

PVL 2602
EXAM PACK 2017

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LAW OF SUCCESSION

1. Indicate whether the following statements are true or false and substantiate your answer.

- (a) A child's share is calculated by dividing the value of the intestate estate by the number of children of the deceased plus one. (3)

False, 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.

- (b) In terms of the Wills Act 7 of 1953 the testator must sign all the pages of the will at the end of each page. (3)

False, If the will consists of more than one page, the testator must sign at the end of the wording on the last page, and he must further sign or acknowledge his signature on every preceding page.

- (c) In terms of the Wills Act 7 of 1953 the same witnesses must sign all the pages of the will. (2)

False, the same witnesses must sign and attest the will in the presence of one another and the testator. The Act only provides that the witnesses must sign the will. This provision is interpreted to mean that the witnesses must sign the last page of the will and not every page of the will.

- (d) A general unworthiness to inherit testate or intestate attaches to a

murderer, and therefore a murderer may never inherit from anybody.

False, it is not a general unworthiness which attaches to a murderer, however, but only an unworthiness to inherit from his or her victim and from certain persons very closely related to the victim.

- (e) Someone who kills another person, may never inherit from that person, because of the maxim *de bloedige hand erft niet* (the bloody hand does not inherit). (4)

False, only a person who intentionally or negligently caused the death of the deceased or a spouse, married in community of property, who murdered the other spouse are incapable of inheriting from the deceased. If a person was insane when he murdered the testator, he has the capacity to inherit from him as an insane person cannot be held accountable for his wrongdoing.

- (f) A testator may not leave a benefit to a beneficiary who has never been married on the condition that the beneficiary does not marry. (3)

True. Such a condition will be contra bonos mores since it encourages the beneficiary to continue in the unmarried state.

- (g) *Wood v Estate Fawcus* provides authority for the statement that a will, which has been revoked by a subsequent will, revives automatically when the subsequent will is revoked. (2)

False, *Wood v Estate Fawcus* provides authority for the statement that the revocation of a will takes effect from the moment when the revoking will is made, and not at the moment of the testator's death.

2. Define the term "residue of the estate". (5)

Refers to that part of the deceased's estate which remains after the payment of funeral expenses, administration costs, tax, the testator's debts and the legacies.

3. Mention 5 ways in which a legacy can fail. (5)

1. **Ademption. If a testator voluntarily alienates the object of a legacy in his lifetime, the legacy lapses.**
2. **If a legatee dies before the legacy vests in him.**
3. **If the legatee repudiates the legacy.**
4. **If the legatee is incapable of inheriting under the will.**
5. **If the bequeathed thing is annulled or destroyed.**
6. **If the testator becomes insolvent.**

4. John inherited a fortune from his grandfather when he was ten years old. On his fourteenth birthday, he signed a document stating that he wishes to leave his entire fortune to his two brothers, Dan and Fred. This document was attested by two of his fourteen-year old friends. John died in a car accident when he was seventeen and left his parents, Anna and Ben, and his brothers Dan and Fred behind. Answer the following questions:

- (a) Will John's estate devolve testate or intestate? Give reasons for your answer. (2)

John's estate will devolve intestate, because at the age of fourteen, when he made the will, he did not have testamentary capacity.

- (b) Write down the name's of John heir's. (2)

His parents, Anna and Ben

5. In *Ep Maurice* the court emphasised 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. (6)

The court must be satisfied that it has before it a document:

1. **which was drafted or executed by a person**
 2. **who has since died, and**
 3. **who intended that document be his/her will.**
6. Briefly name four instances when the service of a trustee will be terminated. (4)

- **On the death of the trustee**
- **On the resignation of the trustee**
- **Upon the removal of the trustee from his office by the Master under the following circumstances:**
 - **if he has been convicted of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a fine**
 - **if he fails to give security to the satisfaction of the Master within two months after having been requested to do so**
 - **if his estate is sequestrated or liquidated or placed under judicial management**
 - **if he has been declared mentally ill or incapable of managing his own affairs or if he is detained in an institution as a mentally ill patient or as a state patient**
 - **if he fails to perform any duty imposed upon him by or under the Trust Property Control Act or to comply with any lawful request of the Master.**
- **When the purpose of the trust has been achieved, the trustee**

ceases to be a trustee.

