Definitions

Law of Succession	A branch of private law, it comprises of those legal rules or norms which regulate the devolution of a deceased person's estate
Testate	occurs when succession is regulated by a valid will in which the testator provides how succession to his or her estate is to take place
Intestate	When the testator dies without leaving a will at all or a valid will
testamentary writing	a document which defines any one of the three essential elements of a bequest: (Ex Parte Davies) (1) the property bequeathed (2) the extent of the interest bequeathed (3) the beneficiary
Ademption	takes place if a testator voluntarily alienates the object of a legacy in his lifetime, ie the legacy lapses
Adiation	acceptance of a benefit
Repudiation	refusal to accept a benefit
Amendment	"deletion, addition, alteration or interineation"
Deletion	a deletion, cancellation or obliteration in whatever manner effected, excluding a deletion, cancellation or obliteration that contemplates the revocation of the entire will
Animus revocandi	the intention to revoke a will
Armchair evidence	the evidence which the court uses to place itself in the position in which the testator was at the time of the making of the will by paying attention to all the relevant facts and circumstances which were known to the testator
extrinsic evidence	evidence outside the document itself, in other words evidence of facts which do not appear from the document itself
Ascendants	ancestors of the deceased, ie mother, grandfather
Descendants	lineal descendants of the deceased
bequest price	when a legacy is bequeathed subject to the beneficiary paying a stipulated price to the estate or a third person
collation	executor must, under certain circumstances, take benefits given to certain heirs by the deceased during his lifetime into account when distributing the estate among certain beneficiaries

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child's share	calculated by dividing the value of the intestate estate by the number of children of the deceased who have either survived him or have predeceased him but are survived by their descendants, plus the number of spouses
cloven/cleaving	where the estate rises to the deceased's parents and is split (``cloven'') into two equal shares
collaterals	persons related to the deceased through at least one common ancestor or ascendant, for example brothers, sisters, cousins
parental	every group of parents and their descendants constitute a parental
per capita	inheritance in equal shares according to ones degree in consanguinity. (per head)
representation	when an heir in the direct line of descendants replaces his ancestor as the heir
stirps	every descendant of the deceased who survives the deceased and/or a predeceased descendant of the deceased who leaves living descendants forms a stirps
substitution	takes place when a testator appoints a beneficiary to inherit a benefit and at the same time appoints another beneficiary to take the place of the first-mentioned beneficiary. Substitution may take place either: 1. In the alternative (direct substitution) {S2C} or 2. one beneficiary after another (fideicommissary substitution).
competent witness	any person over the age of 14 years who is competent to give evidence in a court of law
testamentary capacity	capacity to make a will. Every person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act
Attestation clause	a clause that appears at the end of a will in which it is declared that all the parties were present and signed in each other's presence (not compulsory)
Estate	all assets and liabilities at the time of the testators death. The beneficiaries will only inherit the testators assets and not her liabilities = different from Roman law.
Beneficiaries	The parties upon whom the assets in a deceased person's estate devolve. Beneficiaries may be either heirs or legatees.
A legatee	inherits a legacy which is a specific asset (for example a house) or a specific amount of money (for example R10 000).

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An heir	inherits the whole or part of the estate or the residue of the estate.
Residue of the estate	What remains after the payment of funeral expenses, administration costs, tax, deceased's debts and the legatees
Juristic Act	an act which is intended to create or alter rights and obligations; an act to which the law attaches at least some of the consequences envisaged by the acting party or parties
multilateral juristic act	a juristic act which is performed through the cooperation of two or more persons. E.g. contract
unilateral juristic act	a juristic act performed by the activity of only one person. E.g. donation
executor	the person who is charged with the administration of deceased estate (wind up the estate)
rectification	takes place when 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
freedom of testation	the freedom of a person to execute a valid will in order to govern the transmission and use of assets, and to govern the activities and lives of others after his death
prelegacy	a special bequest which, under testamentary instruction, enjoys preference over all other bequests
joint will	where two or more testators have set out their respective wills in the same document
mutual will	where two or more testators have conferred benefits on each other in the same will
dies cedit "the day will come"	the time when a beneficiary gets a vested right to claim delivery of the bequeathed benefit unconditionally (whether or not the exercise of this right is delayed until some future date which is certain to arrive). The moment in time when the beneficiary acquires a vested right.
dies venit "the day has come"	the time when the beneficiary's right to claim delivery of the bequeathed benefit becomes enforceable. Dies venit is the time when a beneficiary may enjoy the property which he or she has inherited or the day when delivery of the benefit has to take place.
power of appointment	the power to appoint certain beneficiaries as heirs or legatees given to someone else by the testator
unconditional (absolute) bequest	a bequest in which the testator leaves property to the beneficiary without any conditions attached
conditional bequest	a bequest which depends on a future event which is uncertain, in the sense that it may or may not occur

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time clause	a bequest that is subject to an event that will certainly happen in the future, although it may be certain or uncertain when it will arrive.
suspensive condition	the beneficiary does not get a vested finally established right to the benefit unless and until a particular uncertain future event takes place.
suspensive time clause	where the beneficiary will receive the benefit only at a certain future time.
terminative (resolutive) condition	The bequest is made to terminate if a particular uncertain future event of affairs takes place.
terminative time clause	the beneficiaries' rights are terminated when a certain time arrives.
modus	a qualification added to a gift or testamentary disposition, whereby the person benefitted is required to devote the property he or she receives, or the value thereof, in whole or in part to a specific purpose
direct substitution	occurs where a testator names a substitute or even a whole series of substitutes who are to inherit if the instituted heir or legatee does not inherit. Direct substitution is substitution in the alternative.
fideicommissary substitution	occurs where a testator directs in his or her will that, after his or her death, a series of successors (heirs or legatees) are to inherit his or her whole estate or part of it, or specific assets, so that the bequest passes from one successor to another. The different successors thus inherit the same benefit one after the other. The first successor is called the ``fiduciary'', and every beneficiary after is called a ``fideicommissary''.
fideicommissum residui	where property is left to a beneficiary, subject to the condition that as much of it as may be left at the time of the beneficiary's death is to devolve upon another person
si sine liberis decesserit clause	a clause that stipulates that if a beneficiary dies without children (si sine liberis decesserit) after the testator, the property must pass to a third party
usufruct	a personal servitude that occurs where a testator bequeaths ownership of a thing to one person, and the right to use the thing, to take its fruits and to enjoy the thing, to someone else (the usufructuary).
Treuhand	trust, not for oneself but for another or for a particular impersonal purpose

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bewind trust	the arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument
trust for an impersonal purpose	a trust which is intended to be used for charitable purposes
trust instrument	a written agreement, a testamentary writing or a court order in terms of which a trust was created
power of assumption	the capacity given to an existing trustee to appoint additional trustees
massing	when the whole or portions of the estates of various testators are consolidated into one economic unit for the purposes of a testamentary disposition by the testators jointly
right of accrual	the right of an heir or legatee to inherit the bequeathed benefits which a co-heir or co-legatee refuses to inherit or is incompetent to inherit
Joinder re	Occurs where the testator has given the same thing to two or more persons in different bequest in his will
Joinder re et verbis	Where a testator, in a single bequest in one breath, bequests the same benefit to two or more people
Joinder verbis tantum	Where separate benefits are left to different beneficiaries, but in a single bequest – in one breath.

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POSSIBLE QUESTIONS

Give a definition of "residue of the estate".

(a) That part of deceased's estate which remains
(b) After payment of funeral expenses
(c) Administration costs
(d) Tax
(e) Debts and legacies

Define the law of succession

(a) Branch of private law
(b) Comprises, the legal rules or norms which regulate the devolution of a deceased person's property
(c) Concerns itself with what happens – deceased persons estate after death

Why is it strictly speaking not correct to say that someone's "estate" passes to his beneficiaries?

Incorrect to say someone's "estate" passes to his beneficiaries because "estate" defined a person's assets and liabilities. Beneficiaries only inherit assets not liabilities.

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INTRODUCTION

Succession is part of private law: it creates rules, which govern the devolution of a deceased's property.
A deceased leaves behind an estate, which devolves on heirs or legatees.

3 ways succession takes place:

1) **Testate succession:** in accordance with a will
2) **Intestate succession:** without a will
3) **Pactum successorium:** in terms of a contract = antenuptual contract

The general rule is that for succession to occur the person must have died. The exceptions to this rule include a presumption of death, a massed estate or where parties die in the same disaster.

Testator's death:
You can only have succession when someone is dead – question: when is someone legally dead: *S v Williams*: brain death is sufficient.

Presumption of death:
A person who alleges that a testator is dead has the onus of proving it (death certificate). BUT what if someone disappears and you can't find his body? The High court can give an order presuming death. The court can order the estate be divided amongst the heirs – who have to give security that the estate will be restored if the testator does reappear. The onus of proving the presumption of death is on the person alleging it.
Beaglehole: 30 years was not sufficient to grant an order.

People who die in the same disaster:
A beneficiary can only inherit if he/she survives the testator.
BUT where several people simultaneously die in the same disaster (commorientes) – there might be a necessity to see who died 1st, to determine if one inherited from the other.

General rule: if it can't be established without a doubt who died 1st = NO PRESUMPTION of either simultaneous death or survival.
In the absence of evidence to the contrary – the court will find that they died simultaneously.

In *Ex Parte Graham***: a woman and her son were killed in a plane crash. She had left her estate to her son including the house where her parents stayed subject to the provision that they could remain there until date of their death. She further stated that if her son predeceased her then everything would be left to her mother. Court found that the woman and her son died in the same disaster, simultaneously, before the transfer.

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POSSIBLE QUESTIONS

Sasha and Jimmy are cousins. In his will, Jimmy appoints his Sasha to inherit his whole estate. In her will, Sasha appoints her husband Peter, to be her heir. Sasha and Jimmy are killed in the same car accident, and no evidence exists as to whom died first. Jimmy leaves behind both his parents. Sasha leaves behind her parents and her husband Peter. Who will inherit John and Mary's respective estates? Briefly explain

When two people lose their lives in same accident and it's not possible to determine who died first. In Ex Parte Graham the court stated that there is no presumption as to who died first which means neither could inherit from the other. Jimmys' will cannot be given effect to and his estate will devolve intestate (to his parents); Sasha cannot inherit from him. In terms of the will Peter inherit Sasha's estate.

Would it have made a difference to your answer if Jimmy had died at the scene of the accident and Sasha had died two hours later in hospital? Briefly explain your answer

Yes - Sasha survived Jimmy – she would inherit his estate in terms of the will. Her husband will then inherited both her estate and that of Jimmy's. Jimmy's parents would not have inherited.

What are "commorientes"?

People who die in the same disaster

Will commorientes inherit from each other? Explain?

General rule is if can't be established beyond doubt who died first there is no presumption of either - simultaneous death exists.
Thus – won't inherit from each other

Give the name of a decided case that serves as authority for the above answer

Ex Parte Graham

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INTESTATE SUCCESSION

1. Ascendants



X's mother, M, is his ascendant, as is G. G is also M's ascendant.

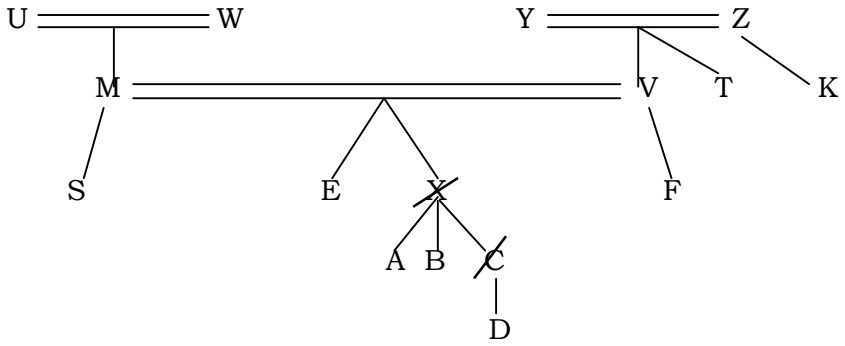
2. Descendants



B is X's son or daughter, and D is his grandson or granddaughter. They are both X's descendants. D is also B's descendant, and B and X are D's ascendants. All children (adopted or extra marital) can inherit.

3. Collaterals

Collaterals can be full or half blood relations (brothers and sisters).
A full-blood collateral is related to the deceased through both parents or two common ascendants. A half-blood collateral is related through only one common ancestor.

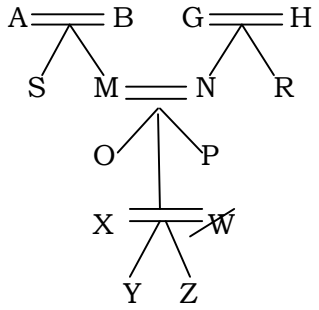


a. M, V, U, W, Y, Z are ascendants of the deceased, X.
b. A, B, C, D are X's descendants. D, C's child, is X's grandchild.
c. S, E, F, T, K are X's collaterals. E is related to X through both parents, M and V, and is therefore X's full brother. S is related to X through only one parent, M, and is therefore a half-sister on the mother's side. S is the child of M and somebody else from a previous marriage. F is related to X through V only, and is a half-brother on the father's side. It should now be clear why T is X's full-blood aunt on the father's side and why K is a half-uncle on the father's side.

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PARENTAL (PARENTEEL) - *Every group of parents and their descendants constitute a parental.*

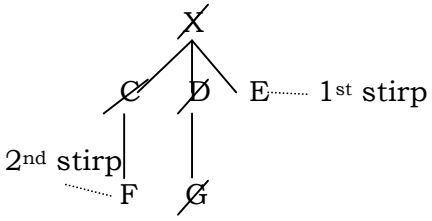
The first parental is formed by X, the deceased, and his descendants; the second parental is formed by X's parents and their descendants, excluding the first parental; the third parental is formed by X's grandparents and their descendants, excluding the first and second parentals, et cetera.



X (deceased) and decendants (W, Y and Z) = 1st Parental
X's parents and their decendants, but excluding X (M, N, O and P) = 2nd Parental
Grandparents and their decendants, but excluding parents (A, B, S, G, H and R) = 3rd Parental

STIRPS (STAAK)

Every descendant of the deceased who survives the deceased AND/ OR a predeceased descendant of the deceased who leaves living descendants forms a stirps



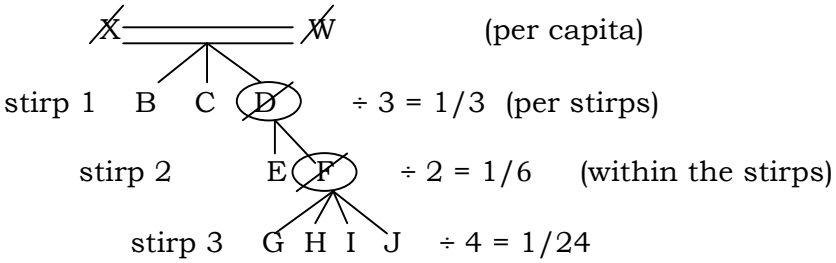
E forms a stirps, as well as C, who is survived by F. D does not form a stirps because he is not survived by a descendant.

SUCCESSION PER CAPITA AND
SUCCESSION BY REPRESENTATION (stirps)

Heirs inherit per capita when they inherit equal shares according to the law of intestate succession on the ground of the degree of consanguinity in which they stand to the deceased. If there are more than one person related to the deceased person in the same degree of consanguinity, each inherits an equal share per capita.

An intestate heir inherits by representation when he, as an heir in the direct line of descendants, replaces his predeceased ancestor.

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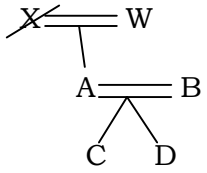


SUBSTITUTION EX LEGE

Substitution takes place where an heir inherits in the place of an heir who was supposed to inherit in the first place is unable to inherit or repudiates his benefit.

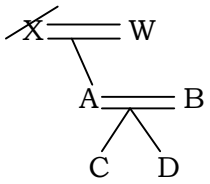
Sections 1(6) and 1(7) was set up to deal with the situation where a beneficiary repudiates, predeceases or is incapable of inheriting.

Subsection 6: if a descendant of a deceased person who, <u>together with the surviving spouse</u> of the deceased, is entitled to a benefit from an intestate estate, **renounces** his right to receive such a benefit, it will vest in the surviving spouse.



if A repudiates / renounce: the benefit goes to W

Subsection 7: if a person is predeceased or disqualified from being an intestate heir or if he renounces his right to be such an heir (subject to the provisions of subsection 6 = there is no spouse), any benefit which he would have received shall devolve as if he had died immediately before the deceased died. This means that he can be substituted by his descendants.



if A is disqualified: the benefit goes to C & D
if A repudiates / renounce and there is no W: the benefit goes to C & D

DEGREES OF CONSANGUINITY - Each line in your diagram = 1 degree

STEP RELATIONS - Cannot inherit intestate from a deceased person since they are not blood relations of the deceased.

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VESTING ON INTESTATE – The question of when a benefit vests with an intestate beneficiary was dealt with in *Harris v Assumed Administrator, Estate Mac Gregor**.* In this case the testator made a will in which he left his entire estate in trust and nominated his wife as the income beneficiary. He stated that upon her death the capital must be paid to the children born of his marriage and if there are no children then it must go to the testators brother and if his brother is deceased then it must go to his brothers children. The testator died in 1943 and his brother died in 1979 both without children.

The question was when did the provision fail?
Was it on the testator's death? – which would mean that the testators mother's estate (she died in 1960) would inherit the estate or was it when the will first failed (at the testator's brother's death)? – which would mean that the testators wife became the beneficiary.

Court found that:

- when a person dies without a will, his estate vests on date of his death – that is when the beneficiaries are determined.
- when a person leaves a valid will which has subsequently become inoperative, his estate vests the date that the will became inoperative (when intestacy occurred).

Vesting occurs in intestate succession when:

- Without leaving a will at all
- Having executed a valid will which has subsequently become wholly or partially inoperative
- With a valid will that is executed but fails to dispose of all of the deceased's assets
- Leaving a document purporting to be a will which does not comply with the formalities and is not condoned in terms of Section 2(3)

CUSTOMARY LAW SUCCESSION – this has been abolished to a large extent by the decision in *Bhe* and the RCLSA. The testator can however stipulate in his will that his estate must devolve in terms of customary law. If a testator doesn't expressly state this – all estates today (testate / intestate) and regardless of who you are, are dealt with under the same relevant legal provisions.

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THE RULES OF INTESTATE SUCCESSION

Rule 1

If a person dies intestate and is survived by a spouse but not by a descendant, such spouse shall inherit the entire intestate estate (s 1(1)(a)).

Rule 2

If a person dies intestate and is survived by a descendant or by descendants but not by a spouse, such descendant(s) shall inherit the entire intestate estate (s 1(1)(b)).

Rule 3

If a person dies intestate and is survived by a spouse as well as a descendant or descendants, the spouse shall inherit the amount allowed by law, currently R250 000 or a calculation of a child's share (whichever is the greater), and the descendant(s) shall inherit the residue (if any) of the intestate estate (s 1(1)(c)).

A **child's share** is calculated by dividing the value of the intestate estate by the number of children of the deceased who have either survived him or have predeceased him but are survived by their descendants, plus one (s 1(4)(f)).

This definition has been amended by the decision in *Bhe* in terms of indigenous marriages to read: number of children plus number of spouses

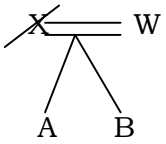
The *Bhe* decision has since been confirmed in the Reform of Customary Law of Succession and Regulation Related Amendment Act (RCLSA).

This Act has further recognised indigenous principles of substitution and the woman in such a position. The Act states that any substitute should be considered a descendant for the purposes of intestate succession rules.

MARRIAGE IN COMMUNITY OF PROPERTY
Spouses own a joint estate therefore before calculating inheritance, the estate must be divided in half. The surviving spouse will then take her half of the joint estate and inherit a child's share or the amount allowed by law (currently R250 000) - whichever is the greater - from the deceased's half of the joint estate.

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X and W were married in community of property. X dies intestate and leaves W and two children, A and B. The joint estate amounts to R900 000.



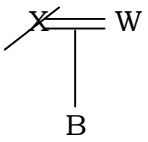
900 000 ÷ 2 = R450 000 (the amount in X's estate)
R450 000 - 250 000 or (450 000 ÷ 3 = 150 000) {whichever is the greater = 250 000} = R200 000
R200 000 ÷ 2 = R100 000 (to each child: A and B)

MARRIAGE OUT OF COMMUNITY OF PROPERTY

Where there is no accrual system, the deceased's estate is his or hers completely.

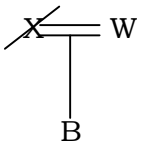
Where the accrual system applies to the marriage, the accrual needs to be calculated before determining inheritance.
The amount of the accrual is either deducted from or added to the intestate estate before the estate is divided.

X dies intestate and is survived by his widow, W, and child, B. X's intestate estate amounts to R950 000. W is entitled to R50 000 as accrual.



950 000 – 50 000 (the accrual) = R900 000
wife's share: 250 000 or child's share (900 000 ÷ 2) = R450 000 (each will inherit R450 000)

X dies intestate and is survived by his widow, W, and child, B. His intestate estate amounts to R220 000. X's estate is entitled to R40 000 accrual.



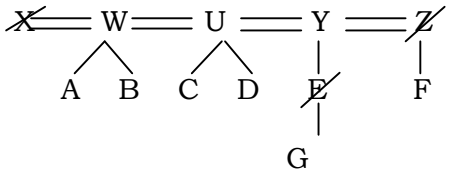
620 000 + 40 000 (the accrual) = R660 000
wife's share: 250 000 or child's share (660 000 ÷ 2) = R330 000 (each will inherit R330 000)

MORE THAN ONE SPOUSE

Where the deceased had more than one spouse the calculation basis remains the same, except there is no need to calculate any share in either estate – the only difference is to note that all the spouses can inherit and reference the case / legislation that provides such authority and further just remember that each spouse is now entitled to a child share or the amount allowed by law – whichever is the greater.

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X dies intestate and is survived by his spouses, W, U and Y; as well as by his children A and B, the children from his marriage to W; C and D, the children from his marriage to U; F, the child from his marriage to Z his predeceased spouse and his grandchild G the child born from his predeceased daughter E, born of his marriage to Y. X's intestate estate amounts to R1.8 million.



2 250 000 ÷ 9 = R250 000 - each wife's share (W, U and Y) = R250 000 (child share is equal). 2 250 000 – 750 000 = 1 500 000 ÷ 6 = R250 000 each child's share (A, B, C, D, F and E's estate) E's portion will be inherited by G (section 1(7))

NEW CASE LAW AMENDMENTS

Meaning of "survivor" and "spouse" in the Maintenance of Surviving Spouses Act 27 of 1990 and the Intestate Succession Act 81 of 1987

In terms of section 1 of the Maintenance of Surviving Spouses Act "survivor" is defined as "the surviving spouse in a marriage dissolved by death". The Constitutional Court had to decide on the meaning of "spouse" and "survivor":

(a) ***Bhe and Others v Magistrate, Khayelitsha, and Others (Commission For Gender Equality as Amicus Curiae); Shibi v Sithole and Others)*****

The law of intestate succession is regulated by the Intestate Succession Act. However, until October 2004 - there was a parallel system of administration for the intestate estates of Africans. Section 1(4) (b) of the Intestate Succession Act provided that an "intestate estate" included any part of an estate in respect of which section 23 of the Black Administration Act did not apply. In other words, section 1(4) (b) excluded intestate estates that were subject to the Black Administration Act from the operation of the Intestate Succession Act. The Black Administration Act was accompanied by regulations.
This parallel system of intestate succession purported to give effect to the customary law of succession. It prescribed which estates were to devolve in terms of what the Act described as "Black law and custom" and detailed the steps that had to be taken in the administration of those estates. Central to the customary law of succession is the principle of male primogeniture, in terms of which the eldest son of the head of the family is his heir. Woman generally do not inherit in customary law.

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In the *Bhe* case the constitutionality of section 23 and its accompanying regulations and the rule of male primogeniture were attacked. The Constitutional Court held that section 23 was unconstitutional, being contrary to sections 9 and 10 of the Constitution because of its blatant discrimination on the grounds of race, colour and ethnic origin and its harmful effects on the dignity of persons affected by it. This discrimination could not be justified in terms of section 36 of the Constitution. It was accordingly held that section 23 had to be struck down. The rule of male primogeniture as it applied in customary law to the inheritance of property was also held to be inconsistent with the Constitution and invalid to the extent that it excluded or hindered women and extramarital children from inheriting property.

