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DEVELOPMENTS WITH ELECTRONIC WILLS

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INTRODUCTION AND GENERAL BACKGROUND

"One thing is certain, technology is here to stay, and as technology progresses it will continue to affect and change the landscape of the legal profession." (Schwarzentraub 2013:24)

Law of Contract:

"As electronic signatures replace pen-and-ink signatures on paper contracts, the law has evolved to adjust to this technology." (Gee 2015:1.5)

Law of Succession:

'Digital or electronic wills', 'digital testation', 'E-bequests' ('making bequests via electronic technology'), 'digital expression of wishes', 'DVD will'

Still, however, succession seems to be reluctant to embrace the new technological era / computer age – worldwide (*still* only Nevada enacted legislation to enable electronic wills)

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INTRODUCTION AND GENERAL BACKGROUND

1990 – video wills? "… too revolutionary at the time and … " (Corbett *et al* 2001:57)

2000 – "So it seems that when the exclusions in [Electronic Communications and Transactions Act] were drafted, the approach of functional equivalence was new to the law, **and technological aspects were treated with caution**. It seems to have been **too extreme** to allow electronically represented wills or wills in the form of data messages to be considered functionally equivalent to a validly executed paper-based will." (Papadopoulos 2012:97)

Reid *et al* (2011:363):

> The court distinguished commercial transactions from wills by noting that 'much more formality has historically been required in the execution of wills than in the execution of the day-to-day business and commercial papers.'

Raubenheimer v Raubenheimer 2012 (5) SA 290 (SCA) [par 1]:

> It is a never-ending source of amazement that so many people rely on untrained advisors when preparing their wills, **one of the most important documents they are ever likely to sign.**

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INTRODUCTION AND GENERAL BACKGROUND

Testate succession: … *intention* of testator as expressed in a *will*

The only valid form of will in South Africa: statutory (underhand) will and it must comply with statutory requirements (formality requirements/formalities) set out in section 2(1)(a) of Wills Act

Will – no statutory definition (existing definitions should include all the 'requirements' (e.g. testamentary capacity, *animus testandi* …) necessary for a will to be valid/for a document to become a will)

What is a will in essence?

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DRAFT (FORMULATE) AND EXECUTE

FREEDOM OF TESTATION: free to dispose of assets after death

WISHES MUST BE MADE KNOWN IN A DOCUMENT

TESTAMENTARY DISPOSITION:

- bequeathed assets
- extent of interest bequeathed
- beneficiaries

A DOCUMENT OR DOCUMENTS EXPRESSING THE TESTATOR'S INTENTION WITH REGARD TO A TESTAMENTARY DISPOSITION MUST BE EXECUTED

Valid execution of a will means that all the statutory requirements have been complied with (section 2(1)(a) of the Wills Act 7 of 1953

Statutory (underhand) will – presumes a document that is:

- written,
- signed and
- attested

(De Waal & Schoeman-Malan 2015:53-54)

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EXECUTION: WRITING AND DOCUMENT

South African law does not allow for an oral will – a verbal statement of intention – because it cannot be executed (Cronjé *et al* 1996:18)

Although it is generally accepted that a will must be in writing, writing is not expressly posed as a requirement in the Wills Act

Where writing is a requirement – audio and video wills are not recognised as "writing" (although they may be of evidentiary value).

Video (or filmed) wills in South Africa? Writing is not a requirement and there is no statutory prohibitions against it … – the procedure adopted by the Master requires a written will (Corbett *et al* 2001:57)

A testamentary disposition should be expressed in writing and contained in/on a medium (document) that is suitable for complying with the formality requirements (statutory will)

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EXECUTION: WRITING AND DOCUMENT

Electronic Communication and Transactions Act 25 of 2002 (ECT) excludes wills from its regulatory ambit: S 4(3) read with Schedule 1 and S 4(4) read with Schedule 2

Result: A will cannot be executed electronically

Electronic documents:

S 2(3) of the Wills Act – three requirements:

- a document must be presented to the court
- this document must have been drafted or executed by the deceased
- the deceased must have intended this document as a will

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CONDONATION OF ELECTRONIC DOCUMENTS

Nothing in the ECT that prevents the application of the condonation provision to be applied – (Wood-Bodley 2004:527)

- *MacDonald v The Master* 2002 (5) SA 64 (O) - an unsigned electronic document stored on the deceased's office computer was the subject of a condonation application

- *Van der Merwe v The Master* 2010 (6) SA 544 (SCA) – an unsigned document that existed electronically as an email attachment that was forwarded

- Unfortunately, the electronic documents in both these cases were readily convertible into the paper documents that served before the respective courts

Condonation without reliance on ECT?