7. Who is obliged to collate? (1)

The deceased's descendants if they are heirs of the deceased, whether testate or intestate, provided that testate heirs are obliged to collate only if they would have inherited ab intestato from the deceased if the deceased had died intestate

8. Who is entitled to collation? (1)

Descendants who themselves have a duty to collate.

9. Which benefits have to be collated? (3)

- **benefits received by a child as part of his or her inheritance**
- **benefits received for the promotion of a child's occupation or business**
- **benefits given with a view to a marriage**

10. Name one benefit which does not have to be collated. (1)

- **gifts given out of generosity**
- **benefits received by a child for services rendered - however, the services rendered must be more substantial than mere domestic obligations**
- expenses incurred by the parents for the maintenance and education of their children

11. Mary and John are siblings. In his will, John appointed his sister Mary to inherit his whole estate. In her will, Mary appointed her husband Peter, to

be her heir. Mary and John are killed in the same car accident, and no evidence exists as to whom died first. John leaves behind both his parents. Mary leaves behind her parents and her husband, Peter.

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

When two people are killed in the same disaster and it is not possible to establish who died first, the court will find that they died simultaneously. In *Ex parte Graham* it was held that no presumption as to the order of death exists. That means that the one could not inherit from the other. John's will cannot be executed because Mary cannot inherit from him. His estate will therefore devolve in terms of the law of intestate succession and his mother and father will inherit his estate. Mary is survived by her husband and he will inherit her estate in terms of her will.

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

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

12. Xavier and Wanda were married in community of property and had three children, Anna, Grace and Ben. Anna died in 1999, leaving her two children, Deon and Carl. Ben was married and had a daughter Linda.

Xavier died in February of 2001 and left Wanda, Grace, Ben and his three grandchildren, Deon, Carl and Linda behind. He also left his father, Fred. Xavier and Wanda's joint estate is worth R800 000.

Calculate how Xavier's estate is going to devolve and indicate how much each person will receive. Give reasons for your calculations. (10)

1. Wanda gets R400 000 ($R800\ 000 \div 2$) because Xavier and Wanda were married in community of property and the joint estate has to be divided in terms of matrimonial property law. Please note that she does not inherit this amount.
2. **Xavier 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 R125 000, whichever is the greater.**
3. **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 (for the surviving spouse).**
4. **To calculate the child's share, we therefore count Anna (as she left children to represent her), Grace and Ben, plus Wanda, and divide the value of the estate by 4 ($R400\ 000 \div 4$)**
5. **This means a child's share amounts to R100 000**
6. **Wanda therefore inherits R125 000, because it is more than the child's share of R100 000.**
7. **R275 000 of Xavier's estate remains to be divided between his three descendants.**
8. **Anna, Grace and Ben are entitled to inherit R91 666 each ($R275\ 000 \div 3$)**
9. **Anna is predeceased and is represented by Deon and Carl – each get half of her share.**
10. **Linda inherits nothing as her father is still alive.**
11. **Fred inherits nothing as descendants inherit before ascendants.**
13. Xeno and Vera were married out of community of property with the accrual system. They have two children: Abel and Bobby. Abel was married and

had two children, Paul and John. Xeno also had a child, Ethel, from a previous marriage. Ethel died in 1999 and left an adopted child, Sandy.

Xeno died in December 2000 and left behind Vera, Abel, Bobby, Paul, John and Sandy. Xeno's estate amounts to R900 000. Vera is entitled to R100 000 accrual from Xeno. Calculate how Xeno's estate is going to devolve and give reasons for your calculations. (10)

1. **According to the facts, Vera is entitled to R100 000 accrual in terms of the matrimonial property law – she does not inherit this. This R100 000 must be deducted from Xeno's estate in terms of intestate succession rules ($R900\ 000 - R100\ 000 = R800\ 000$)**
2. **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 R125 000, whichever is the greater.**
3. **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 (for the surviving spouse).**
4. **To calculate the child's share we therefore count Abel, Bobby and Ethel, plus one (Vera) and divide the estate of R800 000 by 4. E is counted because she was a child from a previous marriage and she is survived by her adopted child, Sandy. An adopted child is for all purposes considered to be in the same position as a natural child. A child's share therefore equals R200 000.**
5. **Vera will therefore inherit R200 000 as this is more than a child's share, which is R125 000.**
6. **The children share the rest of the estate equally ($R600\ 000 \div 3$).**
7. **Abel, Bobby and Ethel therefore each inherits R200 000.**
8. **Ethel is represented by Sandy, her adopted daughter, because she is predeceased.**
9. **Paul and John do not inherit anything because their father, Abel, is still alive.**