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

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

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

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

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

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Effect of the *Bhe* decision on the law of intestate succession:
At present there is only one Act, namely the Intestate Succession Act, which regulates the devolution of all intestate estates.
Bhe amended the calculation of a child's share when a deceased is survived by more than one spouse, in that a child's share would be determined by adding all the surviving spouses (i.e., not "plus one", but "plus the number of surviving spouses".
The court declared section 1(4)(b) of the Intestate Succession Act and section 23 of the Black Administration Act unconstitutional and invalid.

(b) *Daniels v Campbell NO and Others* 2004**
In this case, the applicant had been married to her husband (the deceased) for 30 years. The couple were married by Muslim rites. The marriage was monogamous at all times. It was never solemnised by a marriage officer appointed in terms of the Marriage Act. The deceased died intestate. The applicant was told by the Master that she could not inherit from the estate of the deceased because she had been married under Muslim rites, and therefore was not a "surviving spouse". A claim for maintenance against the estate was rejected on the same basis. The Constitutional Court held that the word "spouse" in its ordinary meaning included parties to a **monogamous** Muslim marriage.

Effect of *Daniels v Campbell* on the law of succession
A party to a monogamous Muslim marriage is a "spouse" and a "survivor" in terms of the Intestate Succession Act and the Maintenance of Surviving Spouses Act and can therefore be an intestate heir of the deceased and can claim maintenance from the deceased estate.

(c) *Hassam v Jacobs NO***
In 2008 the Cape High Court in ***Hassam v Jacobs NO*** (Judgement: 18/07/008 unreported) held that the word "survivor" includes a surviving partner to a polygamous Muslim marriage and that the word "spouse" as used in the Intestate Succession Act 81 of 1987, includes a surviving partner to a polygamous Muslim marriage. The effect of this decision is that surviving spouses in **all** Muslim marriages, irrespective of whether they were *de facto* monogamous or not, can inherit in terms of intestate succession law.

(d) *Volks v Robinson* 2005**
A woman who had lived with a man in a life partnership for almost 12 years prior to his death, claimed maintenance from his deceased estate in terms of the Maintenance of Surviving Spouses Act. The executor rejected the claim, whereupon she approached the Cape Provincial Division of the High Court for relief. The High Court declared section 1 of the Maintenance of Surviving Spouses Act to be unconstitutional, because it fails to include permanent life partners

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(in other words, persons who are living together as husband and wife although they are not married) within the ambit of the Act. The Court found that this violates the equality clause of the Constitution and infringes the right to dignity of surviving life-partners. The case was referred to the Constitutional Court for confirmation.
The majority of the judges of the Constitutional Court found that differentiating between a spouse and a **heterosexual** life partner (ie, someone of the opposite sex to the deceased) by excluding the heterosexual life partner from a maintenance claim against the estate of his or her deceased life partner in circumstances where a spouse would have had such a claim does **not** constitute unfair discrimination.

Effect of *Volks v Robinson* on the law of succession
A *heterosexual* life partner is not a "spouse" or a "survivor" in terms of the Maintenance of Surviving Spouses Act and cannot claim maintenance from the deceased life partner's estate.

(e) *Gory v Kolver NO & Others (Starke & Others Intervening)* 2007
The deceased and the applicant (Gory) were, at the time of the deceased's death, allegedly partners in a permanent, same-sex life partnership. When the deceased died intestate, his parents nominated the first respondent (Kolver) to be appointed by the Master as the executor of their son's estate, and claimed to be entitled to his assets as his intestate heirs. This resulted in a dispute with the applicant as to who the lawful intestate heir was.
The High Court of the Transvaal Provincial Division found that the deceased and the applicant had indeed been involved in a permanent same-sex life partnership and had assumed reciprocal duties of support. It found the exclusion of same-sex life partners from the provisions of section 1(1) of the Intestate Succession Act to be unconstitutional and ordered the reading of the words "or partner in a same sex-life partnership in which the partners have undertaken reciprocal duties of support" into the section after the word "spouse". Gory applied to the Constitutional Court for confirmation of the High Court's order. The Constitutional Court upheld the High Court's finding.

Effect of *Gory v Kolver* on the law of succession:
A partner in a same-sex life partnership in which the partners have undertaken reciprocal duties of support, is a "spouse" in terms of the Intestate Succession Act.

(f) Civil Union Act 17 of 2006
According to section 1 of the Act, "a 'civil union' means the voluntary union of **two persons** who are both 18 years of age or older, which is solemnised and registered by way of either a marriage or a civil partnership, in accordance with the procedures prescribed in this Act, to the exclusion, while it lasts, of all others."

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The effect of the Civil Union Act on the law of succession:
A partner in a civil union will be entitled to inherit in terms of the Intestate Succession Act and will also be able to claim maintenance in terms of the Maintenance of Surviving Spouses Act.

(g) *Govender v Ragavayah*
The question here was whether a spouse in a monogamous Hindu marriage would be incorporated in the extended definition of a "spouse". In this case the court found in favour of the recognition of monogamous Hindu marriages of the purposes of the laws of succession.

(h) Polygamous Hindu Marriages
There has been no case law recognition of polygamous Hindu marriages but one can assume that it ought to be recognised for the purposes of succession on the basis of our Constitutional principles.

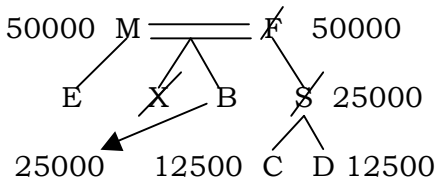
Rule 4

If a person dies intestate and is not survived by a spouse or descendant but by both his parents, his parents will inherit the intestate estate in equal shares (s 1(1)(d)(i)).

Rule 5

If the deceased is not survived by a spouse or descendant, but by one of his parents and descendants of his deceased parent, the surviving parent inherits half the intestate estate and the descendants of the deceased parent the other half. If there are no such descendants, the surviving parent takes the entire intestate estate (s 1(1)(d)(ii)).

X dies intestate, and is survived by his mother, M, his full brother, B, the children of X's predeceased half-sister, S, on his father's side, C and D; and X's half-brother on his mother's side, E. X's intestate estate amounts to R100 000.

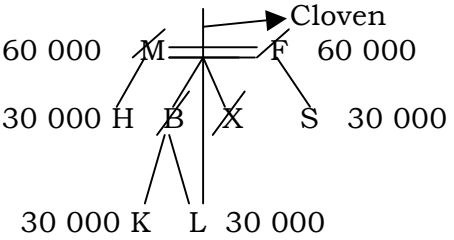


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Rule 6

If the deceased is not survived by a spouse, descendant or parent, but is survived by descendants of his deceased parents (either half siblings or full siblings), then the intestate estate is divided (cloven) into two equal shares.

X dies intestate and is survived by H (his half-brother on his mother's side), S (his half-sister on his father's side), and K and L, the children of his predeceased full brother, B. X's intestate estate amounts to R120 000.

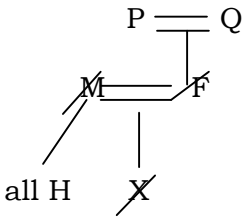


(B's estate receives R30 000 from each deceased parent)

Rule 7

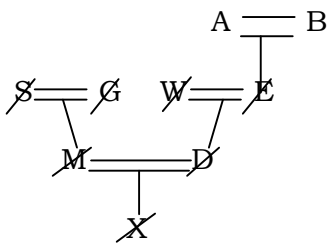
If the deceased is survived only by descendants of one of his deceased parents who are related to him through such parent alone, such descendants inherit the intestate estate (s 1 (1)(e)(ii)).

X dies intestate and is survived by H, his half-brother on his mother's side, and P and Q, his grandparents on his father's side.



Rule 8

If the deceased is not survived by a spouse, descendant, parent or descendant of a parent, his nearest blood relation(s) inherit the intestate estate in equal shares (s 1(1)(f)).



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IF A PERSON DIES WITHOUT LEAVING INTESTATE HEIRS

A person may die intestate without leaving any person capable of inheriting from him ab intestato.
Ex parte Leeuw and sections 35(13) and 92 of the Administration of Estates Act: the executor converts the intestate estate into money and, after payment of the deceased's debts, places the proceeds in the Guardian's Fund. Only when 30 years after payment into the Guardian's Fund have elapsed, and nobody has made a legitimate claim to the estate as an intestate heir of the deceased, the intestate estate accrues to the state.

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POSSIBLE QUESTIONS

X and W were married in community of property and have three children, A, G and B. A dies in 2015, leaving her two children, D and C. X dies in February of 2016 and leaves W, G, B and his two grandchildren, D and C behind. He also leaves his father, F. X and W joint estate is worth R800 000.
Calculate how X's estate is going to devolve and indicate how much each person will receive. Give reasons for your calculations.

(a) W gets R400 000 (R800 000 / 2 = R400 000)
- X and W were married in community
- NB – she doesn't inherit this amount

(b) X estate available for distribution is R400 000
(c) X – spouse + children
- Section 1(1)(c) applies
- A spouse inherits either a child's share or the amount allowed by law (currently R250 000) whichever is greater.

(d) Child's share is calculated by dividing the value of the intestate estate by the number of children of the deceased
Bhe extended the definition to state number of children plus number of spouses
The definition was further extended in your reform act to state – number of children plus number of spouses plus number of substitutes
(e) To calculate child's share – count A, G, B and W and divide by 4 (R400 000/ 4)
(f) Child's share amounts to R100 000 each
(g) W inherits R250 000 by law in terms of the intestate succession act – (its more)
(h) A's estate, G and B – entitled – R50 000 of an equal share in terms of the intestate succession act
(i) But A is predeceased but leaves living descendants, therefore, D and C are each entitled to R25 000 of an equal share by representation in terms of section 1(7) of the intestate succession act
(j) Also state if anyone will not inherit (F).

X and V were married out of community of property with the accrual system. They have five children A, B, C D and E. X died in December 2015 and his estate amounts to R700 000. V is entitled to R100 000 accrual from X. Calculate how X's s going to devolve and give reasons for your calculations

According to the facts, V is entitled to R100 000 accrual in terms of matrimonial property law – she does not inherit this. This R100 000 must be deducted from X's estate before dividing his estate in terms of intestate succession rules.

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R700 000 – R100 000 = R600 000 the amount in X's estate available for division in terms of intestate succession rules is R600 000.

(a) X had a spouse and children – therefore section 1(1) (c) of the Intestate Succession Act applies in terms of which the spouse inherits either a child's share or the amount allowed by law – R250000, whichever is the greater

(b) A child's share is calculated by dividing the value of the intestate estate by the number of children of the deceased who have either survived by their descendants, plus one (for the surviving spouse)
Bhe extended the definition to state number of children plus number of spouses
The definition was further extended in your reform act to state – number of children plus number of spouses plus number of substitutes

(c) To calculate the child's share we therefore count A, B, C and D plus one (for V) and divide the estate of R600 000 by 6. A child's share equals R100 000.

(e) V inherits a child's share or R125 000 whichever is more – R250 000 is more, therefore V inherits R250 000 by law in terms of the Intestate Succession Act.

(f) The children share the rest of the estate equally. There is R600 000 – R250 000 = R350 000 available to divided between 5 children.

(g) R350 000 / 5 = R70 000 each for A, B, C D and E of an equal share in terms of the intestate succession act.

X and W were married out of community of property with inclusion of the accrual system. They have three sons, B, C and D. D has two children, E and F. B died before the testator. X dies intestate and the value of his estate amounts to R800 000. X's estate is also entitled to R100 000 accrual from W. Calculate how X's estate is going to devolve, giving reasons for your calculations.

X's estate = R800 000. Add R100 000 accrual from W
Therefore X's estate = R900 000. Divide this by 3, (wife and 2 children – don't count B as he died without leaving any children) each child and W gets R300 000 of an equal share in terms of the Intestate Succession Act (This is more than the minimum R250 000). E and F get nothing as they are not in the first line of descendants

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When will the intestate heirs be identified if the provisions of a will fail? Discuss.

If testator leaves a will and provisions of the will fail – estate devolve intestate
Intestate heir, according to (Anderson) – identified – date of testator's death (Swift) – if a will been validly in operation, number of years date identifying intestate heirs is the date of the ultimate failure of the Will confirmed in (Harris)

In intestate succession, if the deceased is not survived by a spouse, descendant or parent, but is survived by descendants of both his deceased parents, these descendants of his parents inherit the intestate estate.
What is meant when it is said the estate is "cloven"? Explain briefly in one or two sentences.

Cloven/ cleaving – estate rises to the deceased's parents and it split into two equal shares

What is meant when it is said that certain beneficiaries inherit "with the half hand" and other "with the full hand"?

Where both parents of deceased are dead
Cleaving of estate taken place
Distinction – full bro's / sis or half bro's/sis determines full hand and half hand.

T dies interstate and is survived by only the following persons: H, his half-brother on his mother's side, and G, his grandfather on his father's side. Who will inherit the intestate estate? Give a reason for your answer.

H inherit T's estate ab intestio – H falls 2nd parental and G the 3rd parental
People in 2nd inherit ab intestio over people in 3rd parental.

When does one inherit per stripes, in other words by representation.

Inheritance by representation occurs when an heir in the direct line, replaces his predeceased, disqualified or repudiating ancestor.

Explain when the law of intestate succession is applicable.

Applicable – deceased failed to regulate the devolution of estate in a Will or ANC. Or where it's impossible to carry out wishes of deceased – beneficiaries unable to inherit, don't wish to inherit or are predeceased.

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Explain what happens to a person's intestate estate if he leaves no intestate heirs.

Regulated by Administration of Estates Act
Procedure – executor converts – intestate estate into money and after paying deceased's debits, places proceeds into Guardians fund.
Only 30 yrs elapsed – no one has made a legitimate claim can the estate acquire to the state.

In this question you are given a short set of facts on intestate succession. In each case, X dies intestate and leaves behind certain relatives. You must indicate who will inherit the intestate estate by writing down the correct letter(s) of the alphabet. Also indicate the share of the estate each one will take. You need not give reasons for the division.

X dies intestate and is survived by the following relatives. W, his wife and B, his brother. Who will inherit his estate and what percentage will each one take.

Wife will get 100%

X dies intestate and is survived by the following relatives. His mother M and father P, as well as B and C, the children of his predeceased half brother, H, on his mother's side, and S, his half sister on his father's side. Who will inherit his estate and what percentage will one take?

His parents M and P will inherit equally (50% each)

X dies intestate and is survived by the following relatives B and C, the children of his predeceased half brother, H, on his mothers side, and S, his half sister on his fathers side. Who will inherit his estate and what percentage will each one take?

His estate is cloven (as his parents are both predeceased but leave behind descendants)
B and C will each get (25%) and S will get 50%

X dies intestate and leaves behind the following relatives, H, his half brother on his mothers side, and P and Q his grandparents on his fathers side. Who will inherit his estate and what percentage will each one take?

H will inherit the entire estate (100%)

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TESTATE SUCCESSION

A last will and testament, commonly known as a will, is a document executed in the manner prescribed by law by a person, called the testator, concerning the disposition of property and other matters within his control (appointment of an executor etc.) to take effect after his death.

ADIATION, JOINT AND MUTUAL WILLS, ELECTION AND MASSING

The acceptance/repudiation of the bequeathed benefit:
In terms of law no one can be compelled to inherit anything, he has a right to choose.
If he wants to inherit = **adiation**
If he refuses to inherit = **repudiation**
It's assumed the beneficiaries have accepted the benefit and if he wants to repudiate it must be done in writing to the master.

Effect of adiation: is that the beneficiary gets a vested personal right to claim delivery of the bequeathed benefit after the liquidation of the estate (*Smiths Estate*)

Effect of repudiation:
- It's possible that the will made provision for a substitute to inherit in the place of the repudiating beneficiary
- Or the benefit can accrue to the shares of the other heirs in terms of the accrual
- It may fall in the remainder of the testators estate
- May devolve according to intestate succession

Joint will: Is where two/more testators set out their respective wills in the same document. There are, as many separate wills as there are testators – each testator can revoke or change his will without the knowledge of the others.

Mutual will: Is a joint will, but not all joint wills are mutual wills.
It's found where two/more testators have conferred benefits on each other in the same document. There are as many separate wills as there are testators and each can revoke/change his ill without the knowledge of the others.

THE DOCTRINE OF ELECTION

``Election'' has to take place when a testator leaves a benefit to a beneficiary and at the same time imposes a burden on him. The beneficiary is then put to his election: he may accept the benefit (adiation), but he must then also carry out the provisions of the will that are detrimental to him or he can reject any provision (repudiation), but then he may not accept any benefit under that will.

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WHAT IS A TESTAMENTARY WRITING?

Section 2 Wills Act: will has to comply with certain formalities
Section 1: will can include codicil (supplement to an existing will) and any other testamentary writing.
The act doesn't give a complete definition of a will.

*Moses v Abinader***: any document in the nature of a testamentary writing incorporated into a will must satisfy the requirements for a valid will.

The definition of a testamentary writing:

Ex Parte Davis: a testamentary writing is a document which defines anyone of the three elements:

1. The property bequeathed
2. The extent of the interest bequeathed
3. The beneficiary

A document which identifies any one of these = testamentary writing and it must therefore comply with the formalities of the Act.
Thus, this case indicates "the what", "the how" and "the who".

Photographs and sketch plans are accepted as means to identify provisions / persons in a will. (*Oosthuizen*).

TESTAMENTARY CAPACITY – The capacity to make a will

Because a will is a unilateral act = everyone who can perform a legal act can make a will.

For a person to be able to execute a valid will the following requirements need to be complied with:

- The person executing the will (the testator) must be 16 years/older
- The testator must be mentally capable of appreciating the nature and effect of his/her act
- The executed will must comply with certain formalities
- Free and serious intention

In terms of section 4: every one of 16 /older can make a will unless at the time of making the will he is mentally incapable of appreciating the nature of his act. The person alleges such mentally incapability has the onus of proving it on a balance or probabilities.

Common law grounds for incompetence are extended in so far as they aren't included in the act.

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2 aspects for testamentary capacity:

1. Mental capability of the testator.
2. Animus testandi = intention to make a will

1) The testator must be sane when he makes his will: there is a rebuttable presumption that everyone is sane = the person alleging that the testator isn't mentally capable at the time when he makes his will, has the onus to prove it.
   - An insane person is incapable of making a will even if she hasn't yet been declared insane by the court – BUT can make a will in a lucid interval.
   - A prodigal can make a will
   - Deaf and dumb person at common law was incapable unless she could write = today she can make a will if she is mentally capable of appreciating the nature of her act
   - According to *Katz* (2004) a person does not have mental capacity where they acted under undue influence, had a stroke or does not comply with the formalities.

2) Testator must have a free and serious intention to dispose of her property by means of a will = animus testandi and must exercise it voluntarily (volition): if it can be proved the testator made the will under coercion/undue influence (*Kirsten***) or was nagged into making a bequest which is contrary to her intention = invalid because it isn't the testators intention but the intention of someone else (*Van Zyl***). If the testator signs a document without knowing that it is a will the person lacks *aminus testandi*.

   In *Spies v Smith*** the court held that there is nothing improper in convincing a testator by way of flattery or declarations of love to make a will in a certain way. However, when these actions take the form of fraud the will becomes invalid. The court further stated that the mere fact that the parties are in a particular relationship to each other is not enough to indicate undue influence but it is a factor to be considered when a will is being contested.

   There is a difference in having *aminus testandi* and a person's volition. *Aminus testandi* is the testator's intention to make a will while volition means the testator's choice or own free will.

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FORMALITIES

Requirements – (1) Written
(2) Signed
(3) Serious intention
(4) testamentary capacity
(5) comply with the required formalities

Before the Law of Succession Amendment Act the testator and the witnesses had to sign all the pages of the will – now the testator signs all the pages and the witnesses sign the last page.

Will must be in writing and signed. Written does not include oral, any video / dvd or any other electronic format - computer wills don't comply with the signature requirement.
It is stated that a will can be made in pencil but this is not advisable as it is open to fraud.

SECTION 2(1) (a)

(i) Signed by the testator at the end of the will.
(ii) In the presence of two or more competent witnesses who are present at the sometime.
(iii) The same witnesses must sign and attest the will in the presence of one another and the testator.
(iv) Testator must sign all preceding pages of the will anywhere on the page in the presence of the same two witnesses.
(v) The commissioner of oaths must append a certificate to the will. (when the will is signed using a mark or signed by an amanuensis)

(i) – (iii) when the testator signs a one page will
(iv) when a testator signs a will consisting of more than 2 pages
(v) when the testator signs using a mark or someone signs on behalf of the testator

1. FORMALITIES WHEN YOU SIGN WITH A SIGNATURE:

The testator must sign the will or acknowledge his signature in the presence of 2 or more competent witnesses and the same 2 witnesses must sign and attest the will in the presence of one another and the testator (**S2 (1)(a)**) (*Bosch v Nel)*

At common law women were incompetent to witness a will.
In terms of the Wills Act witness must comply with 3 requirements:

1) Must be 14/older
2) Must be competent to give evidence in court
3) Must be able to write or sign name

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Normally the witness must sign at the end of the will = last page. In *Liebenburg v The Master*: the court held that the will was valid even though the witnesses signed at the top of the last page.

Witness need not know the contents of the will; they don't even have to know that they are signing a will. The only requirement is they should know they are witnessing the testator's signature, which she signed or acknowledged in their presence.

If the will has more than 1 page = testator signs at the end of the last page and signs/acknowledges his signature on every preceding page in the presence of the same 2 competent witnesses who are present at the same time.

Bosch v Nel: the court held that it wasn't necessary to sign in the presence of the witnesses, as long as the testator acknowledged in their presence that the signature was his.

The testator can sign the pages preceding the last page anywhere on the page. The same 2/more witnesses had to sign and attest every previous page is no longer a requirement = the witnesses must only sign the last page.

Attestation clause:
A clause can also be inserted into a will which states that the will was signed by the testator in the presence of witnesses and the witnesses signed in front of each other and the testator. It generally contains the date and place of signing the will.
The law requires no attestation clause – it has evidential value only.

There are two issues to be considered when determining validity of a will and compliance with section 2(1)(a):
- what is a signature
- where is the end of the will

The signature:
*Goldman**:* the court held that the sign made by the testator was a signature, although it was no more than an attempt to write his initials – this is because the testator intended to write his signature and not make a mark = testators intention is important.
In *Harpur v Govindamall* the court held that initials constitute a mark.

This problem has been solved by the Law of Succession Amendment Act: a signature now includes the making of initials = testator and witnesses may now sign with initials only.

Jhajbhai v Master: printing of a name in block letters = signature.

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The marking of an X by the testator or the use of a thumb print by the testator (*O'Connor*) is regarded as a mark. An act in which the testator does not sign her ordinary signature, initials or full name, like writing another name (nickname) or "your loving mother" is regarded as a mark.

The end of the will:
Testator and witnesses must sign the last page of the will.
*Kidwell v The Master***: the testator signed the 2nd page of his 2 page will 9cm from the last part of the will. The witnesses signed 13cm and 17cm below the attestation clause. This was held to be invalid because of the possibility of fraud. Sonnekus criticized this.
The end of the will should be as close to the words as possible to avoid fraud.

2. Formalities where the testator signs with a mark:
Testator can sign with a mark (*Ex Parte Goldman***). The testator must make her mark at the end of the will in the presence of 2/more competent witnesses AND the commissioner of oaths must also be present when the testator makes her mark.

The certificate:
S2(1)(a)(v): a certificate needs to be attached to a will in 2 instances:
1) Where the testator signs by making a mark
2) When someone signs on the testators behalf

*Radley v Stopforth***: commissioner must indicate her office as commissioner on the will and not as an attorney – failure to do so make the will invalid. confirmed in *Jeffrey v The Master.*

Content of the certificate:
Commissioner of oaths must certify the following:
a) She must be satisfied with the identity of the testator
b) That the will so signed, is the will of the testator.

Failure to comply = will invalid.

In the past, the commissioner was required to certify that the testator was known to her and not merely that she was satisfied of the identity of the testator. This was found to be harsh as not everyone who signs a will with a mark is acquainted with a commissioner. So now Section 2(1)(a)(v): Commissioner must satisfy herself with the identity of the testator.