Electronic version versus printout with regard to the INTENTION of the testator (Compare *Mahlo v Hehir* [2011] QSC 243 and *Re Trethewey* [2002] VSC 83)

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CONDONATION OF ELECTRONIC DOCUMENTS

"It was sheer fortuity that the dispensing power statutes were in force before these cases of attempted digital wills began occurring." (Langbein 2017:10)

- *Mellino v Wnuk* [2013] QSC 336 (27 November 2013)
- *Re Estate of Chan (Deceased)* [2015] NSWSC 1107 (7 August 2015)
- *Re Yu* (2013) 11 ASTLR 490
- *Yazbek v Yazbek* [2012] NSWSC 594 (1 June 2012)
- *Re Estate of Javier Castro* (Ohio Ct Com Pl, No 2013ES00140, 19 June 2013)
- *Estate of Currie* (2015) ASTLR 361

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ELECTRONIC WILLS

Formally recognised:

Nevada (NRS 133.085) in the United States of America enacted legislation to enable electronic wills (also take note of *Taylor v Holt* 134 SW3d 830)

Electronic will: “a will that is written, created and stored in an electronic record”

Problems:

“The requirement for the authoritative copy make compliance with the Nevada Electronic Wills Statute impossible because there is no software capable of meeting these requirements.” (Schwarzentraub 2013:1)

“The Nevada legislation imposes new formal requirements intended to generate evidence of the genuineness of the purported will. But these new hurdles are likely to be ones that many testators, especially those unaided by counsel, will fail to master. It is particularly ironic that the dispensing power, which has opened the way to enforcing digital wills by excusing noncompliance with the traditional Wills Act formalities, is begetting new formalities. These new formalities will extend the sphere of application of the dispensing power ever more, as testators flunk compliance with them.” (Langbein 2017:11)

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FORMALITY REQUIREMENTS

Langbein (1975:489):

> What is peculiar about the law of wills is not the prominence of formalities, but the judicial insistence that any defect in complying with them automatically and inevitably voids the will.

Reid *et al* (2011:462):

> The slow *but steady shift from strict formalism* …

In modern law there is a general trend to move away from formalities…

THERE IS STILL A NEED TO RETAIN A LEGAL REQUIREMENT FOR WILL FORMALITIES – South African Law Commission (1986:5), Reid *et al* (2011:433) and Langbein (2017:2)

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FORMALITY REQUIREMENTS

Purpose of formalities:

> In ancient law the execution of a will was regarded as a solemn act and was invested with a high degree of formality. The retention of a measure of formality in modern law is designed to curtail opportunities for fraud and to ensure as far as possible that wills reflect the genuine and voluntary dispositions of testators. (Corbett *et al* 2001:49)

Functions of formalities – evidentiary, cautionary, channeling, protective and identifying.

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SECTION 2(1)(A) REQUIREMENTS:

Application of the formality requirements (formalities):

1. Who must comply (e.g. testator, witnesses …)
2. Where should they comply in the document (e.g. testator must sign the end of the will and all the other pages anywhere …)
3. How should they comply – method of compliance (e.g. signature, initials or a mark)
4. Who should be present (e.g. testator should sign or acknowledge his signature in the presence of two competent witnesses …)

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REFORM

S 2(3) provides a good platform to start exploring how to deal with technological changes and challenges

HOWEVER,

“Van Staden and Rautenbach [2006] convincingly argue that the formality requirements of the Wills Act 7 of 1953 for validly executing a will have not kept up with technological advances, and that **there is an increasing need for this statute to provide for electronic wills**.” (Papadopoulos 2012:93)

“Harmless error doctrine can – and is – handling some cases, but as the frequency increases, **legislation specifically crafted for E-bequests will be inevitable**.” (Simmons 2018)

Challenges posed??

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CONCLUSION

With the importance of formalities in mind, the new challenge is to reformulate current formalities in the interest of finding a new regime that facilitates the fullest possible formal carrying out of the **testator's intention**

"Let me conclude by repeating that I am of the generation that is not very comfortable with the new information technologies. I would be quite content if this intrusion into the accustomed patterns of testation were not happening. But it is, the cat is out of the bag, and the legal systems must respond. **Should we try to devise specific Wills Act criteria for electronic testation, and if so, what dimensions of the process should we seek to govern and how?"** (Langbein 2017:11)

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