14. Mention the requirements for the establishment of a valid trust. (6)

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

- 1. The founder must intend to create a trust.**
- 2. The creation of the trust must be by means of a written agreement, a testamentary writing or a court order.**
- 3. The trust property must be reasonably clearly defined.**
- 4. The trust must be established for an object of purpose, that is the trust property must be intended to be applied for the benefit of a specific or determinable person(s), or with an eye to a determined or determinable aim. The trustee may be authorised to appoint beneficiaries from a specified class of persons designated by the testator. The object or purpose of the trust may not conflict with a particular legal rule, boni mores or public policy.**

15. Write a note on the remuneration of a trustee. (4)

A trustee is entitled to such remuneration as provided for in the trust instrument or, where no such provision is made, to a reasonable remuneration, which shall be fixed by the Master in the event of a dispute. In the case of a professional person acting as a trustee in his or her capacity as such professional, the remuneration reasonably payable to such a professional person will be due to him or her as the trustee (Griessel v Bankorp Trust Bpk).

16. Tiaan's valid will contains the following provision:

" I leave my farm to my daughter, Daisy. If she should ever leave South Africa permanently, the house has to go to my sister, Sarah. My wife has the use and enjoyment of the farm until her death"

Tiaan died in 1999, leaving his wife, Wendy, his daughter Daisy, Daisy's

son, Fred and Tiaan's sister, Sarah.

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.

- (a) resolutive condition (4)

Resolutive condition for the daughter, Daisy. Her rights will terminate if an uncertain future event (leaving the country) takes place. *Dies cedit* and *dies venit* take place for Daisy on Tiaan's death.

- (b) suspensive condition (4)

A suspensive condition is applicable to Sarah. Because the vesting of her rights are postponed until an uncertain future event happens. *Dies cedit* is postponed until Daisy leaves the country. *Dies veniti* is also postponed until Daisy leaves the country, and if the usufruct is still in place, it is further postponed until the end of the usufruct.

- (c) direct substitution (4)

Direct substitution occurs where the testator names a series of beneficiaries to inherit in the alternative. When the first one inherits the substitute has no hope of ever inheriting. Not applicable here as the beneficiaries inherit one after the other.

- (d) fideicommissary substitution (4)

Fideicommissary substitution takes place where a testator nominates beneficiaries to inherit one after the other. The first

beneficiary is called the fiduciary and the next beneficiary is called the fideicommissary. The fiduciary has to pass the benefit to the fideicommissary on the happening of an uncertain future event. Is applicable in this case, as the farm will pass from Daisy to Sarah, according to the express fideicommissum. A fideicommissum tacitum in favour of Fred may also be read into the provision. *Dies cedit* and *dies venit* are postponed for Sarah until Daisy leaves the country.

(e) usufruct (3)

In a usufruct one person gets ownership of a property while another person gets the use and enjoyment of the same property. A usufruct is therefore created in favour of Wendy – she is the usufructuary and Daisy (or maybe Sarah) is the owner. *Dies cedit* and *dies venit* arrive for Wendy at the testator's death.

17. Mr and Mrs Smith were married in community of property. Mr Smith dies intestate and leaves behind his wife, Mrs Smith, and adopted daughter, Dora, a grandchild, Greta (the daughter of a predeceased son, Shaun), a son Ralph (who had not spoken to his parents for many years and refuses to inherit from his father), Ralph's son Peter and Mr Smith's father, Frank.

Mr and Mrs Smith's joint estate amounts to R800 000.

- (a) Divide Mr Smith's estate, giving detailed reasons for your calculations and explain why a family member will inherit or will not inherit.

(15)

1. Wanda gets R400 000 ($R800\ 000 \div 2$) because Mr and Mrs Smith were married in community of property and the joint estate has to be divided in terms of matrimonial property law. Please note that she does not inherit this amount.