In the past, if the certificate doesn't contain the exact words of the act = will was invalid.
But in *Oldfield*: court ensured that the document signed by the making of a mark was the will of the testator, without the exact words of the act being used, "I certify that".

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Where do you attach the certificate?
In the past, the commissioner had to attach the certificate at the end of the will.
Philip: Commissioner can attach the certificate anywhere on the will and must sign each page of the will anywhere, excluding the page on which the certificate appears.

S2(1)(a) of the Law of Succession Amendment Act: certifying officer was required to introduce certificate at the end of the will.

Tshabalala: the will was invalid where the testator signed with a thumbprint. The 1st page had the substance and the 2nd page only the certificate. The Commissioner never signed the 1st page. Thus the will was declared invalid.

Philip v The Master: it was held that the will was valid even though the certificate appeared before the mark of the testator and the signature of the witnesses.
This is suspect because the certifying officer must attach the certificate after the testator made her mark and if the certificate appears before the mark – it's doubtful that the certificate was made after his mark.

When must the certificate be attached? – *uno contextu*
Until 1977 the question was if the certificate had to be attached at the same time as the will was signed by the testator and the witnesses or if it could be done at some later stage.

*Radley v Stopforth***: held that the certificate was intended as a requirement for the execution of the will and isn't merely a provision allowing later proof of identity. The legislature regards the certificate as a supplementary act, aimed at stopping uncertainly.

Law of Succession Amendment Act: Commissioner must append the certificate as soon as possible after the will has been signed in her presence by the testator and the witnesses.
Should the testator die after the will has been signed but before the commissioner has attached the certificate, he must as soon as possible complete it. The legislature intended the certificate to be made in one continuous operation. The certificate must be made as soon as possible after the testator's death.

3. Where someone signs on behalf of the testator:

If the testator gets someone to sign on his behalf = that person must sign/acknowledged his signature at the end of the will, in the presence of the testator, 2/more competent witnesses and the Commissioner.
The witnesses must in the presence of the testator sign the will.

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If the will has more than 1 page – the person signing for the testator must sign all the preceding pages in the presence of the required people.

When someone signs as an amanuensis, the question is whether he/she ought to sign with his own name or whether he ought to sign using the testator's name? – Case law have found that the amanuensis should sign using the testator's name unless he/she uses the abbreviation p.p. (*Sharp, Ex Parte Fourie's Estate*).

POWER OF THE COURT TO DECLARE A DOCUMENT A VALID WILL:

S2 (3) of Wills Act: empower the court to order the master to accept a document as a valid will, if the court is satisfied that the document was drafted by someone, who has since died and who intended the document to be his will – even if it doesn't comply with the formal requirements of a valid will.
This provision is peremptory in nature (requires strict compliance).

Section 2(3) was welcomed as in the past many wills were declared invalid because of non-compliance with the formal requirements, even if the non-compliance was only in a minor respect.
This was because Section 2(1) of the wills act was essential and the court had no option but to declare the will invalid, if the requirements weren't complied with.

NOW the court is empowered to declare a document as a valid will even though it doesn't meet all the formal requirements of wills.
Section 2(3) can today be used to remedy will's defective like in *Kidwell*.

Thus, any document may be accepted as a will without complying with formalities if the requirements in Section 2(3) summarized in *Ex parte Maurice*** were complied with*:*

1) The court has to be satisfied that the document was executed by a person,
2) Who has since died and who
3) Intended the document to be his will

The power of the court to order the Master to accept a document as a valid will:
Section 2(3) only applies if the formalities for creating a valid will have not been complied with, it can't be used to remedy the lack of capacity to make a will.
If court satisfied document intended to be a person's will – must order master to accept the document – it has NO discretion.

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Originally our courts gave section 2(3) a strict approach (*Webster*) but then in *Back*** the court followed more of a flexible approach to interpreting section 2(3) in stating that section 2(3) had nothing in it saying that the testator should have personally drafted the document. This flexible approach however came to an abrupt end in *Bekker v Naude.*

REQUIREMENTS

1) **The court has to be satisfied that the document concerned must have been drafted or executed BY A PERSON who has since died:**
   - Literally interpreted this means that the deceased should have PERSONALLY drafted the document (*Webster*).
   - In March 2003 the SCA delivered a judgement dealing with section 2(3) – *Bekker v Naude***. The SCA preferred the narrow interpretation of the word "drafted" in this case – to mean that the testator must have drafted the document himself (the wider approach to "drafted" was used in *Back* to include someone drafting it for the testator).
   - Facts: the deceased (call him X) had been previously married to the 1st defendant (call her Y) and they had made a will where the survivor of them would inherit the entire estate of the spouse who died first. After X's divorce from Y, he married the plaintiff (call her Z). X and Z then decided to draw up a joint will. They went to the bank and asked a will be drawn up according to their wishes. The bank official drafted their will according to their wishes and sent the draft through to Pretoria where it was then drafted and posted to X and Z. the draft will was for some reason never signed by the parties. After the death of X 5 years later, the validity of the draft will became an issue when Z brought an application to court in terms of section 2(3) asking the court for an order that the will be the valid will of X.
     The court a quo held that the main issue was whether the deceased should have drafted the will in the light of section 2 (3) - that the document must have been drafted by a person who has since died. The court held that the statute was clear in this regard - it did not contemplate the situation where a 3rd party drafts the will. According to the court there must be A CONNECTION BETWEEN THE WILL AND THE DECEASED. Thus the plaintiff, Z, could not succeed in her action.

     She then appealed to SCA. The court had to interpret the word "drafted" in the context of the Wills Act. Did it have a narrow meaning requiring the testator to personally draft, write, type or create the document or that it had a wider meaning of CAUSING THE DOCUMENT TO BE DRAFTED, WRITTEN TYPED OR CREATED.

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The court felt that documents that he caused to have been drafted by an attorney, bank etc, do NOT qualify in terms of section 2(3).

The SCA accepted the NARROWER approach and their reasons were as follows:

- Firstly, in interpretation of statutes effect must be given to the ordinary grammatical meaning of a word unless this interpretation leads to absurdity etc. Court felt section 2(3) didn't lead to such absurdities.
- Secondly, there was a strong indication that the Legislature intended a restrictive interpretation in section 2(3) because if we look at section 2A we find that the Legislature said the following:
    - if a court is satisfied that a testator has made a written indication on his will **or before his death caused such indication be made....**
    - performed any other act or **before his death caused such an act to be performed...**

  This indicates that the Legislature knew the difference between "drafted" and "caused to be drafted", as they wrote it in section 2A. The contrary view in *Back* was not convincing to the SCA.
- Thirdly, the court looked at the intention of the Legislature. The purpose of section 2(3) according to *Back* was to prevent the last wishes of the testator from being nullified by non compliance with formalities. The court in *Bekker* did not agree with this. They felt that the requirement that the doc should be drafted by the testator is expressed in unambiguous terms and imposed for a good reason, as the testamentary formalities are there to combat fraud and thus, the testator should personally draft the doc.
- Fourthly, the history of section 2(3) is looked at. *Bekker's* judge found that the history of section 2(3) supports a literal interpretation.
- Finally, the court was of the opinion that there were no grounds which justify a departure from the ordinary, literal meaning of section 2(3). Thus the court has the "power to condone" only if the intended will was brought into being by a testator personally.

  In this case, the testator had asked the bank to draft the will and the bank used its own standard terms and wording, with the testator's wishes, thus the doc had, according to the court, not been drafted by the testator, but that he'd caused it to be drafted. The appeal was denied (Y inherited).

It has been stated that it is not possible to give effect to an unsigned will using this rescue provision unless such will was personally drafted.

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In ***MacDonald**** ***(2002)*** the testator typed his will on his computer and then committed suicide. He left a note directing those he survived to the will. The computer was put on and the will was printed in the presence of the police. The court held that due to the security involved when printing the will, the document was intended to be his will and accepted same as valid in terms of section 2(3).

In ***Van der Merwe**** ***(2010)*** the deceased had written an email that contained his will and he sent it to his friend who was his sole beneficiary. The deceased never executed the will before he died. The SCA was persuaded that he intended his email to be his last will and they made an order in terms of section 2(3).

In ***Ex parte Williams: In re Williams' Estate ***** The husband of the late applied for an order in terms of s 2(3) application to have an unsigned document that was prepared by F, after consultation with W and the applicant, as the will of declared to be her last will and testament.

The Court, after pointing out that s 2(3) was promulgated to ameliorate the hardships and injustice occasioned by insisting on strict formalities in all cases and to reaffirm the sanctity of the testator's last wishes, made it clear that this purpose had to be served within the framework of the three requirements.

The real problem concerned the correct interpretation of the term 'drafted' and in particular whether it had to be restrictively constructed to mean that the A testator himself must have physically composed the document. The Court pointed out that the solution had to be sought in the provisions of s 2(3) and held that there was no warrant for holding that the Legislature intended nothing less than the personal drafting of a document by the testator.

This was borne out by two considerations the Legislature must have been aware of:

a. the fact that experts with a better grasp of the intricacies involved regularly B drafted wills for the perusal, approval and signature of testators, and
b. that the hardships and injustice occasioned by insisting on strict formalities in all cases had to be ameliorated.

Requirement (3) meant no more than that the evidence and the nature of the document had to establish that the testator intended the document to be his will.

A preliminary sketch for the drafting of a will (such as notes for discussion with an attorney or written instructions to an attorney to draft a will) would not suffice. The provision that the document may be accepted 'although it does not comply with all the formalities for

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the execution or amendment of wills referred to in ss (1)' had to be approached objectively and not interpreted to mean that the testator must subjectively have thought that the document was a valid will. The Court weighed the evidence and concluded that had intended the document in question to be her will. The application was accordingly granted.

2) Intention requirement

The Supreme Court of Appeal held that for the grant of relief under section 2(3) a court must be satisfied that the deceased person who drafted or executed the document **intended it to be his will, and not merely instructions to an attorney** to draft a will for him or her. That intention must have existed concurrently with the execution or drafting of the document.

In ***Ex Parte Maurice*** (1995)**, after discussions with his wife the deceased wrote out a draft will and sent the document to his friend to 'knock it into shape'. The testator died before the will could be finalised. A section 2(3) was denied as the testator had envisaged that the document might be changed and therefore are not his final wishes.

In ***Van Wetten v Bosch*** *(2004)* the deceased wrote the contested will himself. He left it in a sealed envelope, addressed to a friend of his. The envelope bore the words "Only open if something happens to me or if I decide differently." From the circumstances surrounding the making of the contested will, the court drew the inference that the deceased was contemplating suicide. This led the court to the conclusion that when the deceased gave the envelope to his friend, he did not intend the latter to hand the enclosed document to an attorney so that the attorney could see to the drafting of his will. At the time when it was envisaged that the envelope would be opened and the document read, the deceased would already be dead. The court held: A dead man cannot execute a will, and the deceased, even in a troubled frame of mind, would have appreciated that. This fact alone, in my view, shows that the contested will was intended by the deceased to be his will. The terms of the contested will bear that out. The order in terms of section 2(3) was therefore granted.

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LOST WILLS

Just because a will is lost, it doesn't affect the fact that the testator left a valid will – the contents may then be proved by means of Documentary or oral evidence *(Nel)*.

BUT: if the will was known to have been in the possession of the testator BEFORE her death and after her death it can't be found = rebuttable presumption that she revoked it.

Person who destroys, conceals, forges or damages a will commits an offence and liable for a fine of R2000/7 years in prison.

AMENDMENT TO WILLS
Needs formalities of Section 2(1)(a)!!!!!

Amendments BEFORE the execution of the will are governed by common law = must be initialed/signed by the testator and the witnesses.

S2(1)(b) and S2(2): govern amendments after the execution of the will. Where an amendment is made after the completion of the will, it must comply with formalities, which are the same as those for the execution of a will.

In terms of the Wills Act the following bring about amendments and therefore need to comply with the required formalities:
- additions
- alterations
- interlineations (inserting new words between the lines of the will)
- deletions, cancellations and obliterations (includes: erasing, cutting out, pasting over or removing something with correction fluid).

Where the testator confirms the amendment by making a mark/ someone makes the amendment on his behalf – the same formalities concerning who must be present apply = Commissioner, testator and 2 competent witnesses.

Amendments to the will are rebuttably presumed to be made after the execution of the will.

Section 2A of the Wills Act:
Court is empowered to declare part of a will to be revoked, if the testator's intention to revoke is apparent from the will/separate document.

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REVOCATION OF WILLS

Needs no formalities in S2(1)(a) – only animus revocandi and an act of revocation!!!

Because a will is a unilateral act – it can be revoked at any time before the testator's death.
The testator can't revoke her will orally even before witnesses.

Effect of a change of status:
In SA a change of status (marriage) doesn't mean the automatic revocation of a will.
The only exception used to be in Natal = the will of a testator who subsequently got married was tacitly revoked by their marriage, unless the will referred to her future marriage or unless the will disposed of assets which wouldn't have devolved on the testators spouse or descendants if the testator died intestate.

LSAA: Section 2B: if a person dies 3 months after her marriage was dissolved by a divorce, her previous spouse won't inherit under her will.
The will, will be implemented in the same way as if the spouse had died before the date of the dissolution of the marriage = the position is the same as if the previous spouse had died before the testator, unless it's apparent from the will that the testator intended her previous spouse to benefit.

This gives someone 3 months to change her will. If she doesn't do so and dies 4 months after, the divorced spouse will inherit.

Revocation may be express or tacit.

Express revocation:

a) Testator makes a later will in which he expressly revokes the previous will. – *Ex Parte Whiting:* revocatory clause – revocation takes place the moment the revoking will is made and not on the testators death.
b) If a testator who is unmarried expressly revokes the will by means of an ANC
c) At common law: it was possible for a testator to destroy her will wholly or in part with the intention to revoke it = burning it, tearing it up, and deleting signature – *Senekal v Meyer:* testator wrote cancelled on the original copy of the will and confirmed it with his signature. Although there was also a signed copy of the will with the bank, the court held the will was revoked *Marais v the Master.*

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Power of the court to declare a will to be revoked:

Section 2A: the court must be satisfied that the testator:

(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
(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 it, the court shall declare the will or part concerned to be revoked.

This section empowers the court to declare a will or part of it revoked. (*Webster).*

The question is whether the testator intended to revoke the will, and not whether the act is a recognized act of destruction.
The only requirement is that the act of revocation should be evident from the document/ should be apparent from the face of the will.
Oral revocation isn't allowed.
E.g. of acts: cancelled, drawing lines over the will, and cutting out the testator's signature.

Where the testator cancels only part of his will = deletion/revocation.
If it's considered a deletion the formalities must be complied with.
Where the testator destroys part of her will with the intention to revoke = the remaining part is still valid as a will if it forms a whole, which is understandable without reference to the destroyed part.

In *Olivier v The Master* the court was faced with a will and codicil which was unsigned but seemed to revoke certain provisions of the testators will and to substitute new provisions for the revoked material. The court stated that the codicil could not be rescued by section 2(3) as the testator had neither drafted nor signed it. Proper interpretation and effect couldn't be given to the revocation without the court giving effect to the codicil.

Presumptions concerning the revocation of wills:

a) If the will is destroyed by the testator, its rebuttably presumed that he destroyed it with the intention of revoking it and where a will which was in the testators possession can't be found after his death = rebuttable presumed that the testator destroyed it with the intention of revoking it (*Wynne*).
b) Rebuttable presumption that the testator destroyed her will with the *animus revocandi* (intention to revoke) if the will was drawn up in duplicate and the copy which was in the testators possession can't be found after her death. This doesn't apply if both copies were in the testators keeping and only one is found after his death.

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c) Rebuttable presumption that the testator destroyed her will with the intention to revoke falls away if it's proved the testator destroyed her will in a thoughtless moment, by mistake or in a moment or rage/drunkenness or insanity.

Master can accept a duplicate although the original which was known to be in the testator's possession can be found after her death.

In *Re Estate Whiting:* testator appointed D as his executor and one of the heirs in his will. He later executed another will, which differed from the 1st will in trivial detail.
The new will appointed D as the executor and one of his heirs and revoked the old will, BUT it was written by D.
Held: although D couldn't be executor under the new will because it was written by him, the 2nd will was valid and the 1st will was revoked. D could not inherit.

Le Roux: the testator made a will, which he later revoked in a 2nd, will. On his death the 2nd will couldn't be found = this raised the presumption that the 2nd will had been revoked.
It seemed the testator intended to revive his earlier will by revoking the later one.
The testator had destroyed the later will under the mistaken belief that the 1st will would be revived.
He didn't intend to die intestate.
Held: his presumed revocation depended on the condition that the 1st will was revived = NO ANIMUS REVOCANDI and the 2nd will remained valid.

The application of this doctrine in SA has been criticized – because you could use the testator's intention to revoke a will, which may depend on the condition or an assumption.
If the condition isn't fulfilled/assumption turns out to be incorrect the revocation doesn't have any legal effect as the necessary animus revocandi is lacking.

Tacit revocation:
the testator can tacitly revoke her previous wills wholly or partially.
Where the testator dies leaving various wills and the later will doesn't expressly revoke the former, it's possible that they will all be prima facie valid and must be read together and reconciled as far as possible to give effect to the testators intention (*Price v The Master*).

BUT where the provisions in the later will are in conflict with a provision in an earlier will = give effect to the later will (*Vimpany v Attridge*).
The earlier will is tacitly revoked by the testator in the later will.

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In *Pienaar v The Master*** (2011), the testator had executed two wills which contained, *inter alia,* the following provisions:

The November 2006 will:
- Policy: second wife
- Car: son
- Immovable property: son
- Residue of estate: daughters

The May 2007 will:
- Cash sum: son and one daughter
- Car: son in law
- Immovable property: one to each child with a usufruct over the house given to my son in favour of my second wife.
- Residue of estate: daughters

At the testators death he was survived by his two daughters from his first wife and his son from his second wife, whom he had divorced in October 2006.
The court a quo considered the two wills and attempted to read them together where possible. Where there was contradictions effect was given to the later will (2007). The policy was disposed off in terms of the 2006 will and the car in terms of the 2007 will.
On appeal the question was asked whether the second will revoked the earlier will. The court stated it had in contradictory provisions.

REVIVAL OF REVOKED WILLS

Testator can (wholly or in part) want to revive a will, which he revoked – this is open only if the will is still available.
The revoked will can't be revived orally.
If the testator uses a revoking will B to revive existing will A and then destroys the revoking will B with the intention to revoke – will A isn't automatically revived.

Moses v Abinader**:** question of revival was discussed in the AD:

V.D Heever: the doctrine of revival does not form part of our law and the only way a will can be revived is through the testamentary formalities.
Hoexter: prohibited formalities

Schreiner: adopted the view that a revoked will can be revived by a later will – the reviving document has to comply with all the requirements for a valid will.

There is no good reason why a properly executed will which has been revoked shouldn't be revived by a later will.

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Any uncertainty was resolved in ***Wessels*** in 2007 the SCA held 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 the testator's wishes expressed in a duly registered document. The court held that the revival needs to comply with 3 requirements:

- the lapsed will must have been validly executed
- it must be incorporated by reference into a new validly executed will
- the testator must have intended to revive the will

In *Wessels* the testator mad a 2002 will with his spouse which made no provision regarding his estate should he survive her. The provisions all predicated that she would survive him. In 2003 the testator executed a codicil which modified one clause and stated that "the rest of the will remains unaltered". It was held that the testator executed the codicil in the mistaken belief that his previous will was still in force and this excluded the intention to revive it as one cannot revive what one does not know is dead and therefore the testator died intestate.

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POSSIBLE QUESTIONS

J inherited a fortune from his grandfather when he was ten years old. On his fourteenth birthday, he signed a document stating that he wished to leave his entire fortune to his two brothers, D and F. This document was attested by two of his fourteen-year-old friends. J died in a car accident when he was seventeen and left his parents, A and B and his brothers, D and F, behind. Answer the following questions:
Will J's estate devolve testate or intestate? Give reasons for your answer.

Intestate cannot make – valid will – has no testamentary capacity (OR at least 16 years make a will).

Write down the names of J's heirs.

A and B

In Ex Parte Maurice 1995 (2) SA 713 (c) the court emphasized that in terms of section 2(3) of the Wills Act 7 of 1953 three requirements will have to be met before a court will order the Master to accept a document, which does not comply with all the formalities of the Wills Act, as a valid Will. Name the three requirements.

OR

Discuss the requirements of section 2(3) of the Wills Act which have to comply with before the court will order the Master to accept a will, which does not comply with all the formalities for a valid will, with reference to case law.

S 2(3) Wills Act: Court empowered to order master to accept a document as a valid will
Court satisfied:
(a) Document drafted by person
(b) Who has since died
(c) Who intended that document to be his will
S 2(1)(a) – Ex parte Maurice-
Section can't be used if capacity to testator is in question
E.g. Mental illness (careful of Bekker v Naude now as this is an older question)

What formalities are prescribed by section 2(1)(a) of the Wills Act 7 of 1953 in order for a will to be valid if a testator himself signs the will, consisting of two pages, with his/her signature?

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Testator sign will be making a mark
Mark be at end of will – in presence of two or more witnesses
Commissioner of oaths present – Ito S 2(1)(a)(v)
Certificate need only be attached when:
(a) testator signs by mark
(b) when another person signs on testators behalf
Contents of certificate certify that commissioner:
(a) satisfied identity testator
(b) that will is signed by testator

Failure to comply – invalid
Courts – object of S 2(1)(a)(v) – show mark of testator
Commissioner had to place certificate at end of will – caused problems
After amendment S 2(a)(a)(v) – place anywhere on will.
Must sign each page where certificate not present
Must sign ASAP with witness.

Write a note on lost Wills.

If a will was known in a possession of testator before death but cant be found after death it raises a rebut table presumption that he revoked it.

Explain what t a "testamentary writing" is as defined by court <u>Ex Parte Davies.</u>

Testamentary wring document which defines three essential elements"
(a) property bequeathed
(b) Extent of the interest bequeathed, that is ownership, usufruct, fidecommissary
(c) The beneficiary.

Seventeen yr old X went on holiday to Durban with his two best friends, J (16yrs) and M (18yrs) whilst swimming in the sea, X was attacked by a shark, which bit off his right arm. His friends rushed him to hospital. In the hospital X decided to make a will. He dictated the will to M who wrote down his instructions.
In his will of one page, he left his car to M, R5 000 to J and the residue of his estate to his grandparents who raised him.
X, who used to be right handed, then made a thumbprint with his left hand at the end of the will and J and a nurse signed the will as witnesses. X died a few hours later. He was survived by his father and his grandparents.

Was X old enough to make a will? Explain your answer.

Yes – any person 16 yrs or older may make a will (S 4 of Wills Act)

Was J old enough to be a witness to the will? Explain

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Yes – a witness must be 14yrs or older {and competent to give evidence in a court of law} (S 1 of Wills Act)

Did X's will comply with all the testamentary formalities for a valid will? Explain your answer.

Discuss s2(1)(a)

Suppose the will was invalid. What advice can you give to the grandparents of X that will enable them to inherit under the will?

Apply to a court – S 2(3) wills act to Order the Master to accept document as a valid will and prove the requirements:

If court satisfied document drafted / executed by a person
Who died in the meantime
Who intended document to be his will.

Discuss the capacity of J and M to inherit under the will

S 4A wills Act – a witness to a will or person who writes out will(J)
In his own handwriting (M) is disqualified – receiving benefit.
ITO S 4A – court declare both competent to receive benefit.

What did the SCA decide in <u>Bekker V Naude 2003 (5) SA 173 (SCA)</u> regarding the requirement in section 2 (3) of the Wills Act 7 of 1953 that the document that was the subject of a Section 2 (3) application, must have been drafted by the deceased?

Husband and wife married few years – executed joint will
H was W heir and W was H heir on death of first dying.
Divorced – H remarried – again made a joint will
H died 6 yrs later – 2nd wife applied to court to have their will declared valid under S 2(3).
Court considers the 3 requirements – found word "drafted" had been interpreted too widely.
It must mean the deceased – personally drawn up /typed own will
Reason for courts decision were:

(a) Word "drafted" hat to be given ordinary, grammatical/meaning
(b) Legislature intended to use words "cause to be drafted"
(c) Court rejected (Back) and (Williams) wide interpretation – " drafted" combat fraud and eliminates disputes.

Why was the will invalid in <u>Tshabalala v Tshabalala 1980 (1) SA134 (O)</u>?

