses had signed the will. (1)

(Max 3)

3.4 To what executor's fee will Mr Poggenpoel be entitled as executor in terms of Clause 2 of the will? (1)

Answer

3.5% of the value of the estate. (1)

3.5 Write a note on the provisions under Clause 3.2 of the will which provides:

> "The antique grandfather clock that belonged to my grandfather, to my son, Bertus, on condition that it must always go to the eldest son for 99 generations."

In this note, (i) explain which legal concepts appear in the clause, (ii) indicate when *dies cedit* and *dies venit* take place for the parties and (iii) discuss any problems that you foresee. (4)

Answer

(1) This bequest is a legacy in the form of a *fideicommissum*. (1)

(2) Although it is possible to bequeath a movable asset for 99 generations (1) (which is not the case for immovable assets),

(3) the bequest is a *nudum praeceptum* as it contains a resolutive condition but does not state a gift over (1). Bertus will thus inherit the benefit unconditionally.

(4) *Dies cedit and dies venit* take place for him at the testatrix' death. (1)

(4)

3.6 Write a note on the provisions under Clause 3.3 of the will which provides:

> "To my son, Kobus, my farm Sandfontein. At his death the farm must go to my grandson, Koos, and so to the eldest son for 99 generations."

You have the following additional information available:

(a) The testatrix had 4 children: Samantha, Bertus, Kobus and Kathryn.

(b) At the time of her death, the testatrix owned a residential home in Pretoria and a farm called Sandspruit. She had never owned a farm called Sandfontein.

In your note, (i) explain which legal concepts appear in the clause, (ii) indicate when dies cedit and dies venit take place for the parties, (iii) discuss any problems that you foresee and (iv) indicate which remedies are available to the beneficiaries. (15)

Answer

(1) First, the testatrix never owned a farm called Sandfontein and thus there is a mistake in the will. It will be necessary to apply to the High Court for **rectification** of the will. (1)

(2) The High Court has inherent jurisdiction to delete something from a will that was inserted by the drafter by mistake. (1)

(3) It may even add words to a will if this is necessary to give effect to the wish of the testator by way of rectification. In this case the name of the farm was incorrectly added by the drafter and has to be rectified. (1)

(4) *Rens v Esselen.* (1)

(5) Furthermore, the testatrix may not place a **prohibition of alienation on land** for more than two fideicommissaries. (1)

(6) The testator's capacity to prohibit the alienability of land by means of long-term provisions is limited because he may not place a restriction on alienation which lasts longer than the Act 94 of 1965 prescribes. (1)

(7) This means that Kobus, Koos and Koos' eldest son will inherit and thereafter the fideicommissum will lapse (1).

(8) The fact that Kobus has to transfer the farm to Koos establishes a fideicommissum (1)

(9) which is subject to a resolutive time clause for Kobus (1)

(10) and a suspensive time clause (1) for Koos.

(11) A fideicommissum takes place when the testator leaves a benefit to the first beneficiary (the fiduciary). (1)

(12) and stipulates that it must be transferred to the next beneficiary (the fideicommissary) (1).

(13) It is a time clause because it is certain that Kobus will die. (1)

(14) Kobus is subject to a terminative time clause as his rights are terminated when he dies (1)

(15) and Koos is subject to a suspensive time clause as his rights are suspended until the death of his father. (1)

(16) *Dies cedit* and *dies venit* take place for Kobus at the death of the testator (1)

(17) and *dies cedit* and *dies venit* take place for Koos at Kobus' death (1)

(18) and again for his eldest son at his (Koos') death. (1)

(Max 15)

3.7 Write a note on the provisions under Clause 3.4 of the will which provides:

"To my daughter Kathryn, my beach house in Ballito."

After the testatrix' death, it became apparent that the beach house in Ballito was sold at an sequestration auction 6 years prior to her death, two years after she had made the will.

In your note, (i) explain which legal concepts appear in the clause, (ii) indicate when *dies cedit* and *dies venit* take place for the parties, (iii) discuss any problems that you foresee and (iv) indicate which remedies are available to the beneficiaries. (5)

Answer

(1) The bequest to Kathryn is a legacy. (1)

(2) A legacy may be revoked/cancelled by ademption, (1)

(3) but ademption only takes place if the testator voluntarily alienated the object of the legacy. (1)

(4) In this case, it was sold in execution (because of her sequestration) – ie **not** voluntarily - and therefore Kathryn will be entitled to either the house itself (if the executor succeeds in buying it back) (1)

(5) or the value of the house. (1)

(6) *Dies cedit* and *dies venit* take place for Kathryn at the death of the testatrix (Judy). (1)

(Max 5)

3.8 After the testatrix' death, Samantha refused to inherit the jewellery in the photos. Who will inherit the jewellery now? (2)

Answer

(1) Section 2C(1) of the Wills Act provides that where a descendant of the testator is entitled to inherit a benefit under a will together with a spouse and the descendant repudiates the benefit, then the spouse will inherit the benefit.(1)

(2) The testator's husband will be entitled to inherit. (1)

(2)

[Note that section 2C(1) is only applicable when the person who repudiates is a descendant of the testator. If it was the sister of the testator, for example, who repudiated the legacy, the common law will apply and the property will fall back into the residue of the estate to be inherited by the heir, which in this instance also happens to be the spouse.]

Total for question 3 [40]

4 Contrast the differences between a trust and a fideicommissum in table form. (10)

Trust	Fideicommissum
The control or ownership of the trust property is separated from the enjoyment of the property – a trustee only has an administrative interest in the property, unless he or she also happens to be a beneficiary.	The owner of the property is beneficially entitled to the fruits and use of property. (Control and enjoyment are not separated.)
The trustee fills a quasi-public office.	The fideicommissarius does not fill an office.
The Court and Master supervise the proper execution of trusts.	The observance of the fideicommissum is left to fideicommissaries.
If a trust fails, the trustee is not beneficially entitled to the trust property.	If a fideicommissum fails, the fiduciary takes the property free of the burden.
A trust (over movable or immovable property) may continue for an indefinite period.	A fideicommissum over immovable property is limited to two successive fideicommissarii (in terms of the Immovable Property (Removal or Modification of Restrictions) Act).
A trust will not fail because there is no trustee.	A fideicommissum fails in the absence of a fiduciary.

1 mark each (max 10)

Total for Section B: [70]

Total for paper: [100]

5 CONCLUSION

We wish you success in your studies this semester. Remember that all the tutorial letters are available in electronic format on *my*Unisa.

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