2. Mr Smith 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 R125 000, whichever is the greater.

3. **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 (for the surviving spouse).**
4. **To calculate the child's share we therefore count Dora, Shaun and Ralph, plus one (Mrs Smith) and divide the estate of R400 000 by 4. Dora is counted because she is adopted and Shaun is survived by his daughter, Greta. An adopted child is for all purposes considered to be in the same position as a natural child. A child's share therefore equals R100 000.**
5. **Mrs Smith therefore inherits R125 000 (as this is more than a child's share). Mrs Smith also inherits Ralph's share ($R275\,000 \div 3 = R91\,666$), as he repudiates it, and in terms of Section 1(6) of the Intestate Succession Act the surviving spouse is entitled to the benefit. Mrs Smith therefore inherits R216 666.**
6. **Dora and Greta will inherit R91 666.**
10. **Shaun is represented by Sandy, his daughter, because he is predeceased.**
7. **Peter inherits nothing, because his father, Ralph is still alive, and he repudiated his share.**
8. **Frank inherits nothing, because descendants inherit before ascendants.**

18. Seventeen year old Xavier went on holiday to Durban, with his two best friends, Joseph (sixteen years old) and Moses (eighteen years old). Whilst swimming in the sea, Xavier was attacked by a shark which bit off his right arm. His friends rushed him to hospital. In the hospital Xavier decided to make a will. He dictated the will to Moses who wrote down his instructions.

In his will of one page, he left his car to Moses, R5 000 to Joseph and the residue of his estate to his grandparents who raised him.

Xavier, who was right handed, then made a thumb print with his left hand at the end of the will and Joseph and a nurse signed the will as witnesses.

Xavier died a few hours later. He was survived by his father and his grandparents.

Answer the following questions on these facts:

- (a) Was Xavier old enough to make a will? Explain your answer. (1)

Yes, any person, 16 years or older, may make a will.

- (b) Was Joseph old enough to be a witness to a will? Explain your answer. (1)

Yes, a witness must be 14 years or older and competent to give evidence in a court of law.

- (c) Did Xavier's will comply with all the testamentary formalities of a valid will? Explain your answer. (5)

- **Two witnesses were present as required by the Wills Act.**
- **The testator signed at the end of the will as required.**
- **However, he signed with a thumb print – in other words, he made a mark.**
- **When a testator signs with a mark the requirements of s 2(1)(a)(v) must be met. This means that a commissioner of oaths must append a certificate to the will certifying that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator.**

- **Since the certificate is absent, the will is not valid.**

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

(5)

They can apply to a court in terms of Section 2(3) of the Wills Act to order the Master to accept the document as a valid will. The court will do so if the court is satisfied that was drafted or executed by a person who died in the meantime, and who intended that document to be his/her will, although it does not comply with all the formalities for the execution of wills.

- (e) Suppose the will was valid. Discuss the capacity of David and Joseph to inherit under the will.

(3)

In terms of Section 4A of the Wills Act a witness to a will or a person who writes out the will or any part in his own handwriting is disqualified from receiving any benefit under such will.

However, in terms of Section 4A(2), the court may declare both of them competent to receive a benefit under the will if the court is satisfied that they did not defraud or unduly influence the testator in the execution of the will.

19. John's friend, Peter, is an attorney. In 1993, Peter drew up a will for John in terms of which John appointed his wife Mary and his children, Sam and Kim, as his beneficiaries. Peter kept the original will after it was duly executed and John got a copy.

In 2002 John divorced Mary and married Nora a month later. On their honeymoon John died in a motor vehicle accident.

- (a) Was John's will revoked by his divorce? Discuss with reference to legislation. Explain who will inherit his estate. (7)

No, although John's will was not revoked by his divorce, a person's divorce has an effect on his or her will, but only for a limited time and only in respect of certain beneficiaries. The Law of Succession Amendment Act 43 of 1992 provides that if a person dies within three months after his or her marriage was dissolved by a divorce or annulment, the previous spouse will not inherit under that person's will. This provision gives a person three months after a divorce or annulment to change a will.

- (b) Suppose that John's copy of the will was found amongst his possessions. A note was attached to the copy of the will. On the note John had written: "I hereby revoke all my wills."

- (i) Name three ways in which a will can be expressly revoked by a testator. (3)

- **Where the testator makes a later valid will in which he or she expressly revokes all previous wills.**
- **Where an unmarried testator expressly revokes his or her will by means of a subsequent antenuptial contract.**
- **a testator to destroy his or her will, whether wholly or in part with the intention of revoking it.**

- (ii) Taking into account your answer in (i), explain whether the note on John's will constitute an effective express revocation of the will. (1)

Based on the decision of the court in the case of Marais v the Master, John's note constitutes an effective express revocation of his will.