Testators will – consisted one page – signed with thumbprint.

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Commissioner must in terms of s2(1)(a)(v), attach certificate certifying mark is mark of testator.
Commissioner attached his certificate certifying the mark was the mark made by the testator, but failed to sign the one page will where the certificate did not appear.
Declared the will invalid (today, s2(3) would provide a solution).

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

See memo above

J's friend P is an attorney. In 19934 P drew up a will for J in terms of which J appointed his wife M and his children, S and K as his beneficiaries. P kept the original will after it was duly executed and J received a copy.
In 2003 J divorce M and married N a month later. On their honeymoon J died in a motor vehicle accident.
Was J's will revoked by his divorce? Discuss with reference to legislation. Explain who will inherit his estate.

In SA a charge in testator's status doesn't entail automatic revocation of his will.
A person's divorce will affect the will, only for limited time.
Law of Succession Amendment Act – S2B if person dies within 3 months after marriage is dissolved by divorce a previous spouse won't inherit, as the section makes it that the ex-spouse "dies before the dissolution of the marriage"
Thus the will, will be implemented as if spouse had died before date divorcing M. S2B – law allows N to inherit and not M.

Suppose that J's copy of the will was found amongst his possessions. A note was attached to the copy of the will. On the note J had written: " I herby revoke my wills"
Name three ways in which a will can be expressly revoked by a testator.

(a) Testator makes a later valid will revoking previous
(b) Unmarried testator expressly revokes will anc
(c) Common law – testator could revoke wholly or partially by burning it, tearing it, del signature
(d) Allowed this to occur today – (Senelkal)

Taking into account the answer above, state whether the note on J's will constitute an effective EXPRESS revocation of the will.

Yes

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Will a court be able to declare J's will to be revoked? Discuss with reference to legislation.

S2A – empowers court declare a will revoked:
(a) written indication on will by testator
(b) performed any other date in relation to will
(c) drafted another document from which such intention is evident.
J's intention was to revoke – court declare it revoked.

Suppose that the will was validly revoke. Who will be J's beneficiary/ beneficiaries? Only write down name/ names

N, S and K

As far as formalities are concerned, what is the basic difference between amendment and revocation of wills?

An amendment must comply with the same formalities as required for executing a will (S2(1)(a)) whereas revocation requires no formalities.

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CAPACITY TO BENEFIT

A beneficiary must be capable to inherit a benefit in the testator's estate at the moment the benefit vests (dies cedit).
Anyone (natural /juristic) born/unborn can benefit under a will.

The minor
A minor has the capacity to inherit. Inherited property will be administered for the minors benefit by the guardian.
Where the minor has received movable property he will acquire a vested right to the property when the testator dies. The property will however, be administered by the guardian. Where the minor receives money he will acquire a vested right to it on the testators death but law requires that the money be placed in a guardians fund to be administered by the Master of the High Court. The guardian can then request the money when it is needed but for amounts in excess of R100 000, the guardian needs the courts approval.
Where the minor inherits immovable property, the property will be registered in the minors name and administered by the guardian.

The unborn
Roman-Dutch law: testator could nominate uncertain but definite people as beneficiaries. So he can nominate a beneficiary who will only be born after the will is made or after his death.
Testator can also nominate children who may yet be born to someone else (sister's children).

BUT the beneficiary must either exist or at least have been conceived at the moment when the bequeathed benefit vests.
Where the beneficiary has already died or has been conceived at the time when the benefit vests, there can be no succession unless the testator has made a provision in his will for this.

If the beneficiary has been conceived at the moment when the benefit vests – then the unborn can't yet inherit as he has no rights.
Vesting of the benefit is held over until it's certain that a viable person has been born alive. BUT if no viable person is born alive the benefit, which was reserved for him, accrues to other heirs in portions.

Ex Parte Boedel Steenkamp: testator nominated his children in general as his heirs – without reference to their names or number. The court decided that the unborn will inherit and the inheritance will be held in abeyance until a viable person was born.
The inheritance will be kept open if the widow is pregnant at the time of his death – unless the will makes it clear that it was the testator's intention to give the benefit only to those children who were living at the time of his death.
BUT if the testator nominated his children by name or number = the intention is that children who might be born later won't inherit.

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Bequests made to a class of people:
Section 2D(1)(c): unless otherwise indicated, any benefit allocated to the children of a person/members of a class, shall vest in those people who are alive at the time of devolution or who have already been conceived at that time and who are later born alive.
So if the testator wants to benefit children born after his death and who haven't yet been conceived his intention must be apparent.

Unsound mind:
Such a person can inherit but their benefit will be controlled by their curator bonis.

Insolvent:
Any inheritance that is accepted by the insolvent will fall into the insolvent estate but the insolvent can repudiate the benefit (*Wessels v De Jager*).

INCOMPETENT PEOPLE:

Can't inherit testate or intestate:

a) **Someone who murdered the testator:**

Someone who intentionally causes the death of the deceased is incapable from inheriting from the estate of such person = murderer can't inherit from his victim. – *De bloedige hand eft niet* (*Danielz v DeWet* (2008))

*Ex Parte Steenkamp and Steenkamp***: where a man whose father was dead, murdered his grandfather –he can't inherit from his grandfather by representing (per stirps) his father, because the murderer would be inheriting directly from his victim.

Murderer can inherit from others.

Steenkamp: also laid down that a person who has murdered the deceased's **parent, child or spouse** can't inherit from the deceased = because this is a grave wrong to the deceased himself.
BUT a person will be excluded if the result of his murdering someone is directly to his benefit = law doesn't allow someone to get an unfair advantage from his own illegal act.
There must be a causal connection between the crime and the advantage = reasonable foresee ability.

b) **Blameless killer of the testator:**

If someone was insane when they murdered the testator, he then has the capacity to inherit from him (*Gavin v Kavin***)

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c) Someone who negligently caused the death of the testator

- **Indignus (unworthy):**

Common law: someone who negligently caused the testators death couldn't inherit from him (*Taylor v Pim***).

Someone who negligently caused death (car accident) can't inherit.
Rule isn't applied in this way.
Road accidents happen a lot – it's never happened for example – that a child who negligently caused the death of his parent in a car accident was unable to inherit from him for that reason alone – negligent killing appears to be insufficient to disqualify someone.

According to Van der Walt: a negligent killer will be disqualified from inheriting from his victim only if his conduct is morally unacceptable.

*Cassey v The Master***: H under the influence of alcohol accident killed his wife with a firearm = court found he couldn't benefit under her estate.

UNISA: killers act must be morally reprehensible BEFORE he will be disqualified from inheriting from his victim = followed by our courts.

A person who forges the testators will, will also be dis qualified (*Pillay v Nagan*).

d) Spouse married in community who murdered the other spouse:

If the husband killed the wife (married in community) = the marriage is dissolved by death. The husband automatically gets half the joint estate but cannot thereafter then inherit from his wife.

e) Extramarital children:

Green: natural and adulterous children weren't precluded from inheriting under the wills of their parents/others.
Incestuous children couldn't inherit from their parents, as incest was a crime.
Section 2D(1)(b): the fact that a child is born out of wedlock is ignored in determining his relationship to the testator or someone else for the purposes of a will = incestuous child could now also inherit from both parents.

PEOPLE WHO CAN'T INHERIT TESTATE BUT CAN INTESTATE:

1) Writer of a will:

Common law: someone who wrote the will of another was incapable of getting a benefit under that will unless he was an intestate heir or unless the testator had confirmed the bequest to him.
This is related to the writer = person who wrote/types the will (*Van Rensburg*)

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2) <u>Witness and person who signed on the testators behalf:</u>
Section 5 and Section 6: witness and the spouse of the witness will be incapable of inheriting under the will.

CHANGED
Section 4A

a) Witness to a will
b) Person who signs on behalf of the testator
c) Person who writes out the will in his own writing
d) Person who is the spouse of such a person at the time of the execution are disqualified from receiving a benefit under the will.

Section 4A(3) – a nomination as an executor, trustee or guardian shall be regarded as a benefit and therefore section 4A(1) and (2) will be applicable.

BUT in terms of section 4A(2), the Court can declare the person/spouse not disqualified if he:

- Would have inherited intestate had the testator died intestate, but no more than what he would have gotten had the testator died intestate.
- If the court is satisfied he/she didn't defraud or unduly influence the testator.
- Witness/spouse = if the will is signed by 2 other competent witnesses

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FREEDOM OF TESTATION AND POWER OF APPOINTMENT

Freedom of testation: means the freedom of a person to execute a valid will to govern the transmission and use of property by the will.

There is a general rule that a testator has the freedom of testation and can change his will at any stage prior to his death

Exceptions:
1. If two testators in a joint will mass their estates.
2. Presumption of death.

Limitations on the freedom of testation and the competence of the court to make alterations to the will:

Statute or common law:
a) Immovable Property Act
b) S33 – removal of a restriction
c) S13 of Trust Control Act
d) *Contra bonos mores*
e) Against the Constitution / any other legislation
f) Impossible
g) Vague

Contra bonos mores:
e.g. *Minister of Education v Syfrets Trust*

Conditions, which prohibit the beneficiary to marry
The testator can't leave a benefit to beneficiary who has never married on condition that she won't marry = void as it is contra bonos mores (*De Wager*).
BUT it's not contra bonos mores to stop someone who has been married BEFORE from marrying again – if the testator bequeaths something to his surviving spouse on condition that she doesn't remarry = valid (*Ex Parte Gitelson*).
Reason: the testator's motive might be that if she remarries, his children might not be properly cared for.

A will will be invalid if the testator's intention is to destroy an existing marriage (*Levy v Schwartz* – where the testator stated "receive benefits if the marriage is dissolved by death or any other cause").
If the bequest has the result that the marriage breaks down, without this being the intention of the testator it doesn't mean it's invalid (*Barclays Bank DC & O v Anderson*).

The testator in the past could also make it a condition that the beneficiary can't marry a certain person/someone belonging to a certain faith.

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*Aronson**:* AD held that a condition that a beneficiary shouldn't marry a person not born in the Jewish faith = valid.
If the purpose of the condition is to destroy an existing marriage = null and void.
Wasserzug v Administrators of Estate Nathanson – it was held that the condition that the beneficiary should not marry ``out of the Jewish faith'' was too vague and therefore must be held pro non scripto.

A testator should not try to rule the lives of his beneficiaries from the grave!

Condition which forces the beneficiary to live in a certain place / change his name:
At common law a provision which requires someone to live in a certain place was valid and enforceable (*Ex Parte Dodds*). Changes of name clauses were also valid (*Ex Parte Estate Edwards*).

Today such clauses will be seen to be contra bone mores as the go against section 9(3) of our Constitution which states that a person may not be unfairly discriminated against as well as sections 18 and 21 which gives a person the right to freedom of association and movement and residence.

The testator should not try to do through death what he could not do during his life.
Any provision that brings the beneficiary to an agonizing choice must be declared *pro non scripto.*

The testator's capacity to disinherit close relatives:

a) Children, parents, brothers and sisters:

the duty which rested on parents to maintain their children didn't in Roman Dutch law pass onto the parent's deceased estate.
Carelse v Estate de Vries: held that the duty to support children passed to the estate of the deceased parent – even if the children are extra martial children.

The rights of children to claim maintenance out of the deceased estate of their parents has been settled in SA.
Even a major child is entitled to maintenance from his parent's estate if the child can't support himself. This duty however, falls primarily on living relatives of the child before the parent's estate will be liable (*Bank v Sassman*; *Ex Parte Jacobs*).

b) The Surviving Spouse:

The position of the surviving spouse is governed by the Maintenance of Surviving Spouses Act:
Section 2(1): if the marriage is dissolved by death, the survivor shall have a claim against the estate, of the deceased spouse for the provision of reasonable maintenance needs until her

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death/remarriage, in so far as she isn't able to provide for her own means.
The act only applies to marriages dissolved by death after its commencement.

In determining the reasonable maintenance needs of the surviving spouse, the following should be considered:

a) the amount of the deceased estate available for distribution (S3 (a)).
b) The means, earning capacity, financial needs and obligations of the surviving spouse and the subsistence of the marriage (S3 (b))
c) The standard of living of the survivor during the marriage, her age at the death of the deceased (S3(c))

The survivor's claim for maintenance has the same order of preference in respect of other claims against the estate of the deceased, as a claim for maintenance of a dependant child.
If the claim of the spouse and the child compete = they will be reduced proportionally = Section 2(3)(b)

The executor of the deceased spouse's estate can enter into agreements with the surviving spouse, heirs and legatees having an interest in the agreement, including the creation of a trust and in terms of the agreement to transfer assets of the estate to the survivor/trust.

The word spouse in terms of the Maintenance of Surviving Spouses Act has been extended to include spouses in a Muslim marriage (*Daniels v Campbell***; *Hassam v Jacobs***); Hindu spouses (*Govender*) and same sex marriages (Civil Union Act). Hetrosexual life partners are not regarded as a spouse (*Volks v Robinson***). In terms of the RCLSA customary marriages are also included as well as a woman other than a wife of the deceased who provides children (substitute) and a woman married to another woman for procreation of children to the deceased's house (woman-to-woman marriage).

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DELEGATION OF TESTAMENTARY POWER:

General rule: testator exercises his testamentary power himself and can't leave it to someone else to decide who will inherit under his will:

Exceptions:

a) Bequests for charitable purposes – testator can authorize the administrator of his estate to nominate beneficiaries
b) Testator can authorize the bearer of an interim right (fiduciary) to nominate the eventual beneficiaries or to determine when and how they will inherit. The person given this power must have a beneficial interest in the property and must survive the testator. (***Estate Orpen v Estate Atkinson*****)

Braun v Blann and Botha**:** The Appellate Division held that the power could be given to the trustee to appoint beneficiaries from a specified class of people designated by the trustee.

E.g. I leave my farm to my daughter W on her death she must bequest the farm to one of her daughters.
E.g. I bequest the residue of my estate to my trustee to pay the income thereof to my wife during her lifetime. On her death the capital shall be dealt with as my wife has provided for in her will.

The testator can't say "I leave my estate to B and the division thereof is entirely in her hands" – the grantee of the power must exercise the testamentary power delegated to her in accordance with the provisions of the instrument.

The testator has the power to revoke this at any time BEFORE his death.

Our law recognises special and general power of appointment.

a. Special Power of appointment

where the beneficiaries must be chosen from certain persons or a certain class of persons:

Example: ``I leave my farm to my daughter W. On her death she must bequeath the farm to one of her daughters."

b. General power of appointment

the grantee of the power is free to choose the beneficiaries :

Example: ``I bequeath the residue of my estate to my trustees to pay the income thereof to my wife during her lifetime. Upon her death the capital shall be dealt with in the way my wife has provided in her will."

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POSSIBLE QUESTIONS

If a benefit is left to a class of persons, which members of the class will be able to inherit?

Any benefit allocated to the children of a person, or to members of a class of persons shall vest in them or already been conceived time born alive

Name the four persons involved in the execution of a will who, according to section 4A(1) of the Wills Act 7 of 1953, will be disqualified from receiving any benefit from that will.

(a) the witness or his spouse
(b) the person who signs a will by direction of the testator (or his spouse).
(c) The person/his spouse, who writes out the will, or any part of it, in his own handwriting
(d) Nomination as executor.

With reference to case law, discuss whether the person who negligently caused the testator's death may inherit from the testator.

Person who negligently causes another's death cannot inherit e.g. car
In practice, rule not applied
The negligent killing as such appears to have been insufficient to disqualify a person
A negligent killer – disqualified if conduct morally unacceptable
A child negligently causes mother's death in car accidents, won't be affect
While a person such as a (Taylor v Pim) – unable inherit.

Explain what will happen to (i) an inheritance and (ii) a legacy if the heir or legatee cannot take the benefit and accrual does not take place

The legacy lapses and falls back into estate for benefit of heirs
If no testate heirs – devolve upon intestate heirs.

In his will Mr. T bequeathed the residue of his estate to his "grandchildren". He had two children, a son and a daughter. The son had adopted a child, S. T's unmarried daughter was expecting a child upon T's death. Discuss the capacity of S and the unborn, illegitimate grandchild to inherit with the reference to legislation.

Possible for testator – nominate uncertain but definable persons as beneficiaries under will.

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Thus may nominate beneficiaries who be born after will made
Where a beneficiary has already died or not yet been conceived time bequeathed benefit vest – no succession unless testator made provision in his will.
If beneficiary been conceived – then unborn beneficiary (nasciturus) cannot inherit, since being unborn, not yet capable of bearing rights.
If no viable person is born alive, inheritance reserved nasciturus.

How is a testator's power to his inherit his spouse and children limited. Discuss.

Beinart points out –serving spouses claiming maintenance rarely cropped up.
Most marriages concluded in community. Children were entitled to a legitimate portion – inheritance. The testator couldn't deprive them of this. Although children and other close relatives – entitled maintenance. There was no need for the legitimate portion.

Discuss the validity of the following bequest in a will:
" I leave my house to my daughter on condition that she does not marry our of the Jewish faith"

Testator can make a condition of the bequest that beneficiary may not marry certain person. (Wasserzug)
(Wasserzug) – AD – the condition was valid. Today – conditions may be declared invalid – terms constitution. S 9(3) Const. Lists factors – may not discriminate. Court will broaden scope common law – if against public policy allow or refuse such conditions invalid

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CONTENT OF WILLS - VESTING OF BENEFITS

Two vested rights:
1) rights vest in someone – someone is the holder of a right
2) Distinguishing between a right that is certain and one that is a condition:
   a) If the beneficiary has a vested right its certain the right can't be taken away from her
   b) If he has a conditional rights = the rights hasn't yet vested.

Presumption that vesting takes place on the death of the testator:
If a testator dies leaving a will, from which the contrary isn't present, it's presumed he intended the benefit to vest in the beneficiary on his death.

Effect: heirs don't become owners of the property on the death of the testator – on his death the testators heir gets a vested right to claim from the executor, when the accounts have been lain for inspection in terms of the act, to get delivery or transfer of the benefit (*Greenberg v Estate Greenburg***).

Dies cedit and dies venit:
Date when the beneficiary gets a vested right to claim delivery of the bequeathed benefit unconditionally = **dies cedit.**
This usually happens on the death of the testator.

The time when the beneficiary can claim delivery = **dies venit.**
The testator is presumed to have intended dies cedit and dies venit both to arrive immediately on his death –*Botha v Botha.*

Acceleration of benefits:
When an immediate beneficiary repudiates her benefit without the testator having foreseen this may happen. The question is if the benefit may accelerate so the ultimate beneficiary can inherit immediately or the literal intention of the testator be followed.

E.g. "I leave my farm to my son subject to the lifelong usufruct in favor of my wife": the wife as the immediate beneficiary then repudiates the usufruct.
Q: can the farm now immediately go to the son (ultimate beneficiary) or must the will be interpreted literally = Son will only get the farm on the death of the mother.

Yes the benefit should go to the ultimate beneficiary (*Ex Parte Marais**/*Rice/louw*)

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CONTENT OF WILL

TYPICAL WAYS OF MAKING BEQUESTS

A person on whom the assets of the deceased estate devolve = beneficiary = 2 types: heir and legatee.

Heir: inherits an asset/specific share/residue and its called inheritance.
There can be an heir regardless of if succession takes place by means of a will/intestate or in terms of an ANC.

Legatee: always inherits a specific asset/specific sum of money and it's called a legacy.
A legatee can be designated only in a will/ANC. Where a testator hasn't appointed any beneficiaries in his will = succession only takes place through intestate heirs

THERE CAN BE NO INTESTATE LEGATEE.

Roman law: the heir took the place of the testator = he inherited both the assets and liabilities. The heir had to pay the testators debts and pay his legatees.
If the testator liabilities exceeded his assets, the heir inherited an insolvent estate.
A legatee inherited specific property and was never responsible for the testator's debts.

In SA, the executor administers the deceased estate and must pay all the debts and then share the remaining assets among the beneficiaries.

Difference between heir and legatee:

a) After the executor has paid the testators debts, he 1st pays the legatees BEFORE he gives the inheritance to the heirs. – If the legatees amounts to more than the net value of the estate = nothing left for the heirs – if the legatees are left more than the value of the testators estate = the legacies are reduced proportionally and the heirs get nothing.
b) The heirs can be compelled to account for those benefits, which they received during the testator's lifetime – while the legatees aren't obliged to do so.
c) The right of accrual differs between heirs and legatees.

Legacies generally:

- Prelegacy: special bequest which enjoys preference
  – "W must get R50 000 BEFORE any other benefit is paid out"
- Bequest price: the legacy can be bequeathed subject to the beneficiary paying to the estate/3rd party a price – beneficiary can elect whether to take or refuse the benefit

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Failure of a legacy:
A legacy will lapse in the following circumstances:

a) Ademption – testator voluntarily alienates the legacy during his lifetime = legacy will fail.
   This is where a testator voluntarily alienates the object of a legacy in his lifetime, the legacy lapses. Ademption is a form of tacit revocation of the benefit. Ademption does not occur in cases in which the testator was obliged to alienate, (property was sold in execution). Alienation is not voluntary if it is done because there are pressing debts to discharge. If the estate cannot purchase the property back they must pay the legatee the value.

   Barrow v The Master – if the alienation is not voluntary, the bequest will not be revoked. The failure of a legacy by ademption depends on the testator's presumed intention.
   In *Barrow,* the testator bequeathed half his farm Longridge to his son who managed the farm. Due to the distance the son had to travel to the farm the testator sold Longridge. With the proceeds the testator bought another farm (Patchwood). The testator did not alter his will. After the testators death the son claimed the transfer of Patchwood into his name. The court held that the legacy had lapsed due to ademption as the sale was one of convenience and not necessity.

   If the object of the legacy has been alienated and the testator did not have the intention of revoking the bequest, the legatee is entitled to the value of the legacy or to the bequest itself if the executor is able to recover it.

b) Where the legatee dies before the legacy vests in him
c) Legatee repudiates the legacy
d) Legatee is incapable of inheriting
e) Bequeathed thing is destroyed
f) Testator becomes insolvent.

UNCONDITIONAL ABSOLUTE AND CONDITIONAL BEQUESTS

Absolute bequests: This is where the testator leaves the property to the beneficiary absolutely, there is no possibility that the benefit won't be his in the future if a specified certain event takes place/if he does something.

Nor is it suspended till the happening of some uncertain future event.
When the bequest is absolute the benefit forms part of the estate of the beneficiary, so if he dies it passes to his heirs.

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BUT absolute bequests can be subject to time clauses:

a) "I leave my farm to my son, but he can't take it until he reaches 21" = **SUSPENSIVE TIME CLAUSE**: its certain he will turn 21 – if he dies BEFORE 21 his heirs are entitled to the farm.
b) "I leave my farm to my son, when he dies or reaches 60, it's to go to the Government of SA" = **RESOLUTIVE TIME CLAUSE**: no one knows when he will die, but its certain he will either reach 60/die. The son ownership will terminate and his heirs will never get the farm.

Time clause is always certain to arrive but when it will arrive is uncertain.

Conditional bequests: Depends on an uncertain future event, to be valid the condition must be clear, possible and not illegal or contra bonos mores.

Types:
a) **RESOLUTIVE (TERMINATIVE) CONDITION**: is one in which the bequest is made to terminate if a particular uncertain future state of facts come to pass –
"I leave my farm to my wife, if she should remarry it goes to National Parks Board" = not certain if she remarry.

If she doesn't remarry, she remains owner of the farm and on her death it goes to her heirs.

DC and DV happens for the heir on the death of the testator but on the fulfillment of the resolutive condition, he ceases to be an heir.

b) **SUSPENSIVE CONDITION**: the beneficiary doesn't get a vested right unless a particular uncertain state of facts occur (no DC & DV)
"I leave my farm to my son if he wins the national chess competition, if not the farm must go to Susan"
= uncertain if he will win – if doesn't win the farm never becomes his.

It should be noted that, where a suspensive condition is present, there must also be a corresponding resolutive condition somewhere, for example:

``I bequeath my farm to John if he becomes Prime Minister in the next election, if not it must go to Bob."

NUDUM PRAECEPTUM:

If a testator bequests property to a beneficiary but prohibits him from dealing with the property in a certain way, for example alienating the property, such a prohibition will only be valid if someone else has been nominated by the testator to take the property should the beneficiary contravene the prohibition.

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If no provision is made for a substitute or 'gift over' in the event of contravention of the prohibition, the prohibition is called a nudum praeceptum and is not legally binding.

