

Will drafting - modus versus condition

By Lesley Maman

In the mixed jurisdiction of South Africa where we have both common law and statutes or case law,

a testator to a Will is free to appoint beneficiaries, heirs, legatees, executors, trustees and guardians in his Will under whatever terms he wishes.

A Will is a personal document and a testator cannot delegate

the drafting of his Will to another by power of attorney or empower another by his Will to determine how his estate must be distributed after his death.

Whether a particular bequest is to be interpreted as a legacy

or an inheritance subject to a condition or a modus depends on the language used by the testator to express his intention. In cases of doubt, a provision attached to a bequest is presumed to be a modus and not a condition.

A condition must be distinguished from a modus

A modus

Simply explained, a modus is a method by which an obligation can be imposed upon a beneficiary without making his rights conditional.

Where a testator wishes to make provision for, say, his domestic pet, he could either establish a trust or impose an appropriate condition or modus on the heirs or legatees.

An example is that property may be left to a particular person subject to the condition that they care for a domestic pet.

The interpretation of whether a testator has imposed a modus or left it to the discretion of the beneficiary as to how he uses the property, is a question of construction.

If the performance of a modus is illegal, immoral, impossible or unconstitutional it is regarded as pro non scripto

and the bequest is given to the beneficiary free of the invalid modus.

The addition of a modus to a bequest does not make the bequest conditional and vesting is not postponed. An example would be if the legatee is required to divorce his current spouse, or conditions which are considered contrary to public policy (Minister of Education v South Trust Ltd NO 2006 4 SA 205 (C) 2006).

Any juristic or natural person or trust can be a beneficiary or legatee.

A modus may be created in favour of specific or ascertainable beneficiaries or it may be imposed for the fulfilment of an impersonal object such as the continuance of a religious foundation or specific association.

Law would not be what it is if there were no exceptions, so the exception in these circumstances is applied

under the Cy Près doctrine.

Briefly, this doctrine is where a bequest or legacy has been given to a specific association which no longer exists, and the court is then empowered to leave that bequest or legacy to an institution or body which comes closest to its charitable purposes.

In Jewish Colonial Trust Limited v Estate Nathan, Watermeyer JA remarked:

“A modus is defined by Goudsmit in paragraph 64 of his treatise under pandects is a clause by which “the testator imposes upon him on whom he confers a gift the charge of employing it wholly or in part for certain specified purposes or the duty of doing something else which restricts or diminishes the extent of the gift or legacy...”

Addition of a modus to a bequest does not make it conditional and therefore does not affect the vesting”.

practitioners and sets high minimum standards for the industry to protect the public’s interests.

A condition

A condition must be expressed or implied. Every bequest is subject to the condition that the beneficiary survives the testator.* Where there is any doubt if a bequest in a Will is subject to a condition, the courts will interpret the condition restrictively in order to limit the burden imposed on the beneficiary. This approach is particularly applied to forfeiture clauses.

A condition however is one where the legacy will be fulfilled should an uncertain future event occur. Such a condition can either be expressed or implied or where the Will is unclear there is a presumption against such condition and the legacy would be interpreted restrictively.

Suspensive and resolutive conditions

Conditions can either be suspensive or resolutive. Where suspensive, vesting does not take place until the condition has been fulfilled whereas if restorative, the bequest vests immediately on the death of the testator but the benefit

will terminate under the condition being fulfilled, and this circumstance if a testator fails to appoint a further beneficiary under the resolutive condition is a nude prohibition and will be disregarded.

Care should be taken in the preparation of Wills that prejudices are not incorporated as condition. Should any of these conditions be considered impossible, immoral, illegal or unconstitutional they will be taken as being as though it had not been written and the legatee will receive the legacy free of the condition (Minister of Education v South Trust Limited NO 2006 4 SA 205 (C)).

A condition postpones but does not oblige and the modus obliges but does not postpone.

The inheritance or bequest subject to a modus vests immediately and the beneficiary is subject to a personal duty to do whatever the modus directs. This highlights the fundamental distinction between a bequest subject to a condition and the bequest subject to a modus.

This article was written by Lesley Maman, FISA member and Managing Partner of Maman Attorneys.

The Fiduciary Institute of Southern Africa (FISA) is a non-profit organisation that represents fiduciary

*See Ex parte Wessels and Venter NNO in re: Pyke–Nott’s Insolvent Estate 1998(2) SA 677 (O)