- (iii) Will a court be able to declare John's will to be revoked?
Discuss with reference to legislation. (7)

Yes, a court will be able to declare John's will to be revoked. Section 2A of the Wills Act expressly empowers the court to declare a will or part of it to have been revoked if the court is satisfied that a testator intended to revoke the will or part of it by way of

- (a) a written indication on the will made by the testator or caused by him to be made;
(b) or performed any other act in relation to the will (or caused such act to be preformed) which is apparent on the face of the will, or
(c) drafted another document or caused such document to be drafted from which such intention is evident**

- (iv) Suppose that the will was validly revoked. Who will be John's beneficiary/beneficiaries? Only write down the name/names?
(2)

Nora, Sam and Kim

20. Name the following legal concepts in T's will and indicate very briefly when *dies cedit* and *dies venit* take place for the parties involved:

- (a) "I bequeath my assets to X. Whatever remains upon X's death must pass to Y." (3)

Fideicommissary substitution - X will first inherit the estate and afterwards, when X dies, Y will inherit what's left.

- (b) "I bequeath my farm to my son. My wife may stay on in the house on

the farm until she dies."

(3)

The legal concept in this provision is a usufruct. The wife is the usufructuary, and the son is the owner or remainder man. For the usufructuary, dies cedit as well as dies venit arrive on the death of the testator. For the remainder man, on the other hand, dies cedit arrives on the death of the testator, and dies venit on the death of the usufructuary.

- (c) "I bequeath my house to Jan. When he turns sixty, or when he dies before that, the house must be sold and the money paid to the SPCA."

(3)

The son will acquire ownership of the farm subject to a resolutive or terminative time clause. It is uncertain when he will die but he is certain either to reach 60 or to die, and then ownership must pass to the SPCA. It is certain that the son's ownership will terminate and his heirs will never get the farm. In this case dies cedit as well as dies venit for the son arrive on the testator's death. (The rights of the SPCA are, at the same time, subject to a suspensive time clause.)

- (d) "I bequeath my whole estate to my wife. She must look after my mother until she dies."

(3)

Modus for an impersonal purpose - looking after the testator's mother.

- (e) I bequeath my horse to Susan. If she cannot or doesn't want to inherit the horse, Maria must inherit the horse."

(3)

Direct substitution - either Susan or Maria will inherit the house.

21. 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, Sam. T's unmarried daughter was expecting a child upon T's death. Discuss the capacity of Sam and the unborn, illegitimate grandchild to inherit with reference to legislation. (7)

22. What did the court decide in *Barrow v the Master* with regard to ademption? (3)

The failure of a legacy by ademption depends on the testator's presumed intention. The presumption may therefore be rebutted by evidence of the testator's actual intention.

23. How is a testator's power to disinherit his/her spouse and children limited? Discuss. (5)

The right of the children to claim maintenance out of the deceased estates of their parents has become settled law in South Africa. Even a major child is entitled to maintenance from his parent's estate if such a child cannot support himself.

24. T's valid will contains the following bequests. In each case you must explain how the benefit will devolve, giving reasons for your answer.

- (a) "I leave my house to my sister's two daughters, A and B." A dies before the testator, but leaves a child, C. (5)

The share that A would have inherited will be inherited by B. 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 of section 2C(2) is not applicable, because A and B were not descendants of the testator.

- (b) "I leave my farm to my wife, W, and my daughter, A. If either W or A does not inherit, my brother B must inherit her share." A

repudiates her share of the farm. A has a child, B. (5)

The share that A would have inherited will be inherited by W. Section 2C(1) is applicable, because A is a descendant of the testator, she is entitled to a benefit in terms of the will together with the surviving spouse, and she repudiates the benefit. B does not inherit because section 2C(1) does not allow for a contrary intention indicated by the testator.

25. The basis of the trust is the Germanic concept of *Treuhand*. How can this concept be described? (3)

To be the entitled party, not for oneself but for another or for a particular impersonal purpose.

26. Explain what is meant by the doctrine of election. (2)

The doctrine of election entails that, where a testator leaves a bequest to a beneficiary and at the same time imposes an obligation on him or her, the beneficiary may not accept the benefit but refuse to comply with the obligation.