For example, the testator cannot simply say,
``I leave my farm to my wife on condition that she does not remarry.''

MODUS / OBLIGATION:

The testator can make a bequest subject to a burden or obligation (modus) = it obliges the beneficiary to apply the bequest or the proceeds of it to a particular purpose.

Modus: qualification given to a gift, where the person who benefited must devote the property he gets to a specific purpose.

A gives B a gift of property and at the same time requires him to give R10 000 to C = B becomes absolute owner of the property at once, subject only to the personal obligation to perform as required.
Even if he doesn't give C his money he is still the owner of the farm – but is then liable under a personal action.

Reasons for making a modus vary:

a) It may be in the interest of the beneficiary himself: if the benefit is just for the beneficiaries benefit, he isn't obliged to carry out the modus: *Ex Parte Gardner.*
b) Modus may be for the interests of other people: "testator leaves his farm to his eldest son, subject to an obligation to pay R200 000 into the testator's estate to devolve on his other children."
   Here performance may be demanded from the burdened heir by the testator's executor/master/people in whose favour the modus was made.

   Executor can reclaim the bequeathed benefit from the beneficiary if he refuses to carry out the modus.
c) Modus can be for the furtherance of an impersonal object: care of the testator's grave etc.

Problem: there is no one to supervise the performance of the modus.

The modus has no influence on the vesting of the bequeathed benefit and if the beneficiary dies before performance of the modus, the benefit devolves on his heirs.
The modus will rest on the deceased estate of the beneficiary concerned.

Where there is doubt if something is a modus or suspensive condition, there's a presumption that it's a modus since a modus is unconditional.

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MASSING

This is usually in the joint/mutual wills of people married in community of property – but isn't required – can be of sisters for example.
It takes place when the whole or portions of the estate of various testators are massed into one unit for the purpose of disposing of it by the testators jointly.
To effect massing the 1st dying testator should have disposed of his own estate as well as the estate of the survivor (*Ex Parte Gouws*)
Where the testator disposed of his own estate only by his will this isn't massing.
There are 3 basic requirements:

1. It is the intention of the parties to consolidate their estates.
2. The first dying spouse must have disposed of the survivors share of the estate
3. The survivor must adiate.

Motive for massing:

a) To ensure that the survivor will continue to be in control of the massed estate during his lifetime and thus enjoy the same standard of living, like when the testators are married to each other.
b) Is to protect the children's interests and at the same time provide for the survivor – the survivor is protected against himself because he can't alienate the massed property in conflict with the will.

Massing is covered by Section 37 – the requirements for the operation of Section 37 are the following:

1. There must be a mutual/joint will
2. There must be 2/more people who are parties to the mutual will and they need not be married to each other
3. Some/all of the testator's property must be consolidated into a single mass and it must be disposed of by the mutual will.
4. The mutual will must give the survivor a limited interest in the property.
5. The survivor must accept the bequeathed benefit
6. The disposition must take place at some time after the death of the 1st dying.

Example: X and Y are married in community of property, and their joint estate consists of a farm. In their mutual will (joint will) they leave the farm to their daughter, Z, with a usufruct in favour of the surviving spouse. If Y accepts the usufruct on X's death, massing takes place.

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Consequences of massing:
surviving testator loses the power to revoke or change the joint/mutual will.
By accepting the benefit under the will the survivor renounce the power to dispose of his estate in a way which is different from that in the will – *Mostert*

At common law: the ultimate beneficiaries were not entitled to any real rights in the part of the massed property to which the survivor had contributed. They only had personal rights.

Section 37: the ultimate beneficiary of the massed property gets the same rights in respect of the survivor's part of the massed property as they do in the property of the 1st dying.

Section 37: gives the children same rights in respect of the ½ share of the community estate which belongs to the survivor and the executor must reflect this in the distribution account. (*Rampathy v Krumm*)

If on the death of the 1st dying testator, the surviving testator repudiates the benefits under the will = this has the following effect:

a) The survivor can't get any benefit under the will
b) Survivor keeps his own estate and can dispose of it as he wishes
c) The mutual will, as the will of the 1st dying testator relates to his estate only

In a case or reasonable doubt whether a will has affected massing or not = there's a presumption against massing = the testator disposes of his property only.

Massing and the doctrine of election:
where the testator leaves a benefit to a beneficiary and at the time imposes a burden on him, the beneficiary is put to his election:

- He can accept the benefit (adiation) = but he must then carry out the provisions of the will
- He can reject the benefit (repudiate) but then he can't accept any benefit under the will = must reject the will as a whole.

Beneficiary can't accept or repudiate conditionally.

Election must be made within a reasonable time.

From ***Rhode v Stubbs********* it is clear that the principles of massing are difficult to apply and if there is any reasonable doubt as to the intention, the court must steer clear of massing.

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The facts of this case provide an interesting example of the difficulty in establishing whether, in a specific instance, massing took place or not.

Facts
Attie and Lettie Williams, who were married in community of property, executed a joint will. In the will they provided that the plot ("erf") in Pniel on which they resided and in respect of which they had rights of occupation, had after the death of the first-dying to be divided into two more or less equal parts. There were two houses on the plot, an old one and a new one. The rights to the one part of the plot (with the old residence thereon) were bequeathed to their son, Archie Williams, and the rights to the other part (with the new residence thereon) were bequeathed to Ethel Mentoor (Attie's daughter from a previous marriage). These bequests were made subject to a usufruct in favour of the "survivor of us".
The will further provided in clause 8:
We nominate and appoint the children born out of our marriage as heirs of the residue of our joint estate, loose assets as well as fixed property . . . and desire that they shall inherit the residue in equal shares.

When Attie died, his share of the immovable property devolved upon the two legatees (Archie and Ethel), while Lettie enjoyed the usufruct over the whole property. Prior to Lettie's death, the situation was that Ethel was entitled to an undivided half share of the part of the plot with the new residence on it and Archie was entitled to an undivided half share of the part of the plot with the old residence on it, while Lettie was entitled to undivided half shares in both parts of the plot of land.
She was also entitled to the usufruct over the whole property. At some point the plot was subdivided into two plots and the part of the original plot with the new house on it became plot 171.
Prior to her death Lettie executed a will in which she bequeathed her half share of plot 171 to Charles Stubbs, a son from a previous marriage. She bequeathed her half share in the other plot (with the old house on it) to Archie.

After Lettie's death a dispute about the properties arose. It was agreed that Archie was entitled to all the rights in the plot with the old house on it. However, the rights of occupation of the whole of
erf 171 (the plot with the new residence on it) were registered by the Pniel Transitional Council in the name of Ethel, despite a liquidation and distribution account accepted by the Master in which half of plot 171 was awarded to Charles. It was common cause that the rights of the persons involved, and at the same time the correctness of the transitional council's decision, depended entirely on whether the mutual will of Attie and Lettie massed their estates.

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

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

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

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

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

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

The Court held that upon analysis of the other provisions of the will, the wording of the joint will of Attie and Lettie did not offer proof in rebuttal of the presumption that it had to be interpreted as two wills. Clause 8 did not provide clear proof of an intention to mass their respective estates. Since massing was not intended, Lettie was therefore entitled to make a new will and to dispose of her half share of the two properties as she pleased. She was entitled to leave her half share of plot to Charles. Her acceptance of the usufruct could not result in massing.

The importance of *Rhode v Stubbs* for the law of succession:
According to our common law rules of interpretation, when interpreting a joint or mutual will of parties married in community of property, one has to start off on the premise that one is dealing with two separate wills of the parties, until the contrary becomes clear.
This rule results from the common law rule that no one can deprive himself of the power to freely make a last will. A testator can, by means of massing, deprive himself of his power to make a will, but if there is any uncertainty about his intention, the will should be interpreted in a manner that will allow the greatest possible measure of freedom of testation.
This gives rise to the subsidiary rule of interpretation, namely the presumption against massing, which applies when the golden rule of interpretation, namely to give meaning to the testator's words within the framework of the will, cannot be applied because the words are unclear or subject to more than one interpretation.
For massing to take place, it is necessary for one testator to dispose of both his own estate (or a part thereof) and the estate (or a part thereof) of the other testator.
For massing to take effect, the surviving beneficiary must adiate a benefit under the mutual will.
However, if massing was not intended, acceptance of the benefits from a mutual will cannot in itself bring about massing.

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SUBSTITUTION, USUFRUCT & ACCRUAL

SUBSTITUTION

The testator in his will appoints another beneficiary to take the place of the appointed beneficiary if he can't/doesn't wish to take the benefit.

There are 2 kinds of substitution:

1) **Direct substitution**
2) **Fideicommissary substitution.**

DIRECT SUBSTITUTION:

Direct substitution occurs where 1/more people are nominated in a will to inherit in place of an appointed beneficiary in the event of the latter not taking the inheritance because he has:

- Predeceased
- Is incapable of inheriting
- Refuses to inherit (repudiates)
- Can't take the benefit because of non-fulfillment of a condition

Direct substitution = 2/more beneficiaries are instituted in the alternative. If the one can't takes the benefit then the other takes it absolutely.
Either one takes it or the other does.
There's no limitation on the number of substitutes.

E.g. "I leave my farm to A, if she doesn't take it I leave it to B"
If A accepts the car B will NEVER get it. If A refuses /dies BEFORE the testator, B will be entitled absolutely to the farm.

The purpose of a direct substitution = avoid intestate succession in respect of the bequeathed benefit.
It also serves to exclude the right of accrual.

Direct substitution implied by law: Section 2C of the Wills Act:

Direct substitution can be express or implied.
Section 2C of Wills Act confirms that if the testator appoints a descendent as the beneficiary and that descendant renounces/predeceases/disqualified, then the testators SURVIVING SPOUSE OR DESENDANTS CHILDREN are impliedly direct substitutes.

T dies and leaves behind her husband W, daughter D and D's children.
T leaves her farm to W and D but D repudiates = it now all goes to the surviving spouse W.

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Section 2C (1) provides if the descendant of the deceased is entitled to a benefit in terms of a will, renounces her right to receive such a benefit, it will vest in the SURVIVING SPOUSE (Statutory accrual).

The purpose of this type of accrual is to allow a child to forgo his inheritance in favor of his surviving parent.
Minors and mentally ill are excluded from Section2C (1) – this is to avoid undesirable pressure being exerted by the parent on such a person to renounce.

Section 2C (2): if the descendant of the testator would have been entitled to a benefit, if she hadn't predeceased the testator/ hadn't been disqualified/ hadn't renounced, that descendant shall subject to Section 2C (1) per stirps be entitled to the benefit (statutory representation / substitution).

A descendant can be represented only if she would have been entitled to a benefit under the will. *Nel v The Master*: if in her will T appointed her children as her heirs and T's daughter died BEFORE T executed her will = the child of T's daughter wouldn't be entitled to the benefit under the will, because the daughter died BEFORE the will was executed.

FIDEICOMMISSARY SUBSTITUTION:
this is used to create a fideicommissum = fideicommissary
substitution occurs where the testator directs that after her death a series of successors are to own her whole estate/part of it – so that the bequest passes from one successor to another.
1st successor = fiduciary
Every beneficiary to who he must pass the benefit = fideicommissary

Fideicommissary substitution occurs where the testator institutes a beneficiary to take a benefit and provides that at a certain time (on the death of the testator) or at the fulfillment of a condition, the benefit has to go to another by way of substitution.

Purpose: give the testator the opportunity to nominate various successors to inherit the property one after the other.

FIDEICOMMISSUM

3 people involved: testator, fiduciary and fideicommissary.

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VARIOUS FORMS OF FIDEICOMMISSA

CONDITIONAL FIDECOMMISSA:

Here the property is left to one beneficiary subject to the condition, that if a particular uncertain future event takes place, the property passes to another.
If that uncertain future event doesn't take place – the 1st beneficiary (fiduciary) will remain the owner and when he dies the property forms part of his estate.

I leave my farm to W, if she should remarry it must go to my son
= condition because the remarriage is an uncertain future event.
The son can never be sure if he will ever become the owner of the property because it will depend on the fulfillment of the fideicommissary condition.
Neither DC nor DV happen for the fideicommissary until the condition is fulfilled.

Another form of fideicommissum is a **fideicommissum in diem** – the moment the property will pass to the beneficiary will depend on a future date either being definite (age) or indefinite (death).

SI SINE LIBERTIS DECESSENT CLAUSE (if someone dies without children):

If the testator bequeaths property to another, stating that if the heir dies without children the property must go to a 3rd party = FC in favor of a 3rd party.
However if the heir does leave children the 3rd party can't inherit, as the condition remains unfulfilled.

Q: is a tacit FC created in favor of the children because of the fact that they were mentioned in the condition?

*Du Plessis v Strauss***: at common law the distinction made between children who were descendants and those who weren't.
For a Descendant: a tacit FC was created in their favor =
I leave my farm to my son S, if he dies without leaving children it must go to my daughter D –

- S must die without children BEFORE D can inherit
- If S dies without children the condition if fulfilled = D can inherit

Du Plessis correctly held that the fact they were mentioned in the condition created a tacit FC in their favor.
Where the children aren't descendants – *Du Plessis* says that there is no presumption in their favour.
I leave my farm to my sister's son S, if he dies without children it must go to my sister's daughter D.

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FIDEICOMISSUM RESIDUI:
This is when a testator bequeaths property to a fiduciary subject to the condition that the residue (as much of the property that is left on termination) of the fiduciary interest shall devolve on the fideicommissary.

The fiduciary has the power to alienate the property and the devolution applies only to what remains on the termination of the interest.

It is often identified in a will by the words "whatever remains" / "what is then to be found".

E.g. I leave my estate to W (fiduciary) and what is left on her death must go to C (fideicommissary).

The fiduciary can only alienate ¾ of the property.

If the fiduciary alienates more than ¾, the amount that falls short can be paid out of his estate BUT if he alienated less than ¾ the fideicommissary takes all that remains after his death (*Estate Smith*)

This is an exception to the general rule that the fiduciary can't alienate the fideicommissary property.

Restrictions imposed by the Fideicommissum:
"I leave my farm to my son, on his death it must go to his eldest son, on his death it must go to his eldest son etc."
BEFORE this was valid and binding.

This was changed by the Wills Act: which restricts all fideicommissum over immovable's to a maximum of 2 substitutions after the original fiduciary has become owner.

Fideicommissum over movable property is still effective for as long as the testator wishes.

Position of the fiduciary:
He is the owner of the property subject to a resolutive/terminative condition whose rights terminate if the condition is met or the term arrives. He can use and enjoy the property but he can't alienate, burden with a mortgage or grant a servitude or a pledge except where he gets the co-operation of all the Fideicommissaries, where they are all majors or with the consent of the High Court.
Fiduciary can alienate his interest = he can pass ownership of the property to the buyer subject to the original terminative condition – so if the fiduciary dies BEFORE the fideicommissary the fideicommissary becomes the owner = the buyer would lose all his rights to the property even though he is still alive.

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The fiduciary must manage the property as a reasonable person would – when he passes the property to the fideicommissary he is liable for any damage caused by him (either intentionally/negligently).

If the fideicommissary dies before the fiduciary, the fiduciary becomes the full owner.

The position of the fideicommissary:
He has the right to receive the property undiminished in value and extent of fulfilment of the condition or the term.
He need not be in existence at the time of the testator's death BUT must be alive or already conceived at the time indicated by the testator, when the property must pass to him.
If the fideicommissary dies before that moment the fideicommissum falls away and his heirs have no right to the property. The fiduciary gets full ownership.

The nature of the fideicommissary's right
The fideicommissum has no right BEFORE the fulfillment of the condition but only a hope (**spes**).

Barnhoorn v Duvenage: inferred that the fideicommissum has a personal right.
AD stipulated that the fideicommissum, BEFORE the fulfillment of the condition/expiry of the fideicommissum, is the holder of an actual existing right, although it's not a vested right, in the sense that it forms part of his deceased estate.

The law allows the fideicommissum to take steps to protect his interest, as an interested party.
Immovables:

- He can get his right registered against the title deed.
- Get an interdict to prevent the alienation of the property
- Can claim security from the fiduciary
- Can cede his right
- Where the fiduciary has alienated the property without the right to do so, on fulfillment of the condition, he can recover the property with the rei vindicatio from the person to whom it was sold.

Nothing will devolve of the fideicommissaries heirs if he dies BEFORE the fiduciary/ BEFORE the fulfillment of the condition.

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There is a difference of opinion among writers:

Corbett: says the fideicommissum has a personal right
V.der.Merwe: has a personal right subject to a terminative condition

Unisa: the fideicommissum is the holder of a personal right and he has a real right where the fideicommissum relates to immovable property and is registered against the title deed of the property.

Presumption in favor of direct rather than fideicommissary substitution:

Van Zyl: AD made it clear that where the wording of the will incorporated a fideicommissary substitution, effect must be given to it. It's only where there is a reasonable doubt whether the testator wanted direct substitution/ fideicommissary substitution, that there is a presumption in favor of direct rather than fideicommissary substitution.

USUFRUCTS

This is a type of bequests to more than one beneficiary – the testator gives ownership of the thing to one person, the dominus and the right to use, enjoy and take the fruits to someone else, the usufructory, for the duration of the usufructory's life time.

"I leave my farm to my son, but my wife is to have a lifelong usufruct of the farm"

= the son gets a vested right to the farm (DC) and he is entitled to ownership BUT DV is postponed until the wife dies.
If the son dies while the wife is still alive, the farm will pass to his heirs (heirs of the dominus)= right to ownership is unconditional but its bare ownership.
DC and DV occur for the wife on the death of the testator.

Difference between a fideicommissum and usufruct:
both first holders have the right to use and enjoy the property and the other party has full ownership. It does differ though:
fideicommissum: 1st ownership vests in the fiduciary and later passes to the fideicommissary on the fulfillment of the condition. If the condition isn't fulfilled the fiduciary remains owner.

Usufruct: the usufructuary never becomes the owner but has a real right.
If uncertainty regarding if a bequest is a usufruct or a FC, we look at the INTENTION of the Testator.

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RIGHT OF ACCRUAL

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

The accrual only operates if there is no provision for substitution either expressly or in terms of section 2C.

The most important aspect is the intention of the testator. If the intention is not clear there are 3 indications (coniecturae) on which the courts rely.

a) JOINDER RE TANTUM: the testator has given the same thing to 2/more people in different bequests in his will –

left the farm to A in clause 2 in the will and without referring to A left the farm to B in clause 4

= the interests of A and B are joined by the thing = the testator intended accrual – so if A can't take the benefit B gets it and if they can both take it they become co-owners. ASSUMES ACCRUAL

b) JOINDER RE ET VERBIS: occurs where the testator in a single bequest (one breath) bequeaths the same benefit to 2/more people –

I leave my farm to A and B. ASSUMES ACCRUAL

c) JOINDER VERBIS TANTUM: joinder by words takes place where separate bequests are left to different beneficiaries in the same bequest –

I leave my farm to A and B – A gets the portion north of the river and B gets the portion south of the river.

Where the testator in one breath left specific portions of the same thing to a beneficiary =

I leave ¾ of my farm to A and ¼ to B, I leave my farm to A and B in proportions 2:1, I leave half my farm to A and half to B.
I leave my farm to A and B; A gets the north portion and B the south.
I leave my farm to A and B in equal shares.

NO ACCRUAL ASSUMED (*Winstenley v Barrow*).

However, *Lello v Dales* did not automatically lead to a presumption against the accrual. The focus is on the intention of the testator.

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Lello v Dales:*** AD had to interpret "the residue of my estate shall devolve as follows:

> To my son Harry as the income beneficiary and upon his death the estate is to devolve on my son's lawful issue. If he has no issue it must devolve ½ to my brother Edward and the other ½ in equal shares to my nephews and nieces.

Harry died childless and Edward died BEFORE the date of vesting. The question arose if his share lapsed and fell back into the residue or if it accrued to the nephews and nieces. The court said the beneficiaries had been joined verbis tantum and recognized that the presumption, which flows from this, isn't necessarily logical.
Court held: indicated that the testator probably intended that accrual should take place = what had been bequeathed to Edward accrued to the nieces and nephews.
Lello shows that the mere fact that a joinder is verbis tantum won't automatically mean that accrual doesn't take place.

Circumstances under which the right of accrual doesn't operate:

a) Once a beneficiary has a vested interest there is no room for accrual – if the beneficiary dies after DC – the assets will devolve on her heirs.
b) If the testator has named a substitute to inherit if the instituted beneficiary can't accrual is excluded.
c) Where the T has completely separated the interests of the beneficiaries, eg. Car to A and house to B = no accrual.
d) AND BY S2(C)(1) and (2)!!!

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REMEMBER THESE IMPORTANT ASPECTS AND DON'T CONFUSE THEM IN THE EXAM!!!!!!!!!!!!!!!!

****** ACCRUAL WORKS FOR BENEFICIARIES THAT ARE NOT DECENDANTS OF THE T.**
****** S2(C)(1) AND (2) IS IMPLIED SUBSTITUTION – FOR DECSENDANTS OF THE T.**

EXAMPLES:

1. I leave my estate to A and B. A dies before the T –
   here accrual takes place. WHY? Because A and B are not descendants of T, and because the provision is a joinder re et verbis – in one breath, he leave one thing to 2 different beneficiaries, who are not his kids! Thus the share A would have received, accrues to B.

2. I leave my estate to my 2 sons A and B. If one of them does not inherit, his share will go to my daughter D.
   A dies before the T but leaves a child, C – here, A and B are descendants of the T, but the T put in a DIRECT SUBSTITUTE and thus A's share will go to D because this is what T wanted! No accrual and no s2C.

3. I leave my house to my 2 daughters A and B. A dies before the T but leaves a child C –
   here A and B ARE DESCENDANTS of the T, and thus NO accrual and there is not direct substitute, thus we use s2C!! Not 2C(1) as there is no surviving spouse nominated with the kids, so s2C(2) operates and A's share goes to C, per stirpes.

4. I leave my car to A and my house to B. The residue of my estate goes to J.
   A dies before the T and leaves a child C - there is no accrual here as it's a joinder verbis tantum and thus A's share wont accrue to B. They are not descendants of T, so no s2C. BUT there is an heir, and thus A's share will fall into the residue of the estate and goes to J.

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POSSIBLE QUESTIONS

Give a definition of dies venit.

When the beneficiary's right to claim delivery of bequeathed benefit becomes enforceable.

Mention 5 ways in which a legacy can fail.

(a) Ademption – voluntary alienation
(b) Legatee dies before legacy vests\
(c) Legatee repudiates
(d) Legtee incapable of inheriting under the will
(e) Testator insolvent
(f) Thing is destroyed

T's valid will contains the following provision:
"I leave my farm to my daughter, D. If she should ever leave SA permanently, the farm has to go to my sister, S."
T dies in 1999, leaving his wife, W, his daughter, D, D's son, F and T's sister, S.
Indicate which of the following legal concepts are applicable and which are not, giving reasons in each case. In addition, apply those legal concepts that are applicable to the above facts and indicate when *dies cedit* and *dies venit* take place for each of the parties.

Resolutive condition

Resolutive condition is applicable D
At the fulfillment of an uncertain future event (D's leaving) her rights will terminate. Dies Cedit and Dies Venit occurs for D at T's death.

Suspensive Condition

Suspensive condition is applicable to S.
Vesting of her rights is postponed until and uncertain future event happened. Dies cedit and dies venit – postponed until D leaves the country.

Direct substitution

No- takes place if testator appoints a substitute to take place on a beneficiary who cannot or doesn't want to inherit.
As soon as instituted beneficiary inherits, substitute loses all hope of inheriting. S may still inherit once D has inherited, therefore direct substitution isn't applicable to these facts.

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Fideicommissary substitution

There is a series of successors that inherit – same property one after the other.
It's applicable because S will inherit the property after D, should D leave the country.
D is the fiduciaries and S is the fideicommisary after a certain time – upon fulfillment of a condition.

Usufruct

No. In case of a usufruct one person gets ownership.
Another gets the use and enjoyment of same property.
S gets full ownership.

What did the court decide in <u>Barrow v The Master</u> with regard to ademption?

Ademption doesn't occur in cases in which – testator was obliged to alienate. E.g. property was sold in executioner give pledge.
If property was sold solely for reasons of convenience – ademption does indeed take place.

Give a definition for each of the following concepts or legal principles:

(a) Repudiation

An heir/legatee may refuse to accept a benefit from a deceased estate.