27. What is the basis of collation? In other words, why does it have to take place? (1)

Collation is the principle according to which the executor of an estate must under certain circumstances take benefits given to certain heirs by the deceased during his lifetime into account when distributing the estate among certain beneficiaries.

28. X dies intestate and leaves the following relatives:

His father F and his grandfather G on his mother's side (his mother is

predeceased).

His half-brother B, who was born from his mother's first marriage to K.

His predeceased full brother D's son S.

The total value of X's estate is R800 000. Explain the devolution of X's estate giving reasons for your calculations. (5)

1. **X's estate splits in two and will be divided between his father and his relatives on his mother's side as his mother is predeceased.**
2. **F will inherit R400 000 ($R800\ 000 \div 2$)**
3. **X's brother D and his half-brother B will share the remaining R400 000 that would have gone to M had she been alive. Therefore they each inherit R200 000.**
4. **However D is predeceased and is represented by his son S.**
5. **G won't inherit anything as descendants inherit before ascendants.**

29. Indicate how the bequeathed benefit will devolve in the following scenario's. Give reasons for your answers.

- (a) "I leave my estate to my best friends A and B." A died before the testator. (3)

The share that A would have inherited will accrue to B. A and B were joined *re et verbis* and this indicates that the testator probably intended the *ius accrescendi* (right of accrual) to operate.

- (b) "I leave my estate to my two sons, A and B. If one of them does not inherit, his share will go to my daughter, D." A dies before the testator, but leaves a child, C.

The share that A would have inherited will go to D. The testator expressly provides for direct substitution and this clear indication

of his intention excludes the operation of section 2C(2) and of the *ius accrescendi* (right of accrual).

30. Define the law of succession. (2)

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

31. Distinguish between an estate and the residue of an estate. (4)

Estate = A testator's estate consists of the assets and liabilities.

Residue of an estate = Refers to that part of the deceased's estate which remains after the payment of funeral expenses, administration costs, tax, the testator's debts and the legacies.

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

1. W is entitled to R200 000, which is half of the estate, in terms of the marriage in community of property and the joint estate has to be divided in terms of matrimonial property law. Please note that she does not inherit this amount.

2. **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 R125 000, whichever is the greater.

- 3. 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 (for the surviving spouse).**
- 4. We have to count S plus one (for W) when calculating the child's share. A child's share is therefore R100 000 ($R200\ 000 \div 2$).**
- 5. W will therefore inherit R125 000, as this is more than a child's share.**
- 6. S inherits R75 000 ($R200\ 000 - R125\ 000$).**
- 7. M and B inherit nothing because descendants inherit before ascendants and a relative in the collateral line.**

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

- 1. X's estate is entitled to accrual from W's estate. X's estate therefore amounts to R600 000 ($R450\ 000 + R150\ 000$).**
- 2. 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 R125 000, whichever is the greater.**
- 3. 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 (for the surviving spouse).**
- 4. We have to count S and D, plus one (for W). A child's share is therefore R200 000 ($R600\ 000 \div 3$).**

5. **W therefore inherits R200 000, as this is greater than a child's share.**

6. **S and D each inherit R200 000 ($R400\ 000 \div 2$).**

34. From the following list of cases you must choose one that serves as authority for the particular statement made hereunder.

1. *Back V Master of the Supreme Court*
2. *Ex parte Williams: In re Estate Williams*
3. *Casey v The Master*
4. *Gafin v Kavin*
5. *Pillay v Nagan*
6. *Botha v The Master*
7. *Rens v Esselen*
8. *Re Estate Whiting*
9. *Levy v Schwartz*
10. *Barclays Bank & O v Anderson*

(a) Section 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. (1)

Back v Master of the Supreme Court

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

Botha v The Master

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

Barclays Bank & O v Anderson

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

Casey v The Master

35. Explain what a testamentary writing is as defined by the court in *Ex parte Davies*. (3)

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

- 1. the property bequeathed**
 - 2. the extent of the interest bequeathed, that is ownership, usufruct, fideicommissum, etc.**
 - 3. the beneficiary**
36. In their mutual will B and S consolidated their estates with the intention of massing their estates. On B's death S refused to accept any benefit under the mutual will. Answer the following questions.

- (a) What is a mutual will? (2)

A mutual will is a will in which two or more testators benefit each other mutually. It is also a joint will.

- (b) What is the effect of S's refusal of the benefit? (2)

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

37. What is the "golden rule" when interpreting a will? (1)

The testator's intention must be established from the words of the will.

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

Yes. The Master may not consider them, but they are considered by court. Only a court may hear evidence and, because the hearing of evidence is necessary when presumptions are considered, only the court may consider presumptions.

39. Discuss the formalities prescribed by section 2(1)(a) of the Wills Act 7 of 1953 which have to be complied with in order for a will to be valid if a testator signs a will, consisting of two pages, with his or her mark. (10)

If the testator signs by making a mark, the will must comply with the requirements of section 2(1)(a)(v) of the Wills Act. This means that a commissioner of oaths must append a certificate to the will. The testator's mark must, further, be made in the presence of the commissioner of oaths. The certifying officer must certify:

- 1. that he has satisfied himself as to the identity of the testator**
- 2. and that the will so signed is the will of the testator**

Failure to comply with these requirements renders the will invalid.

40. 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 one page only.

If the will consists of one page, it must be signed at the end by the testator. The testator must sign the will or acknowledge his signature in the presence of two, or more, competent witnesses who are present at the same time.

The question concerning what constitutes a "signature" has caused problems in the past. This problem has been solved by the Law of

Succession Amendment Act, which has amended the Wills Act so that "sign" now includes the making of initials and "signature" has a corresponding meaning. This means that a testator or a witness may now sign a will with initials only.

The testator is required to sign at the end of the last page of the will, that is at the end of the body of the will. In *Kidwell v The Master* the testator signed the second page of his two-page will some 13 cm below the signature of the second witness, and 17 cm below the attestation clause. It was held that the will was invalid because of the possibility of fraud.

The same witnesses must sign and attest the will in the presence of one another and the testator. Normally the witnesses will sign at the end of the last page of the will, but in *Liebenberg v The Master* the court held that the will was valid although the witnesses signed at the top of the last page. A witness may however not sign by making a mark.

The witnesses need not know that contents of the will. It is not even necessary for them to know that they are signing a will. The only requirement is that they should know that they are witnessing the testator's signature.

41. 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 more than one page.

If the will consists of more than one page, the testator must sign at the end of the last page, and he must further sign or acknowledge his signature on every preceding page in the presence of the same two, or more, witnesses who are present at the same time. The testator may sign the pages preceding the last page anywhere on the page. The witnesses need not sign the previous page – they must sign only the last page of the will. No attestation clause is required by law.

The testator is required to sign at the end of the last page of the will, that is at the end of the body of the will. In *Kidwell v The Master* the testator signed the second page of his two-page will some 13 cm below the signature of the second witness, and 17 cm below the attestation clause. It was held that the will was invalid because of the possibility of fraud.

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The witnesses need not know that contents of the will. It is not even necessary for them to know that they are signing a will. The only requirement is that they should know that they are witnessing the testator's signature.

42. Write down the name of each particular concept below its definition.

(a) Refusing to inherit (1)

Repudiation

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

Fideicommissum residui

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

Bewind

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

Dies venit

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

Suspensive condition

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

Resolutive time clause

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

Collation

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

Liquidation and distribution account

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

Armchair evidence

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

Legacy

43. Section 13 of the Trust Property Control Act provides for the variation of trust provisions by the court. Discuss briefly. (5)

If a trust instrument contains any provision which brings about consequences which in the court's opinion the founder did not foresee or contemplate and which hampers the achievement of the objects of the founder or prejudices the interests of beneficiaries, or is in conflict with public interest, the court may delete or vary such provision or make in respect of it any order which the court deems just; including an order whereby particular trust property is substituted for other particular property, or an order terminating the trust.

PVL 202-U: Law of Succession Examination May 2009: Memorandum

Question 1

1.1 Give a definition of each of the following concepts:

1(a) Legacy (2)

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

1(b) Fideicommissary substitution (2)

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

1(c) Direct substitution (3)

Direct substitution (*substitutio vulgaris*) occurs in the will where, a testator names a substitute or even a whole series of substitutes who are to inherit if the instituted heir or legatee does not inherit (1): for example, if the instituted heir or legatee repudiates (1) or is incompetent (1) to take a benefit under the will or if he dies before the testator (1). Either the instituted heir /legatee or the substitute inherits (max 3)

1(d) Suspensive condition

(3)

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

(3)

Question 1.2

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

Answer the following questions and give reasons for your answers:

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

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

(2)

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

them.