(b) Suspensive condition

If a bequest is mad subject to a suspensive condition the beneficiary doesn't get a vested finally established right.
Unless an uncertain future event takes place.

(c) Legacy

A legatee always inherits a specific asset or a specific sum of money.

What is the basic difference between direct substitution and fideicommissary substitution?

Fideicommissary substitution – testator direct in will, a series of successors are to inherit
Direct substitution – Testator names a substitute who inherit if instituted heir doesn't inherit.

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What is the traditional view on the nature of the fideicommissarius' right before fulfillment of the fideicommissary conditioner expiry of the fideicommissary term? Give the name of a decided case in which this approached was adopted.

Traditional view – Fideicommissary – no right before fulfillment of fideicommissary condition or expiry of term (Wasserman v Sackstien)

What was the view of the Appellate Division in Barnhoorn v Duvenage 1964 (2) SA 486 (A) on the nature of the fideicommissarius' right? Explain briefly in two or three sentences.

Nature of fideicommissary's right raised (Barhhoorn v Duvenage)
AD – court didn't clarify whether he had a real or a personal right.

Define fideicommissum residui.

Property is left to a beneficiary subject to the condition.

What is the basic difference between usufruct and fideicommissary substitution?

If ownership intended to vest in ultimate beneficiary immediately when testator died.
Holder merely has a *ius in re aliena* – be a usufructuary
Ownership was intended to vest in first holder immediately testator died.
Subject to a resolutive condition
Then the bequest will be a fideicommissum.

What do you understand under the doctrine of election.

Election – testator leaves a benefit to beneficiary – same time place a burden him.
Beneficiary is then put to his election- may accept benefit – also carry on out provisions of the will that are detrimental.
He is free to reject any provisions not like- but then not accept a any benefit under that will.

Give two consequences of massing (one of them was introduced by s37 of Act)

Survivor loses power to alter/ revoke mutual will. Once accepted bequeathed benefit under joint/mutual will. Testator cannot make independent willing conflict with joint will. s37 spouse can elect on death, take no benefit. She will keep her own estate.

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EXAMPLES TO EXPLAIN THE WORKING OF DIRECT SUBSTITUTION, ACCRUAL AND S 2(C)

Example 1

Facts: "I leave my estate to A and B" A dies before the Testator.
Solution: The share A would have inherited will accrue to B.
Reason: A and B were joined *re et verbis,* and this indicates that the Testator probably intended the *ius accrescendi* (right of accrual) to operate.

Example 2

Facts: "I leave estate to my two sons, A and B. If one of them does not inherit, share will go to my daughter, D". A dies before the Testator but is survived by a child, C.
Solution: The share that A would have inherited will be inherited by D.
Reason: The Testator expressly provides for direct substitution and this clear indication of his or her will excludes the operation of **S 2C(2)** and the *ius accrescendi* (right of accrual.

Example 3

Facts: "I leave my house to my two daughters, A and B". A dies before the Testator but is survived by a child, C.
Solution: The share that A would have inherited will be inherited by C.
Reason: Here we have implied direct substitution in terms of **S2 C92)** in favour of C. This section is applicable because A is a descendant of the Testator. Whilst A is predeceased, the will does not contain any indication to the contrary. Since **S 2C(2)b** excludes the *ius accrescendi*, A's share will not accrue to B.

Example 4

Facts: "I leave my house to my sister's two daughters A and B". A dies before the Testator, but is survived by a child, C.
Solution: The share that A would have inherited will be inherited by B.
Reason: Since A and B were joined *re et verbis*, the indication is that the Testator intended the *ius accrescendi* to operate. The implied direct substitution in terms of **S 2C(2)** is not applicable because A and B were not descendants of the Testator.

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Example 5

Facts: "I leave my farm to my wife, W and my daughter, A". A repudiates her share of the farm. A has a child B.

Solution: The share that A would have inherited will be inherited by W.

Reason: **S 2C(2)** is applicable because A is a descendant of the Testator. Therefore, she is entitled to a benefit in terms of the will together with the surviving spouse and she repudiates the benefit. Statutory accrual in favour of W will take place. (The ordinary rules of accrual would have given the same result). B does not inherit in terms of **S 2C(2)** because **S 2C(1)** excludes **S 2C(2)**.

Example 6

Facts: "I leave my farm to my wife W and my daughter A. If either W or A does not inherit, my brother D must inherit her share". A repudiates her share of the farm but is survived by a child, B.

Solution: The share that A would have inherited will (probably) be inherited by W.

Reason: **S 2C(1)** is applicable because A is a descendant of the Testator, so she is entitled to a benefit in terms of the will together with the surviving spouse, and she repudiates the benefit. Presumable **S 2C(1)** does not allow for a contrary intention in the will to override the provisions thereof. (If the courts, in future, were to interpret this section differently, and were to decide that the Testator's contrary intention can override the applicability of **S 2C(1)**, D will inherit A's share since he was expressly nominated as a direct substitute). B does not inherit in terms of **S 2C(2)**, because **S 2C(1)** excludes **S 2C(2)**.

Example 7

Facts: "I leave my car to A and my house to B. The residue of my estate must go to my brother, J". A dies before the Testator, but is survived by a child, C.

Solution: The share that A would have inherited will be inherited by J.

Reason: where the Testator has completely separated the interests of the beneficiaries, as in this case, the *ius accrescendi* (right of accrual), does not operate and no accrual can take place. So if A cannot take the benefit, the house will accrue to B, but the legacy will fail and the house will constitute part of the residue of the estate to be inherited by J. **S 2C(2)** will not be applicable since it is not indicated that A and B are descendants of the Testator.

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Example 8

Facts: "I leave my house to my child, A. I leave my car to my child, B. If A does not take the house, B is to inherit it. If B does not take the car, A is to inherit it. My wife, W, inherits the residue of the estate". B predeceased the Testator but is survived by his daughter, M.

Solution: The share that B would have inherited will be inherited by A.

Reason: The will makes provision for a direct substitution. A is appointed as a direct substitute for B and will, therefore, inherit in B's place. **S 2C(2)** is not applicable because the will contains a contrary intention. **S 2C(1)** is not applicable because B did not repudiate the benefit but predeceased the Testator. **S 2C(1)** is only applicable if the descendant has repudiated his benefit

.

Example 9

Facts: "I leave my house to my children". The Testator has three children: A, B, and C. A murders the Testator. A has a child, D.

Solution: The share that A would have inherited will be inherited by D.

Reason: **S 2C(2)** is applicable because A is a descendant of the testator who is incapable of inheriting from the testator and the will does not contain a contrary indication such as an express, direct substitution. **S 2C(2)** creates an implied direct substitution in favour of A's child, D. **Note** that **S 2C(2)** applies to bequests that are made to a class of beneficiaries ("my children"). **S 2C(2)** excludes the *ius accrescendi*, therefore, A's share will not accrue to B and C.

NOTE: It would have made no difference if the Testator left behind a wife because **S 2C(1)** is not applicable, where the descendants are incapable of inheriting.

Example 10

Facts: "I leave my house to my children". The Testator had three children: A, B and C, but A died before the Testator had made his will. A is survived by a child, D.

Solution: B and C will inherit the house.

Reason: B and C were appointed in the will to inherit the house. D will not represent A, because a descendant may be represented in terms of **S 2C(2)** only if he or she **would have become entitled to a benefit** under the will. If a Testator appointed his or her "children" as heirs, the Testator's children, who **died before the execution of the will**, would not have been entitled to a benefit under the will and cannot be represented.

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THE TRUST

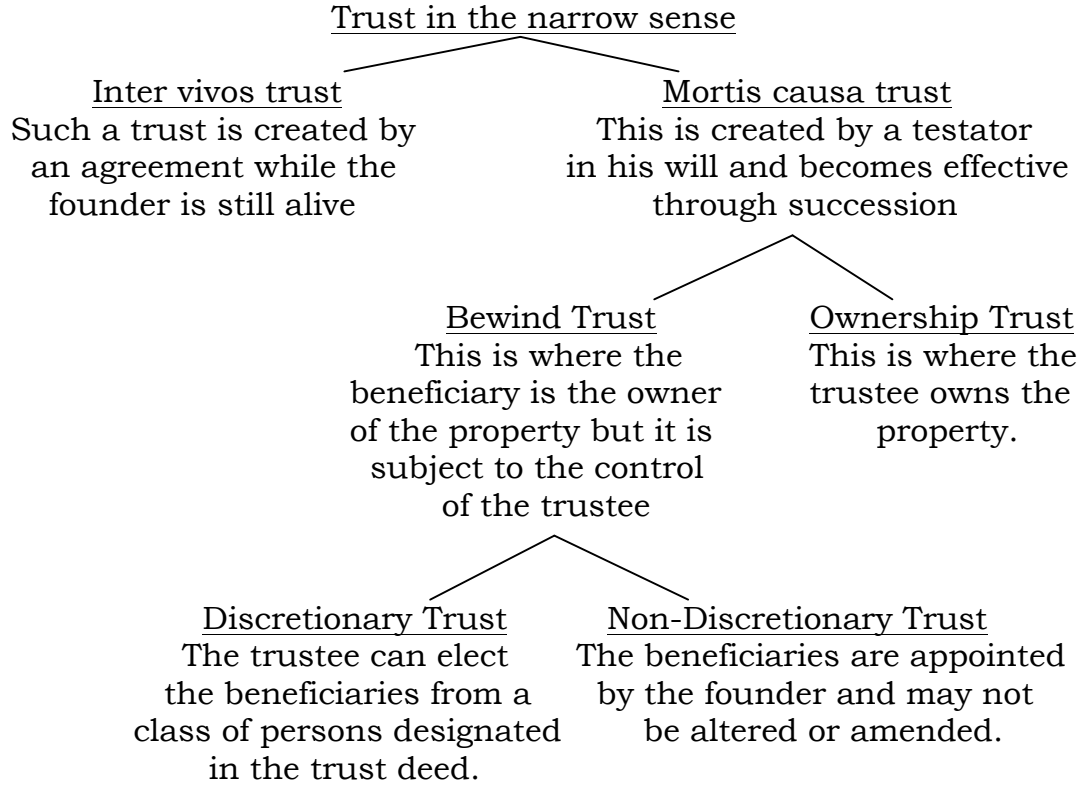
Treuhand: the Germanic concept for a trust – to be the entitled party, not for one's self but for another or for a particular impersonal purpose.

E.g. T may want to make a trust as his child is mentally disabled, but he'd like him to inherit, so T puts his estate into a trust to be administered by a trustee, who becomes the owner and controls it, but the son is the beneficiary of the capital.

A trust can be defined in either the narrow or the wide sense. We commonly refer to a trust in the narrow sense.

Wide: Comprehensive concept to indicate any legal relationship where one person and administers property for another or an impersonal object.

Narrow: Ownership and or control in or over property handed over to the trustee for the benefit of another or an impersonal object in terms of section 1 of the Trust Property Control Act. A trust in the narrow sense is governed by the Trust Property Control Act and the principles of common law.



In a trust the beneficiaries can either be income beneficiaries (inherit the income from a capital amount placed in the trust) or capital beneficiaries (inherit the initial amount placed into trust upon its dissolution.

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Legal nature of a testamentary trust:
This is embodies in the will of the founder and comes into existence on the death of the testator.
*Braun v Blann and Botha***:* a trust is not a fideicommissum but a separate legal concept with its own set of rules. Although the office of the trustee is fiduciary in nature there is still a difference between a trustee and a fiduciary:

Trustee	Fiduciary
Control and enjoyment are separate as the trustee on administers the property.	The owner is also entitled to the enjoyment.
Quasi public office	No office
Supervised by the Master / the court	Observed by the fideicommissaries
If the trust fails, the trustee does not benefit	If the fideicommissum fails the fiduciary takes the property
Can be indefinite	Limited to two successors after the fiduciary
Trust won't fail in absence of a trustee	Fideicommissary fails in absence of a fiduciary

For a trust to be valid the following requirements must be met (*Nichol*):

a) The founder must intend to create a trust.
b) The founders intention must be expressed in such a way that a binding obligation for establishing the trust is created.
c) The creation of the trust must be by means of a written agreement, testamentary writing, which complies with section 2(1)(a) or a court order.
d) The trust property must be reasonably defined.
e) The trust must be established for an clear and lawful object or purpose.

It's important that the purpose of the trust is clearly indicated, where the object isn't apparent from the founding act, the whole disposition may be void and the property will then devolve like the remainder of the estate (*In re Estate Grayson*).

BEFORE the decision in *Braun v Blann* the founder of the trust couldn't leave the determination of the beneficiaries to the trustee except in the case of a charitable trust (*Ex Parte Henderson*)

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After Braun the trustee can now authorize the appointment of beneficiaries from a specified class of people designated by the testator.

The founder can also stipulate that the benefit doesn't fall into the insolvent estate of the beneficiary = I leave my farm to B, if he becomes insolvent the farm must go to C.
BUT he can't say I leave my farm to B, if he becomes insolvent it must not fall into his insolvent estate.

The legal position of the trustee
The trustee administers the trust property for the benefit of the trust beneficiaries.
Section 1 of the Trust Property Control Act = trustee is anyone, including the founder, who is authorized to act as trustee, as well as anyone whose appointment as trustee was in force at the commencement of the act.
Anyone, whose appointment as trustee comes into effect after the act, may act in that capacity only if authorized to do so in writing by the master.

The trustee can be a natural or juristic person and the law requires he must have the capacity to act.

Appointment: the founder will usually appoint the trustee by name in the trust instrument but she can also nominate a specific person to appoint the trustee.
The trust won't be allowed to fail for want of a trustee
If there's a vacancy and no provision for filling it in the trust instrument, the court or the master can appoint a trustee.

The power of assumption: is the capacity given to the trustee to appoint additional trustees – he may only do so if this power was given to him in the trust instrument.

Powers and duties of the trustee
The Trust Property Control Act imposes the following duties on the trustee:
1) The trustee must lodge the trust instrument/ certified copy with the Master, he must give security for the due and faithful performance of his duties and he must give the master an address where notices can be served BEFORE he assumes control of the trust property.
2) Acquaint himself with the trust instrument in order to ascertain his powers and duties.
3) Obtain effect control of the assets
4) Administer the trust in accordance with the law and the trust deed.

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5) Act with diligence, care and skill that could reasonably be expected of a person who manages anothers affairs.
6) Whenever he gets money in his capacity as trustee he must deposit it in separate trust account.
7) Trustee must indicate in his bookkeeping what property he holds in his capacity as trustee.
8) Must at the written request of the master, account to the master for his administration and disposal of the property.
9) Must act in good faith at all times and avoid conflict between his personal interests and those of his trust duties.
10) May delegate the execution of decisions to someone else.
11) Collect all debts due to the trust
12) Can't destroy any documents which is proof of any investments, custody, control, admin, alienation or distribution of the trust property BEFORE the expiry of 5 years from the termination of the trust.

Termination of the services of the trustee:

1) Terminates on the trustee's death
2) Trustee can resign by giving notice in writing to the master and beneficiaries
3) Removal by the court (*Blunt-McKenzie* (2002)):
   i. Removed funds for apparently safe investment but transfers them to his personal account
   ii. Deliberately fails to comply with the trust deed
   iii. Where the trustee does not obtain from the trust deed what the rights and obligations of the office of trustee entail
   iv. Where the trustee treats the trust & its assets as her own
   v. Where the trustee expresses no independent views about matters affecting the trust, but relies entirely upon a dominant co-trustee and approves his her wrongful conduct
   vi. Where the trustee, without objection, allows grave misconduct on the part of a co-trustee
4) Trustee can be removed from the office at any time by the master.
5) When the purpose of the trust has been achieved.

The legal position of the beneficiary:

There must be a person or purpose for which the benefit is intended.
They can be a major or a minor, mentally ill or sane, alive or conceived or persons that might still be born in the future or even a juristic person.
A trustee can be a beneficiary, but not the sole beneficiary.

The nature of the beneficiary's right: personal in nature. *Estate Kemp.*

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Types of beneficiaries

1. **Income beneficiary** (Right in respect of trust income)
   i. Non-discretionary trust:
   "I bequeath R100 000 and my shares in ABC company to the trustee, Mr P, in trust. The income beneficiary is my wife, Zara."

   ii. Discretionary trust:
   "I bequeath R100 000 and my shares in ABC company to the trustee, Mr P, in trust. Mr P had the discretion to choose the income beneficiary (s) and the extent of his or her or their benefits from my grandchildren."

2. **Capital beneficiary** (Right in respect of trust capital)
   i. Ownership trust: (trustees own property)
      a) *Non-discretionary trust without provision for substitution:*
      "I bequeath my assets to my trustee, Mr K, in trust. The income beneficiary is my wife, V. The Capital beneficiary is my son, B."

      b) *Non-discretionary trust with provision for substitution:*
      "The capital beneficiaries of the trust are my children. If a capital beneficiary should die before die before dissolution of the trust, such beneficiary's descendants will represent that beneficiary as capital beneficiaries. If the predeceased capital beneficiary leaves no descendants, he or she will be substituted by the other capital beneficiaries."

      c) *Discretionary trust:*
      "Trustee F can choose the capital beneficiary(s), and the extent of their benefits, from my grandchildren."

   ii. Bewind trust: (Beneficiaries own property which is subject to the trustee's control)
   "I bequeath my assets to my child, Z. The assets must however be held in trust and be administered for Z's benefit by my trustee, Mr G, in terms of the provision in clause 10."

Trusts for an impersonal purpose:

Trusts which are used for charitable (benevolent) purposes are called benefits *ad pias causas* (for religious purposes). Today this also includes educational and charitable causes.

Trusts for charitable purposes differ from ordinary trusts in the following respects:

a. such bequests are benevolently interpreted by the courts and are not allowed to fail cause of vague language.

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b. From *Braun v Blann*, the testator can leave it to the discretion of another to appoint the beneficiaries.
c. Where it is impossible to carry out the will to the letter, the court will allow it to be carried out *cy pres* / as nearly as possible. (*Ex Parte Methodist Church, Ex Parte Estate Hofmeyr*).

The termination of a trust

1) If the object for which the trust was founded is realized.
2) The destruction of the trust property without fault on the part of the trustee.
3) A court order.
4) Failure of the trust for some other reason.
5) Acceleration of the rights to the trust capital beneficiary (income beneficiary renounces his right).
6) Sequestration of the trust.

Variation of trust provisions:

Section 13: If the instrument contains any provision which brings about consequences which the court's opinion founder didn't foresee and which:

a. hampers the achievement of the objects of the founder or
b. prejudices the interests of the beneficiaries or
c. is in conflict with public interest

the court can delete or vary such a provision on application by the trustee or any interested person. *(Ex Parte President of the Conference of the Methodist Church: In re William Marsh Will Trust.)*

The trustee can be given the power in the trust deed to amend the provisions of the trust but he can't amend who the beneficiaries are, what benefits accrue to the beneficiaries or the stipulated powers of the trustee.

Racial and gender clause in a trust created by a will:
Minister of Education and Another v Syfrets Trust Ltd NO* 2006 (4) SA 205 (C)**

It is indicated in the study guide that the Constitution might influence the freedom of a testator to include clauses in his will that discriminate against certain persons on the basis of race, gender, religious and sexual orientation.
In Minister of Education and Another v Syfrets Trust, the testator created a trust in his will, providing that only certain groups of persons may benefit from the trust. The discussion of the case that follows is therefore of importance in relation to freedom of testation.

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Facts:
The late Mr Scarbrow (the testator) made a will in 1920 in which he provided that the residue of his estate should be held in trust. He further provided that after the death of his wife, and in the event of his sons dying without issue, the residue should be applied for the purpose of "forming a Fund, to be called the "Scarbrow Bursary Fund". The testator in addition directed that the administrators of his estate were to use the income from this fund to "provide bursaries for deserving students with limited or no means of either sex (but of European descent only) of the University of Cape Town" who wished to study overseas. The governing body of the University was granted the sole discretion to decide who would receive the bursaries, what amount would be paid and for what period it would be paid. The testator further provided that the bursaries should be advertised periodically in a newspaper. A few months after the execution of the will, the testator added a codicil to the will in which he provided that "persons of Jewish descent and females of all nationalities" were not eligible to receive such bursaries. **In other words, in terms of the will and the codicil thereto, only white, non-Jewish males were eligible for the bursaries.**
The testator died in 1921. The trust was established in1956 after the death of both his sons without issue. Syfrets was appointed as the trustee of the trust and the University of Cape Town administered the awarding of the bursaries from the trust. However, in 1969 the Council of the University decided that it could no longer administer the trust, because of its discriminatory provisions. Syfrets took over the administration of the bursaries in the place of the University. In 2002 an advertisement, inviting past and present students of the University of Cape Town to apply for a Scarbrow bursary appeared in a weekend newspaper. The Minister of Education also saw the advertisement and was upset because of the fact that the bursaries were only open to students who were of European descent, male and non-Jewish. The Minister wrote to Syfrets and requested Syfrets to remove the criteria for applicants relating to race, gender and religion in the light of the constitutional protection of equality. Syfrets did not defend or justify the discriminatory condition, but indicated that the principle of freedom of testation precluded them from deviating from or varying the wishes of the testator as contained in the will, unless a Court order directed them to do so.
The Minister thereupon brought a court application requesting the deletion of the discriminatory provisions in the will. The University of Cape Town was the second applicant. Syfrets was the first respondent and the Master the second. Both respondents abided by the decision of the Court.
(Consequently this case will probably not go on appeal.) A *curator ad litem* was appointed to represent the potential beneficiaries from the class referred to in the will.

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Arguments presented by applicants:
The applicants based their application for an order deleting the discriminatory provisions on three grounds [par 9]:
(a) Section 13 of the Trust Property Control Act, which confers upon the Court the power to vary a trust provision if the provision brings about consequences that were unforeseen by the trust founder (i.e. testator) and that are in conflict with the public interest.
(b) Common law, which prohibits bequests that are illegal, immoral or contrary to public policy (i.e. *contra bonos mores*).
(c) The Constitution, specifically the equality and anti-discriminatory provisions of section 9.

Arguments presented by *curator ad litem* against the application:
The *curator ad litem* argued that the contested provisions of the will were valid. He invoked *inter alia* the testator's freedom of testation.

Decision and arguments of Court
The Court pointed out that the principle of freedom of testation has never been absolute and unfettered. Over the years various restrictions have been placed on this by common law and statute.

(a) Public policy
One of these restrictions on freedom of testation is the principle that the Courts will refuse to give effect to a testator's directions which are contrary to public policy.
Public policy has been rooted in the Constitution and the fundamental values it protects. Public policy can now be seen as an objective, normative value system. In the present case the Court therefore also had to look at the constitutional values of human dignity, achievement of equality and the advancement of non-racialism and non-sexism.
The public policy of today differs from that of 1920. The Court rejected the argument of the *curator ad litem* that the public policy at the time when the will was executed should be looked at, and this public policy would not have objected to the provisions in the will. Since the Constitution represents a break from the past, it stands to reason that the public policy of today should be decisive in the present application.

(b) Equality
In support of their argument that the provisions in the will were invalid, the respondents relied on the equality clause of section 9 of the Constitution. According to section 9(4), read with section 9(3), no one may unfairly discriminate directly or indirectly against anyone on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 9(4) clearly operates horizontally between all persons, natural and juristic persons, including (as in the case under discussion) a charitable

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trust. [Note that a trust is neither a juristic person nor a natural person, but a legal institution *sui generis*]. Discrimination based on any of these grounds is presumed to be unfair, unless it can be established that the discrimination is fair (s 9(5)).
The Court did not apply the Constitution directly to the facts, but indirectly, since it based its decision on its common law powers to remove provisions that are contrary to public policy. As such, the Court was of the opinion that if it were to hold that the provisions amounted to unfair discrimination, it could also hold them to be against public policy.

(c) Unfair discrimination
The condition that limited eligibility to candidates of European descent amounted to indirect discrimination based on race and colour. The provision that excluded Jews and women amounted to direct discrimination on the grounds of religion and gender. In terms of section 9(5) these provisions are presumed to be unfair discrimination unless the contrary is proved.
The Court also emphasised that one is dealing with an element of State action, in the sense that the institution that is appointed to distribute the rewards of the testator's beneficence is a quasipublic institution, namely the University. Furthermore, a trust, especially a charitable trust, is an institution of public concern. These "public" elements in the distribution of the benefits exposed the provisions to a constitutional challenge.
The court therefore held that the provisions constituted unfair discrimination and as such it was contrary to public policy as reflected in the foundational constitutional values of non-racialism, non-sexism and equality. The Court could order the deletion of the offending provisions of the will, based on its common law power to delete provisions in a will that are against public policy.
Importantly, the Court pointed out that this decision did not mean that the principle of freedom of testation was being ignored; it simply reinforced an existing limitation on freedom of testation.
Neither did it mean that all clauses in wills or trust deeds that differentiate between different groups of people were invalid. It only meant that the conditions in that case, which unfairly discriminated on the grounds of race, gender and faith, were invalid.

Importance of *Minister of Education and Another v Syfrets Trust:* for the law of succession:
The principle of freedom of testation cannot be ignored, but there are limits to freedom of testation. One of these limits is the common law principle that provisions that are *contra bonos mores* may be deleted.
Provisions that constitute unfair discrimination are contrary to public policy, as reflected in the foundational constitutional values of non-racialism, non-sexism and equality.

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

In ***Ex Parte BOE Trust Ltd*** ** **(2009),** a trust provided bursaries to "white South African students who have completed an MSC degree..." The court was not satisfied that the provision was contrary to public policy.
There was no need for the Court to strike out the word "White".
The Founder does specify that:

> 'In the event that it should become impossible for my trustee to carry out the terms of the trust, I direct that the income generated by the trust be used annually to provide donations equal in size to each of the following charitable organisations....'

In ***Curators, Emma Smith Educational Fund v The University of Kwa-Zulu Natal*** ** **(2010),** In 1938 Sir Charles George Smith executed his will. He created a charitable trust in memory of his mother called the Emma Smith Educational Fund and stated "that his estate be placed in trust to apply the income thereof in and towards the higher education of European girls born of British South African or Dutch South African parents, who have been resident in Durban for a period of at least three years immediately preceding the grant." The trust was established in 1941. The University was appointed as the trustee.
The University's Principal and Vice-Chancellor recorded that the University experienced considerable embarrassment in performing its function as trustee of the Fund because of the racially exclusive basis upon which bursaries have to be awarded. The University argued that such discrimination is self-evidently unfair. The trust further goes against the equality clause.He approached the court in terms of section 13 for an amendment, which the court allowed. On the appeal against this decision the curators of the potential beneficiaries argued that the Act does not apply to the Trust. The trust was transferred from the Natal University College to the present respondent by way of statutory enactments, which resulted in the Trust effectively having been '. . . written into the statute. . . '. No amendment of its terms through the mechanism of s 13 of the Act is therefore possible. They further argued that freedom of testation is not only a fundamental principle of the law of succession, but also an essential part of the right not to be deprived of property. They stated that a decision to amend the provisions of the Trust may open the floodgates to have similar testamentary charitable trusts amended, with resultant prejudice to existing and potential beneficiaries. In the alternative,

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and in the event of it being held that the Act does apply to the Trust, the curators submitted that there is no provision in the will that brings about consequences that the testator, a man of foresight and vision, did not foresee in broad and general terms. The provisions were lucid when the Trust was created. Section 13 of the Act could thus not be invoked in this instance.
The court relied on the decision in *Syfrets Trust .*
The court held that section 13 can be applied and therefore the appeal is dismissed.

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POSSIBLE QUESTIONS

Briefly name 4 instances in which the services of a trustee will be terminated.

(a) Death
(b) When resign (s21)
(c) When removed from office by court (s20(1))
(d) Purpose of trust been achieved.

Mention requirements for the establishment of a valid trust

(a) Founder – intend create a trust
(b) Trust created – written agreement/court order
(c) Trust property must be reasonably cleared defined
(d) Trust must be established for object or purpose

Write a note on the remuneration a trustee.

Be agreed upon by founder and trustee in the trust instrument where no provision is made – entitled – reasonable remuneration.
Master fix amounting case of dispute (Griesse v Bankorp Trust)

What is a "bewind trust".

To beneficiaries designated in the trust instrument, property is placed under control of another person.

Write a note on the establishment of a trust.

(a) Founder – intend create a trust
(b) Trust created – written agreement/court order
(c) Trust property must be reasonably cleared defined
(d) Trust must be established for object or purpose

Briefly name four instances – services of a trustee will be terminated.

Trusteeship of a trustee terminates on death
Trust instrument provides for trustee's resignation
Application of master or any person having interest in trust property S20(2) Trustee be removed.

In terms of the Trust Property Control Act 57 of 1988 and the common law a trustee has certain powers and duties. Name 10 of them

(a) Trustee lodge trust instrument
(b) Trustee furnish security

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(c) Trustee furnish Master with an address – served
(d) Deposit money trust account
(e) Indicate clearly – property he holds
(f) Trustee, written request of master, account master for administration
(g) May not destroy any document – proof investment
(h) Not entitled remuneration
(i) Make payments to beneficiaries accordingly
(j) Not a juristic person – sui generis.

Section 13 of the Trust Property Control Act provide for the variation of trust provisions by the court. Discuss briefly

Trust instrument contains any provision brings consequences which
(a) hampers a achievement of the objects
(b) prejudices interest of beneficiaries
(c) in conflict with public interest.

Discuss <u>Syfrets Trust</u> case.

Here you need to be able to discuss the facts of the case for approximately 10 marks

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COLLATION

Descendents who got any assets or money from the testator (during the testator's lifetime) have to collate such benefits before they can inherit, so that there is a fair distribution of the deceased estate among the beneficiaries.
Collation is based on the presumption that parents wish to treat their children on an equal basis.
Obligation to collate arises when the property vests and falls away if the heir refuses to inherit or the co-heirs don't insist on collation.
The testator can during his lifetime exempt beneficiaries from collation.

Q: Who must collate?
Collation only takes place in the direct line among descendents; it takes place whether the deceased dies testate or intestate. The obligation rests on the deceased's descendents, provided that testate heirs are obliged to collate, only if they would have inherited ad intestatio from the deceased if he died intestate. Descendents who inherit as legatees, usufructries, fiduciaries or FC's aren't obliged to collate.
Where the testator nominates both his child and his grandchild to inherit, no obligation rests on the grandchild to collate, because they wouldn't have inherited ab intestatio if the testator died without a will.

Q: Who is entitled to collation?
The only people entitled to collation are the descendents who have a duty to collate, there is no duty to collate in favor of ascendants or descendents who cant inherit ab intestatio.
The testator's creditors, legatee's can't insist on collation.

The surviving spouse who was married to the deceased in community is entitled to claim that the deceased's descendents collate what they received from the deceased BEFORE division of the common estate.

Q: Which benefits must be collated?
The testator's intention is decisive, but it's alleged that the following must be collated:

a) Benefits received by a child as part of inheritance
b) Benefits in promotion of the child's occupation/business
c) Benefits given with view to a marriage
d) Gifts which amount to inequitable treatment
e) Debts owed

The following DON'T have to be collated:

a) gifts given out of generosity
b) Benefits for service rendered (remuneratory donation)
c) Expenses incurred by parents for the maintenance and education of the Child,

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THE INTERPRETATION OF WILLS

High court interprets wills in order to determine the testators intention. The Magistrate court has no jurisdiction to interpret a will.

Principles of interpretation:
Main principle: the testator's intention as it appears from the words must be ascertained.

a) To determine the testators intention as it appears from his will read as a whole – if more than 1 will = read together.
b) Court gives words their ordinary meaning, which they had at the time of making the will.

GOLDEN RULE OF INTERPRETATION: to ascertain the wishes of the testator from the language used – to look at the ordinary grammatical meaning of the words (*Robertson*)

Where the same word is used more than once there's a rebuttable presumption that the testator used it in the same sense every time, unless the contrary is apparent.
If the word has more than one meaning, the court must use the meaning that makes the will valid.

It's only where the word is meaningless/impossible to put into effect can it be held *pro non scripto*.

Evidence
Armchair evidence: the court is entitled to place itself in the position which the testator was at the time of making the will, by paying attention to all the facts and circumstances which were known to the testator = to determine what the testator intended when he used certain words/expressions in his will - this is admissible even where there's no ambiguity.

Extrinsic evidence: evidence of the surrounding circumstances in which the will was made and if the evidence isn't available to clear up the obscurity, the obscure part will be held pro non scripto.
Evidence is admitted to ascertain the identity of the will, testator, benefit or bequest.
The general principle of evidence is that where a legal act is incorporated into a document no extrinsic evidence can be adduced to contradict, amend or supplement the contents of the document – where the wording of the will is clear, so that the testator's intention appears clearly, no extrinsic evidence is admissible.
It's only where the will is obscure that the extrinsic evidence to interpret the will, to ascertain the testator's intention, is admissible.
The evidence = show what the testator meant when he used the obscure word/expression.

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Variation
The courts can't vary a will that is capable of being carried out. If the speculations are clear, effect must be given to it even if there is a loss of profit (*Jewish Colonial Trust v Estate Nathan*).

In *Estate Nathan* the testator left money in trust to be paid to the Jewish Colonial Trust after 50 years. The JCT needed the money now and they alleged that the estate had enough surplus to pay it out. The court stated that they could not vary the provision.

The court will permit variations in the following instances:
- it is impossible / unreasonable to give effect to the testators intention
- strict enforcement results in failure of the testators bequests
- the testators intention can't be realized
- the circumstances of the case demand departure
- the testator makes dispositions on the mistaken assumption about the testators assets and liabilities.

Rectification of wills:

Definition: when a court adds, deletes or changes something in a will because the testator made a mistake when making the will and the will does not reflect his intention correctly.

Rectification occurs after the testators death by the courts unlike variation which is done by the testator during his / her lifetime. As this is done by the court and not the testator and due to the principle of freedom of testation, our courts will seldom rectify a will.

Prerequisites for rectification:
Before a court will rectify a mistake in a will, it will require proof that:
1. Because of a mistake, the will in its present form does not reflect the testator's intention.
2. Of what the testator really meant to say, ie. how the mistake can be rectified. – evidence would need to be submitted

Extent of the court's power to rectify:
Mistakes in a will can be for eg:
1. Clerical mistakes, eg R10000 become R1000 due to typing error.
2. Words / clauses can be inserted erroneously (deleting).
3. Words / clauses can be omitted erroneously (inserting).

The courts can allow a rectification of clerical mistakes (*Botha*), and that words / clauses that have been inserted by mistake can be deleted (*Rens v Esselen***), but they are divided on whether words can be added (*Aubrey-Smith v Hofmeyr* – the insertion of words would amount to the remaking of the testators will). After *Aubrey-Smith* the

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court in *Botha v The Master* adopted the view that rectification by insertion is indeed an option.

Presumptions:
where the court isn't able to ascertain the testator's intention in light of these principles, it may make use of certain presumptions:

a) In law a person can die partly testate and partly intestate – where a will has been made = presumption that the testator wanted to dispose of his assets in it and die testate.
b) Writing or typing prevails over a standard for will (do it yourself will).
c) There's a presumption that the testator didn't wasn't to disinherit his children/descendants but wanted them all to benefit equally.
d) Testator in possession of his will, and after his death the will can't be found = presumption he destroyed it with the intention to revoke.
e) Testators who are co-owners of joint property = presumed the testator wanted to dispose of his share in the joint property
f) Presumption that a joint will contains separate wills of the co-testators and each wants to dispose of their assets only.
g) Beneficiary gets a vested right under a will at the testators death
h) Presumption in favor of direct substitution and against FC substitution
i) Assets are left to a beneficiary = presumption that he gets full ownership of the assets.
j) Testator nominated his descendents/collaterals as heirs in a group, without mentioning names and numbers – presumption that a predeceased heir must be represented per stirps in accordance with the rules of intestate succession.

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SUCCESSION BY MEANS OF A CONTRACT

Pactum successorium

Borman case: the pactum successorium (PS) = agreement in which the parties regulate the succession to the estate of one/more of the parties, after the death of the party concerned – *A & B agree to appoint each other as heirs.*

In accordance with the principles of freedom of testation, no interference with the testators free capacity to make a will is permitted and any agreement (if in a will/verbally made) which limits this capacity – *I.e. That someone cant make a will/cant revoke / or amend the will she has made* – is known as a PS and is unenforceable (but isn't illegal or contra bonos mores.

2 Exceptions to the rule that a PS is unenforceable:

a) Where massing of estates takes place – the surviving testator is bound by the provisions of the joint will, following the acceptance of the benefit under the joint will.
b) Where the PS has been incorporated into an anc.

The antenuptual contract:

In SA succession can be regulated by an anc but by no other contract. Where the beneficiary under a succession clause was a party to an anc, under Roman Dutch law there could be no revocation of that provision without her consent = this is also the view of our courts.
H and W in a joint will in which the bequest in an anc is revoked on the death of H – she has the choice of inheriting under the anc or the joint will.

Our courts have regarded a succession clause in an anc as a stipulation in favor of a 3rd party and thus refuse to recognize its unilateral revocation by a will if the beneficiary has accepted the benefit = acceptance of the stipulatio alteri has the effect of making succession clauses in an anc irrevocable.

Donatio mortis causa:

It's a contract and therefore a bilateral juristic act. DMC is a donation made with the view to the donor's death and thus remains revocable until the donor dies.

It's sometimes difficult to establish if a donor intended a donatio inter vivos or a DMC = distinction:

a) DIV is unenforceable unless it's in writing and signed by the donor – no formalities if the contract to donate and delivery of the donated thing take place simultaneously.
   DMC must meet the requirements for a valid will in order to be valid.

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b) Owner of the property may sometimes dispose of it inter vivos (sale/donation) – *e.g. FC residue = the fiduciary can dispose of ¾ of the property inter vivos but can dispose of anything mortis causa (void).*

In a will, in borderline cases, a will will more readily be interpreted as a DIV because a DMC is invalid unless it's contained in a document which must meet the requirements of a valid will and since in borderline cases the formalities aren't complied with the courts are in favor of the DIV interpretation.

The present position is that disposal in a will is deemed to have been IV and not MC: unless the following are present:

1. An express statement by the donor to the effect that she's making the donation because of the anticipation of her death.
2. An express stipulation that the donation is revocable while the donor is still alive.

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THE ADMINISTRATION OF DECEASED ESTATES

The estate is liquidated by the executor/rix.
Before 2000 there were different rules applicable to blacks who died intestate (Section 23 of the Black Administration Act) as there was to white people who died intestate (Intestate Succession Act). The law has since changed and the rules are mostly uniform.

Estate: A deceased estate consists of a collection of all the patrimonial rights vested in a natural person at the time of his or her death as well as all the claims against him or her at the time of death.

Master: the person who is appointed under section 2 and who has jurisdiction in respect of the matter, property or estate and who is subject to the control, discretion and supervision of the Chief Master. A fee is payable: R42 on the first R17 000, R6 for every completed R2000 thereafter to a maximum of R600 but no fee is payable on an estate of under R15 000.

Executor: the person who is authorised to act under letters of executorship granted or signed and sealed by the Master. An executor might be nominated by the testator in the will (executor testamentary) or if the testator did not appoint an executor or the appointed executor cannot act then an executor will be appointed by the master (executor dative). The executor receives 3,5% of the gross value of the deceased's estate that is in the estate at dissolution and 6% on any income obtained after the death of the deceased. There is a minimum fee payable of R350. Estates which are smaller than R250 000 can appoint an administrator (representative) and not an executor, there is also no need to draw up a liquidation and distribution account making the winding up process much faster.

The executor is the person who winds up the deceased estate:

- He accepts payment on behalf of the estate
- Pays estate creditors
- Distributes the remaining assets among the heirs and legatees

General rule: is that security is required from all executors unless they have been exempted by the will from providing security or the executor is a close family member of the testator (surviving spouse).
The Master has an overriding power to require security in all cases.
Ex Parte Smit: it was held that the court has a discretion to dispense with security.

Duties of the executor:
Common law: the duty to disclose any personal interest they may have in any transaction, which is part of their fiduciary duties – they can't get any secret profits.

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Section 49 of the Administration of Estates Act: any purchase of estate property by the executor is void unless the master/court assents to the purchase.

The executor must perform a number of specific duties and functions as set out in the act:

1. Report the estate to the Master by supplying: the death notice, the death certificate, inventory, will and acceptance of executorship form.
2. Ascertain the value of the assets in the estate
3. Ascertain the liabilities
4. Must open a bank account.
5. Must determine a suitable method of liquidation.
6. Establish suitable procedure for administration of the estate and consult the heirs if there is a cash deficit.
7. Pay liabilities if the estate is solvent.
8. If the estate is insolvent it must be dealt with in terms of section 34 of the Administration of Estates Act.
9. He draws up the liquidation and distribution account.
10. Advertise the account for inspection.
11. Must pay the creditors and beneficiaries of the estate according to the account.
12. Pay the Master's fees.
13. Pay the estate duty
14. Attend to the Masters final requests
15. Obtain the Masters release.

The process of the administration of the estate is divided into three phases:

Phase 1: Starts the day that the testator dies. The first step is to report the death to the Master by completing the required death notice. This is done by the surviving spouse, nearest relative of the person in control of the place where the death occurred. Usually the executor will do this task. The following documents need to be completed: death notice, inventory of the estimated values and acceptance of executorship. The executor then has to wait to receive his / her letter of executorship before he / she can begin winding up the estate.

Phase 2: this phase begins when the letter of executorship has been issued. The executor begins with the winding up process. The executor must:

- Take control of the estate's assets
- Advertise for creditors and debtors to submit claims within 30 days
- Determine whether the estate is solvent
- Open an account in the name of the estate if there is more than R1000 in the executor's possession

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- Choose a method of liquidation
- Prepare a liquidation and distribution account

There are five methods of liquidation:

1. *Awarding and handing over the specific assets* – beneficiaries receive their benefits in a specific form and not in cash
2. *Partial sale* – the executor sells some of the assets in order to meet the liabilities of the estate
3. *Total sale* – Sells the assets in the estate. This is only applied in exceptional circumstances
4. *Taking over by a surviving spouse* – when this method is used, it is not necessary for the surviving spouse to be a beneficiary in terms of the will. Under certain exceptional circumstances, the surviving spouse may take the estate over at an amount determined by the appraiser. The Master will only give consent to the taking over once required security has been provided.
5. *Redistribution agreement* – it is possible for the beneficiaries of an estate to conclude an agreement with regard to the redistribution of the assets in the estate.

The final L & D account has to be submitted within 6months after the letter of executorship has been issued by the Master. If the executor is unable to submit the account in time, he or she must apply in writing to the Master for an extension of the date. Such application must be supported by a justifiable reason (account is still laying open).

The L & D must include the following:

- heading
- liquidation account
- recapitulation account
- distribution account
- income and expenditure account
- fiduciary asset account
- estate duty addendum

Phase 3: This phase begins once the final liquidation and distribution account has been approved. The final requirements include:

- Proof of advertisement
- Certificate of the Magistrate
- Proof of payment of the Master's fee
- Proof of payment to the creditors and cash legatees
- Proof of delivery of legacies and inheritances
- Obtaining the final bank statement with a zero balance

After the executor has done his final tasks, he or she is entitled to discharge.

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POSSIBLE QUESTIONS

What do you understand the term " armchair evidence"

Evidence which court uses to place itself in positioning which the testator was at time of making will.

What is the "golden rule" when interpreting a will?

Testator's intention is established from the words of the will.

Name 9 presumptions that court use when interpreting a will.

Only where testator not disposed or certain assets in his will either expressly or tacitly that he dies intestate with regard to these:

(a) Presumption – testator didn't wish to disinherit his children/ descendant.
(b) Testator in possession of will but it cannot be found – presumption destroyed it animus revocandi
(c) Testator co-owner joint property – presumption- dispose of only his share
(d) Presumption against massing
(e) Presumption beneficiaries acquire vested rights (a morte testatoris)

Who is obliged to collate?

Descendants – that would have been intestate heirs, had the deceased died intestate.

Who is entitled to collation?

Descendants that would have been intestate heirs.

Which benefits have to be collated?

(a) Benefits received by child part of inheritance
(b) Benefits for promotion of business
(c) Benefits given with view to marriage

In winding up the estate of a deceased, the executor must perform a number of specific duties and functions set out in the Administration of Estates Act 66 of 1965 name them.

Must take personal possession of all estate assets
Draw up inventory of estate assets
Assess solvency or otherwise of the estate
Ascertain who creditors are submit claims
Open account name of estate soon has R100

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Executor must liquidate the estate
Executor sell estate assets – satisfy creditors
Executor performed duties – entitled discharge.

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NOTE THE FOLLOWING CASES

1) Arkell v Carter – power of appointment:

All the testator intestate heirs lived overseas, the testator bequeathed considerable sums to the overseas heirs. In certain clauses he bequeathed a farm to A and his personal belongings to A to distribute among the testators family as he thinks fit. In another clause he left the contents of the house to A and the personal belongings to distribute. One of the heirs lodged an objection. It was contended that the power of appointment was couched in such general terms as to render it legally invalid and the property should go back into the estate and devolve ab intestatio. The court agreed with A.

2) Aronson v Estate Hart – condition in a will compelling a beneficiary to marry a Jew:**

The testators will had a condition providing for the forfeiture by the beneficiary of a benefit, if she married someone not born of the Jewish faith. One of the beneficiaries applied for an order declaring the condition void = application was dismissed.

3) Back v The Master of the Supreme court – S2 (3):**

The deceased had a valid first will dates 3 November 1993 and a codicil signed on the 2 November 1995. Before his death the deceased told the first applicant that he was terminally ill with cancer and he was no longer happy with some of the provisions in his will. He asked the first applicant to convey his wishes to his attorney (Flax) who was to prepare and draft a new will for his consideration. Flax suggested certain modifications to the wishes of the deceased and the establishment of a trust inter vivos to facilitate the deceased son's inheritance of a farm. Will was discussed with the deceased and he was satisfied. On the 16 November 1995 the final draft was complete, but the deceased died without signing the will of the 17th. The applicant (executor) applied for an order declaring the draft was the last will of the testator and the first will and the codicil should be revoked. The application was granted.

4) Barclays Bank DC & O v Anderson – condition in the will with regard to the disruption of an existing marriage:**

The testator left parts of his farm to his 2 daughters and in a clause stated that every beneficiary must personally and permanently occupy the land, if they don't they will lose their claim. For medical reasons one daughter couldn't occupy her portion. Both their husbands also had business interests, which would make settling on the farm difficult. The applicant (executor) applied for an order declaring that

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the respondent had lost their rights to the farm. The 2 daughters averred that the provisions were void, as they would bring about a separation between husband and wife. The court held that the daughters forfeited their rights.

5) Barrow v The Master – ademption:

The testator required his son, Edward to give up his employment and take over the management of the testators farming operation. A farm was acquired and transferred to Ed. It was arranged that Ed would live on that farm and manage the farming operation on Longridge. The testator sold Longridge and in his will bequeathed it to Ed. With the proceeds the testator bought another farm (Patchwood). After the testators death Ed claimed the transfer of Patchwood into his name.

6) Bekker v Naude – S2(3):**

The deceased (call him X) had been previously married to the 1st defendant (call her Y) and they had made a will where the survivor of them would inherit the entire estate of the spouse who died first. After X's divorce from Y, he married the plaintiff (call her Z). X and Z then decided to draw up a joint will. They went to the bank and asked a will be drawn up according to their wishes. The bank official drafted their will according to their wishes and sent the draft through to Pretoria where it was then drafted and posted to X and Z. the draft will was for some reason never signed by the parties. After the death of X 5 years later, the validity of the draft will became an issue when Z brought an application to court in terms of s2(3) asking the court for an order that the will be the valid will of X. The court a quo held that the main issue was whether the deceased should have drafted the will in the light of s2 (3) - that the document must have been drafted by a person who has since died. The court held that the statute was clear in this regard - it did not contemplate the situation where a 3rd party drafts the will. According to the court there must be A CONNECTION BETWEEN THE WILL AND THE DECEASED. Thus the plaintiff, Z, could not succeed in her action. She then appealed to SCA. The court had to interpret the word "drafted" in the context of the Wills Act. Did it have a narrow meaning requiring the testator to personally draft, write, type or create the document or that it had a wider meaning of CAUSING THE DOCUMENT TO BE DRAFTED, WRITTEN TYPED OR CREATED. The appeal was denied (and Y inherited her ex's estate)

7) Bhe v Magistrate, Khayelitsha – Intestate succession:**

see notes

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8) Bosch v Nel – testator acknowledges his signature:

In 1984 the testator executed a valid will in terms of which he appointed his wife (P) as the sole heir and executor of his estate.
In 1988 the brother in law of the testator drew up another will at the testator's request. In terms of this will his brother-in-law was appointed as executor and his estate was to be divided between P and 3 other people. The will has 2 pages – but when he signed the will there were no witnesses present. Later that day the testator acknowledged his signature in the presence of 2 people who signed the will as witnesses. The plaintiff contested the validity of the second will, in that there were no witnesses present when he signed the document (didn't comply with S2 (1) (a)). She wanted an order declaring the second will invalid and the first will the testator's valid will. The application was dismissed.