(13)

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

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

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

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

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

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

The first requirement, namely that the document concerned must have been drafted or executed by a person who has since died, caused problems as, literally interpreted, it means that the deceased had to personally draft the document.(1) At first it was

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

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

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

Thirdly, the Court looked at the intention of the legislature. The Court discussed the viewpoint in Back's case regarding the intention of the legislature in enacting section

2(3). One of the arguments was that the purpose of section 2(3) was to prevent the last wishes of a testator from being nullified by non-compliance with technical formalities. If the personal, physical drafting by a testator should be a prerequisite to the operation of section 2(3), the legislature would in fact be requiring compliance with another formality before recourse may be had to a provision which "condones" non-compliance with the formalities prescribed in section 2(1). In *Back* it was argued that this could not have been the intention of the Legislature and would in fact make a conspicuous absurdity of section 2(3).(1)

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

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

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

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

(max 13)

TOTAL Q1: [25]

Question 2

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

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

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

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

Answer the following questions:

2.1 Discuss the capacity of the following beneficiaries to inherit:

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

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

(3)

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

Although G's adoption does not exclude him from inheriting as adopted children are

treated as own children (1), a person who intentionally caused the death of the deceased is incapable of inheriting any benefit in the estate of the deceased(1) Thus a murderer (G) is incapable of inheriting any benefit from his victim (T) - *Ex parte Steenkamp and Steenkamp* (1) (3)

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

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

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

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

(1) the amount in the estate of the deceased spouse available for distribution to heirs and legatees (1)

(2) the existing and expected means (1), earning capacity (1), financial needs and obligations of the survivor (1) and the subsistence of the marriage (1)

(3) the standard of living of the survivor during the subsistence of the marriage (1) and his age at the death of the deceased spouse (1)

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

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

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

(max 14)

TOTAL Q 2: [20]

Question 3

3.1 Write a note on the variation of trust provisions by the court. Include a discussion of *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) in your answer. (15)

3.1 Section 13 of the Trust Property Control Act 57 of 1988 extends the power of the court to vary trust provisions. If a trust instrument contains any provision which brings about consequences which, in the opinion of the court, the founder of the trust did not contemplate or foresee (1) and which (1) hampers the achievement of the objects of the founder,(1) or (2) prejudices the interests of the beneficiaries, (1) or (3) is in conflict with the public interest,(1) the court may, on the application of the trustee or any person who in the opinion of the court has a sufficient interest in the trust property, delete or vary any such provision or make in respect thereof any order which the court deems just.(1) This may include an order whereby trust property is substituted for other property, as well as an order terminating the trust . *Ex parte President of the Conference of the Methodist Church of Southern Africa: In re William Marsh Will Trust*.(1) In 1899 the testator left his estate in trust to

his son to be used for the establishment of homes for "destitute white children". The court decided that the testator did not foresee that economic circumstances would change to such an extent that the number of white destitute children would become so few that his charitable intention would be frustrated. The court also decided that it would not be against public policy to accept children of all races into these homes. The court accordingly ordered the rescision of the word "white" from the will.(1)

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

In *Minister of Education and Another v Syfrets Trust Ltd* NO 2006 (4) SA 205 (C) the court had to decide on the validity of a trust. The trust, created in 1920, provided that only white, non-Jewish men may be beneficiaries of the trust.

(1) The validity of these provisions were challenged in 2002. The applicants based their application for an order deleting the discriminatory provisions on three

Grounds:

(a) Section 13 of the Trust Property Control Act (1)

(b) Common law, which prohibits bequests that are illegal, immoral or contrary to public policy (ie *contra bonos mores*). (1)

(c) The Constitution, specifically the equality and anti-discriminatory provisions of section 9. (1)

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

The Court held:

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

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

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

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

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

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

X's estate amounts to R700 000. Calculate how X's estate will devolve and give reasons for your calculations. (10)

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

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

Each wife will receive R125 000 as it is more than a child's share (1). The residue of R375 000 will be shared by F, H, Y (representing E (1)) and Z (representing G). M and P do not inherit as they are ascendants (1) and S doesn't inherit as he is a collateral. (=12)
(max 10)

Total Q 3: [25]

TOTAL Q3: [25]