9) Botha v Botha – Suspensive condition and vesting:

In clause 5 of their joint will the testators bequeathed the residue of their immovable property to their son's children, subject to certain conditions. Clause 5(d) stipulated that if the son should die without any legitimate descendants, a church would become entitled to the proceeds of the immovable property. The son had two children, but had been predeceased by one of them at the time of his death. The surviving grandson applied for a declaratory order to the effect that he was sole heir to the residue of the immovable property. The widow of the predeceased grandson (respondent) opposed the application. The court granted the application.

10) Botha v The Master – rectification:

The testator created a trust for the education of his nephews, at the time of execution the nephews were all 36/more and had completed their education – the testator was aware of this. The nephews applied for an order rectifying the will by inserting the words "the sons of" before "my nephews". They also gave evidence concerning a letter written by the testator, from which it was clear it was his intention to benefit their children. The court granted the application.

11) Braun v Blann and Botha – power of appointment:**

In clause 4 of her will the testator had bequeathed the residue of her estate in trust to her administrators. She conferred upon the administrators *inter alia* the power to appoint in their discretion the income as well as the capital beneficiaries from a group of persons she had designated. She further stipulated when the trust was to be dissolved and in a proviso to clause 4(d) she empowered her administrators in certain circumstances to "apply such portion of the capital as they determine to the creation of a trust for such lawful

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issue for such a period and subject to such terms and conditions and under the control of such trustees as my administrators shall determine." The testator's daughter, the appellant, applied for an order declaring that the residue of the estate should devolve as on intestacy. She challenged the validity of the trust on the ground that a power of appointment could not be conferred upon a trustee. The application was opposed by the administrators of the trust. The court *a quo* dismissed the application. An appeal failed.

12) Campbell v Daly:

The testator made a will in 1981 in which he left his entire estate to his two minor children. The testator executed two codicils to the will. In the second codicil the testator left all of his rights, title and interests in a certain town house to the respondent, his fiancé, subject to her paying the balance of the townhouse to the seller. At death the amount owing was R13 990.00. The executor paid this amount to the respondent as being part of the right, title and interest in the town house. She contended that the town house should be transferred to her "unencumbered and free of any bonds or liabilities". She was successful in the court *a quo*. The Appellant, the testator's divorced wife and mother of the two children, appealed against this decision and the appeal was upheld. On appeal the court found that the judgment of the court *a quo* was the correct one.

13) Casey v The Master – incapacity to benefit:**

The second respondent and his wife were married in community of property. In their joint will the surviving spouse was appointed as the sole heir. One evening the respondent under the influence of liquor, but not to the extent that he didn't know what he was doing, went into his bedroom and took his pistol with him – as he always did – and while handling it, it went off and his wife was fatally injured. Court held – although he was automatically entitled to half the joint estate, as he was married in community, he couldn't inherit from his wife.

14) Daniels v Campbell – Intestate Succession:**

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

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15) De Reszke v Maras – Section 2(3):

The deceased appointed an attorney to draft a will for him. He also wrote the contested document. The document contained instructions on how to draft his will. The court held that in these circumstances it could not be said that the required intention (namely that the document should be his will) existed. The document contained instructions to an attorney setting out what the content of the proposed will should be, rather than the will itself. The application in terms of s2(3) was denied.

16) Du Plessis v Strauss – *Si sine liberis decesserit* clause:**

The testator left a farm to his son and a farm to each of his two daughters subject to the condition that if any child dies with children, his / her farm will go to his / her child but if he /she dies without children his / her share is to go to the surviving 2 siblings in equal shares. After the testator death the one farm was transferred to the son subject to the condition. The son then got an order to alienate the farm and to transfer the land to a private company subject to the condition. The company then later liquidated and the son's estate was sequestrated. The appellant contended that the insolvent, the fiduciaries, would become full owner of the land even if he were survived by children or further descendants. A major son of the insolvent opposed this. The court *a quo* held that if the insolvent were to die and be survived by children (or further descendants), they would become the full owners. The provision was discharged – the major son of the insolvent was successful.

17) Estate Orpen v Estate Atkinson – Power of Appointment:**

During their life time Mr and Mrs A massed their estates. Their will stated that on the death of the first dying, their estate was to be put in trust and used for the benefit of the survivor of the parties and their daughter Mrs O. It further stated that if their daughter later died with children, then the entire estate would go to her children, subject to the usufruct. If she died without children then 20% of the joint estate would devolve upon Mrs O's estate to do with as she wished and the other 80% was to be dealt with in a way determined in the joint will. In Mrs O's will she stated that the 20% is to devolve upon her husband. Mrs O died before Mr A, leaving no children. When Mr A died (first dying of the spouses), Mr O attempted to claim the 20% from Mr A's estate through Mrs O's will. The court held that Mr O could not claim the 20% as the beneficiary (Mrs O) must survive the testator (Mr A) in order to benefit.

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18) Ex Parte Estate Davies – testamentary writing:

Testator bequeathed R2000, to someone who wasn't disclosed in the will, but his name was given on a separate note addressed to the executor. This document was signed by the testator but not by the witnesses. This case confirmed the requirements of what needs to be contained in a testamentary writing.

19) Ex Parte Executors Estate Everard – pactum successorium in an ANC:

Before their marriage Mr. and Mrs. E concluded and ANC in terms of which, he was appointed her sole heir of ½ the estate. In his last will Mr. E left his estate in a trust and provided his wife was to get income from the trust during her lifetime. On her death the estate was to be distributed among her children. Because of the conflicting provisions in the ANC and the will – the executors applied for a declaratory order stipulating the rights of the wife and the children. The court held that Mrs. E could elect to inherit either in terms of the ANC or the will.

20) Ex Parte Graham – commorientes:**

A 50-year-old woman left her estate to her adopted son of 16. In her will it stated that should the son predecease her, her estate would go to her mother. The testator and her son were killed in an air disaster. The executor gave the whole estate to the mother, but the registrar of deeds first wanted an order of the court declaring that the son died first at the same time as the testator before he would transfer the property. He applied for an order of simultaneous death and it was granted.

21) Ex Parte Maurice – S2(3):**

The applicant's husband died without having left a validly executed will. She sought an order that an unsigned document drawn up by her and her husband and which was in her husband's handwriting be accepted as their joint will. A few weeks before his death the deceased forwarded the handwritten document to Mr C and requested that he "knock it into shape if necessary". Mr C stated that the document did not require any changes to be made. The application was refused.

22) Ex Parte Steenkamp & Steenkamp – incapacity to benefit:**

The testator bequeathed a farm and certain movables to their grandchildren, one of these children's father (Steenkamp) then murdered both testators. He was convicted and sentence to life imprisonment. One of the grandchildren dies and Steenkamp and his wife applied for an order declaring that they were the sole heirs of the

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deceased child. Master raised the question if Steenkamp could inherit anything out of the estate of a child who had come from the grandparents, as he murdered them. The court held he wasn't unworthy to inherit from the child.

23) Ex Parte Swanevelder – conditions alleged to have been included in a will:

In their joint will the applicant's parents left certain farms to her subject to a fideicommissum in favour of her children. The will provided that should the applicant die without children, the farms had to be sold and the proceeds distributed among the testators' other children (or their descendants). If any of the applicant's children should die without children such child's share had to go to his / her brothers and sisters and if all her children died without children, the farm again had to be sold off and the proceeds distributed among the testator's other children (or their descendants). It was further provided that if the applicant's husband should predecease her the above mentioned conditions were to lapse. The applicant applied for an order declaring the conditions of the bequest to be null and void as the conditions are against public policy as they had been deliberately created and imposed with the object of causing discord between the applicant and her husband. The court held that the conditions were valid and the application was rejected.

24) Ex Parte Williams: In Re Williams Estate – S2 (3):

Mr. Williams applied in terms of S2 (3) of the Wills Act to have an unsigned document that was prepared as the last will of his wife, declared her last will. The matter was referred to the full bench and was GRANTED

25) Gafin v Kavin – incapacity to benefit:**

The respondent and his wife executed a joint will in term of which it provided that in the event of the wife predeceasing him, he was to be the sole heir of her estate. The respondent then shot and killed his wife and 2 of the children and wounded the other child. He was charged with murder but found not guilty because of the fact he was mentally ill and incapable of acting in accordance with the appreciation of wrongfulness and wasn't criminally responsible for his acts. The executor of the wife's estate applied for an order declaring the respondent unworthy to inherit from his wife and child. The court accepted the findings of the court a quo in the criminal matter that the respondent wasn't criminally responsible for his acts and found he wasn't disqualified from inheriting from his wife.

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26) Gory v Klover – Intestate Succession:

see notes.

27) Govender v Ragavayah – Intestate Succession:

see notes.

28) Greenberg v Estate Greenberg – vesting:**

The testator left in trust to his executors certain immovable property and a mortgage bond, subject to the condition that his surviving spouse was to administer the property and receive the proceeds thereof. He expressly stipulated that she had to bear the expense of maintaining the property as well as any rates and taxes payable. Upon her death or remarriage of the surviving spouse, the property and the bond, or the proceeds thereof, were to be divided among their sons. In the event of any son dying "before becoming legally entitled to any inheritance", the children of such a son should take his place. All three sons were alive when the testator died, but they predeceased their mother. Two of them had left issue. Uncertainty arose as to when vesting on the sons took place. The court *a quo* held that vesting took place upon the testator's death, subject to a usufructuary interest in favour of the widow. The widow and the sons' children appealed. The appeal failed.

29) Harris v Assumed Administrator Estate MacGregor - vesting:**

The testator created a trust and stipulated that the trust income was to be paid to his wife during her lifetime. After her death the trust capital was to devolve upon their children. Should they not have any children, it was to go to his brother, MacGregor, and to his brother's children if he predeceased the testator's wife. No children were born of the marriage and the brother predeceased the testator's wife leaving no issue. The capital had to devolve *ab intestatio*. The testator was survived by his wife, his mother (who later died) and his brother (who later died). The testator's widow applied for an order identifying the intestate heirs on the death of the testator's brother. Her co-administrator contended that the date for determining who the intestate heirs were was the date of the testator's death. The court *a quo* held that the intestate heirs were to be determined on the date of the testator's death. The appellate division reversed this decision and held that the intestate heirs had to be determined on the death of the testator's death.

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30) Hassam v Jacobs – Intestate Succession:**

In 2008 the Cape High Court held that the word "survivor" includes a surviving partner to a polygamous Muslim marriage and that the word "spouse" as used in the Intestate Succession Act 81 of 1987, includes a surviving partner to a polygamous Muslim marriage. The effect of this decision is that surviving spouses in all Muslim marriages, irrespective of whether they were *de facto* monogamous or not, can inherit in terms of intestate succession law.

31) Jeffrey v The Master – office of the certifying officer:

The testator, who was illiterate, executed a will by placing her thumbprint on each page in the presence of the witnesses and the witnesses signed in her presence. One of the witnesses, her attorney, attached and signed the certificate. After the testators death the master refused to accept the will on the ground that it didn't comply with the requirements of 2(1) (a) (v), since the attorney didn't state his office. Applicant sought an order directing the master to accept the will but the application was dismissed.

32) Kidwell v The Master – end of the will:**

The testator had a 2 page will – the first page was the substance of the will and the second page was unimportant clauses. On the first page, 9cm between the last paragraph and the testators signature and was followed by the attestation clause. Below this 2 witnesses signed on the left hand side and the testator signed on the last page on the right. Between the signature of the testator and the witnesses was a bank space of 17cm. The master refused to accept the will, because in his opinion, it wasn't signed at the end as required by S2 (1) (a). The testators daughter (sole heir) applied for an order that the will be declared valid and in the alternative the first page be declared the testators will. Court held the will was invalid.

33) Kirsten v Bailey – testamentary capacity, undue influence:**

The testator made three wills shortly before her death. The defendant was the only beneficiary in terms of the first and third wills. The master accepted the third as the testator's valid will. The testator's intestate heirs, who were beneficiaries under her second will, challenged the validity and claimed that the defendant had unduly influenced the testator. They claimed an order declaring the second will to be valid, alternatively, that the testator had died intestate. The court confirmed that she had died intestate.

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34) Lello v Dales – accrual:**

AD had to interpret "the residue of my estate shall devolve as follows:
"½ to my brother Edward and the other ½ in equal shares to my nephews and nieces."
Edward died BEFORE the date of vesting and the question arose if his share lapsed and fell back into the residue or if it accrued to the nephews and nieces. The court said the beneficiaries had been joined verbis tantum and recognized that the presumption, which flows from this, isn't necessarily logical. Court held: indicated that the testator probably intended that accrual should take place = what had been bequeathed to Edward accrued to the nieces and nephews.

35) Levy v Schawartz (condition in a will calculated to break up an existing marriage):

The testator left a benefit to his daughter, Mrs. Levy, in terms of which she would only receive it in the event of her marriage dissolving. Mrs. L applied for a declaratory order and contended that the provisions in the will that restricted her right to get the benefit was against public policy and contra bonos mores. It was intended to bring about the dissolution of the marriage. The court granted the application.

36) Liebenberg v The Master – the place where the witnesses must sign:

The testator had a 1 page will, the testator signed at the end but the witnesses signed above the body of the will. The Master disputed the compliance with S2 (1) (a) in that the witnesses didn't sign at the end of the will. Held: that the will was still valid.

37) MacDonald – Section 2 (3):**

The testator typed his will on his computer and then committed suicide. He left a note directing those he survived to the will. The computer was put on and the will was printed in the presence of the police. The court held that due to the security involved when printing the will, the document was intended to be his will and accepted same as valid in terms of S2(3).

38) Marais v The Master - revocation:**

The testator divorced his wife in 1972. In his will, executed in 1977 he bequeathed his entire estate to his ex-wife. The testator was in possession of a copy of his will and the copy was unsigned. Before his death the testator tried to revoke the will by writing on all 3 copies, indicating that the wanted to revoke the will. On the cover of the copy of his will, he indicated that his mother was to inherit his property.

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These directions didn't amount to a will because the formalities for the execution of a valid will haven't been met. If the testators will was considered to be revoked he would have died intestate in which case, his estate would have gone to his 3 children. The master rejected the original will and the ex-wife tried to get an order declaring the will valid. The court held that the will was validly revoked.

39) Meyer v Rudolph's executors – donatio mortis causa:

Mrs. R had written a letter to Meyer (who was in jail) – stating he could have the farm and the cattle, as she wasn't well. After her death he claimed delivery of the cows and transfer of the property on the ground that the letter containing a donation inter vivos. The executor refused to deliver on the ground that the donation was mortis causa and it didn't comply with the testamentary formalities and was therefore invalid. The court a quo agreed with the executor and the appeal against this decision was dismissed.

40) Minister of Education v Syfrets Trust Ltd – provisions of a trust:**

see notes.

41) Moses v Abinader – revival of a revoked will:**

Testator executed a will on the 6 August 1948, in which he appointed his 2 stepbrothers as his sole heirs. On the 12 August 1948 he executed a second will in which he revoked his first will. In his second will Mrs. Moses would inherit ½ of his estate, while his stepbrothers would get the remaining half. On the advice of a friend who didn't know of the second will, the testator varied a clause in his first will. A disagreement arose between Mrs. M and one of the brothers (respondent) as to whether provision of the codicil had the effect of giving the provisions of the first will precedence over the second will. Court a quo: first will as revised by the codicil was the testator's last will and the second will was invalid. BUT AD: effect should be given to the second will and the codicil.

42) Pillay v Nagan – incapacity to benefit:

The capacity of a person who forged the testators will to inherit. The first defendant forged his mother's will – he appointed as sole heir and certain immovable property which formally belonged to his mother was transferred into his name. The other children of the deceased claimed an order declaring that he deceased died intestate and the setting aside of the transfer of the property. They also wanted an order declaring the first defendant unworthy of taking any benefits from the deceased's estate. The court granted the order.

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43) Radley v Stopforth – Commissioner of Oaths certificate:**

The testator signed his will by making a cross. The certificate was attached directly below the cross. The master rejected the will because the certifying officer had not stated his official capacity on the will and that the certificate did not identify the testator. The beneficiaries argued that the act did not require the certifying officer to specify his official capacity and that the contents of the certificate did not need to follow the exact words of the act. The court *a quo* upheld both the master's objections. The daughters appeal against this decision was rejected.

44) Re Estate Whiting – revocation:

The testator executed a will on the 31 August 1908, appointing the plaintiff as the executor and the plaintiff and his wife as heirs. 3 September 1908 he executed a will, which was identical to the previous one but corrected the address. This will revoke the previous will and had been written by the plaintiff as required by the testator. The plaintiff and his wife were in terms of common law unable to benefit under the second will because the plaintiff had written it. The plaintiff wanted and order declaring the will on the 31 august as the valid will of the testator. The plaintiff contended that it wasn't the testator's intention to revoke the first will, but he merely intended to correct the address. Held: will on September 1908 was the last will of the testator.

45) Rens v Esselen – rectification:**

In clause 1 in his first will the testator bequeath his farms to his son D and property situated in Margate to his son S and daughter. In clause 2 he bound the property in question by a FC in favor of their children. Later the testator sold the Margate property and had to change his will. In his second will he bequeathed money to S and daughter. The attorney who drafted the second will and the testator's nurse testified that he was instructed to delete clause 2, as he wanted to give the farm to D unencumbered. When the will was typed the clause was added by mistake, and the testator didn't read it before he signed. D applied for an order declaring the clause pro non-scripto and the court granted the application.

46) Rhode v Stubbs – Massing:**

see notes.

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47) Spies v Smith – undue influence:**

The testator was mentally handicapped and suffered from epilepsy. At the age of 21 he made a will in which he appointed the 2 daughters of his step-mom as heirs. After his father's death he went to live with his uncle, who was appointed as his curator. He later made a second will revoking the first and appointing the child of his uncle as beneficiary. After his death, 10 years later, his step-mom contested the validity of the second will on behalf of her daughters. She contended that the testator wasn't mentally capable when he made the second will/ changed it because his uncle unduly influenced him. The court held the second will was valid and the appeal against this decision was dismissed.

48) Taylor, L v AE Pim – disqualification of inheritance:**

After the death of her husband the deceased took up residence with a married man (the defendant). The testator became addicted to alcohol and despite the fact that the doctor had forbid her to drink, the defendant supplied her with it which in the end caused her death. The defendant further tried to prevent her from receiving medical treatment. The testator left a will leaving her entire estate to the defendant. The testator's sister (the plaintiff) applied to have the will declared null and void. The court held that the defendant was unworthy to inherit.

49) Tregea v Godart – testamentary capacity:

While the testator was having treatment in hospital before his death, he told R to have a will drawn up in which he left his house and ½ his estate to Sister Tregea who nursed him. The other half would go to his nephew and nieces. On the day the testator died he was ill and conscious for only 3 brief intervals. According to R, he read the will in the morning and asked if it was of and the testator said yes. 2 hours before he died the testator made his mark on the will and R was appointed the executor and one Thompson signed as a witness. The 2 nephews who would have benefited under the previous will contested the validity of the last will on the ground that the testator didn't have testamentary capacity when he made it. The trial court held that the onus was on the defendants (sister and R) to prove that the will was valid and they never discharged this onus. On appeal the decision was upheld.

50) Van Wetten v Bosch – Section 2(3):

The deceased wrote the contested will himself. He left it in a sealed envelope, addressed to a friend of his. The envelope bore the words "Only open if something happens to me or if I decide differently." From the circumstances surrounding the making of the contested will, the

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court drew the inference that the deceased was contemplating suicide. This led the court to the conclusion that when the deceased gave the envelope to his friend, he did not intend the latter to hand the enclosed document to an attorney so that the attorney could see to the drafting of his will. At the time when it was envisaged that the envelope would be opened and the document read, the deceased would already be dead. The court held: A dead man cannot execute a will, and the deceased, even in a troubled frame of mind, would have appreciated that. This fact alone, in my view, shows that the contested will was intended by the deceased to be his will. The terms of the contested will bear that out. The order in terms of section 2(3) was therefore granted.

51) Van Zyl v Van Zyl: presumption against FC substitution:**

Under their mutual will the testator and his wife bequeathed a portion of their farm to each of their children and should a child predecease to their descendent. All the bequests to the children were subject to:

a) A usufruct in favor of the surviving spouse
b) Provision that in the event of a legatee dying without children, and then the land should revert in equal shares to the other descendents by representation.

One son (FW Van Zyl) died without leaving children – a child applied for an order declaring that portion of the farm bequeathed to FW didn't form part of his and his wife's joint estate. FW's widow was the first respondent in her capacity as executor and second respondent in her personal capacity. The applicants contended that the provision amounted to a FC and this was unsuccessful.

52) Volks v Robinson 2005 (CC) – Same sex inheritance:**

A *heterosexual* life partner is not a "spouse" or a "survivor" in terms of the Maintenance of Surviving Spouses Act and cannot claim maintenance from the deceased life partner's estate.

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POSSIBLE QUESTIONS

From the following list choose one that serves as authority for a particular statement made hereunder.

1) **Back v Master of the Supreme Court**
2) **Botha v The Master**
3) **Liebenberg v The Master**
4) **Braun v Blann and Botha**
5) **Du Plessis v Strauss**
6) **Lello v Dales**
7) **Ex Parte Williams: In re Estate Williams**
8) **Casey v The Master**
9) **Re Estate Whiting**
10) **Barclays Bank DC & O v Anderson**

A will, which has been revoked by a subsequent will, doesn't automatically revive the subsequent revoked will. = **Re Estate Whiting**

S 2(3) of the Wills Act can't be applied where the particular document consists of instructions to an attorney in terms of which a will must be drawn up and which must then still be approved by the Testator. = **Ex Parte Williams: In re Estate Williams**

A Testator may confer on Trustees the power to appoint the income and capital beneficiaries of a trust from a group of persons designated by the Testator. = **Braun v Blann and Botha**

The mere fact that beneficiaries in a will were joined *verbis tantum* doesn't mean that accrual can never take place = **Lello v Dales**

A *si sine liberis decessent* clause creates a tacit *fideicommisum* in favour of the child mentioned in the condition, provided that the child is a descendant of the testator. = **Du Plessis v Strauss**

S 2(3) of the Wills Act 7 of 1953 may be applied even if the deceased has not personally drafted or executed the particular document but has asked an attorney to do so = **Back v Master**

A will may be rectified by the insertion of words. = **Botha v The Master**

A condition in a will, which has the effect of breaking up an existing marriage, is valid where such an effect is purely incidental and did not form part of the Testator's intention. = **Barclays Bank DC & O v Anderson**

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A person who negligently caused the death of the testator may not inherit from the Testator. = **Casey v The Master**

Witnesses may sign anywhere on the last page of a will. = **Liebenberg v The Master**

NOTE THE NAME OF EACH PARTICULAR CONCEPT BELOW THE DEFINITION.

Refusing to inherit = **Repudiation**

The legal institution where property is left to a beneficiary subject to a condition that as much of it as may be left at the time of his death is to devolve upon another person. = ***fidei commissum residui***

The type of trust where the beneficiary is the owner of the trust property. = **Bewind**

The time when a beneficiary's right to claim delivery of the bequeathed property becomes enforceable. = ***Dies venit***

If an inheritance is made subject to this concept, vesting of the bequeathed property in the heir only takes place upon the happening of an uncertain future event. = **Suspensive condition**

If a bequest is made subject to this concept, the beneficiary loses his vested rights when a certain future event takes place. = **Resolutive time clause**

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

In this account the executor lists all the assets and liabilities of the estate and sets out how the estate is to be distributed. = **Liquidation & distribution account**

This evidence is evidence of facts and circumstances, which were known to the Testator, and places the Court in the Testator's position at the time of making the will, when the Court interprets the will. = **Armchair evidence**

This concept applies when a testator leaves a specific benefit. For example a house or a farm, to a beneficiary. = **Legacy**

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