“The Living Will – managing relationships around end-of-life directions and decisions”
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Introduction

- The legal position of “living wills” in general.
- Legal status of “living wills” compared to other documents relevant in the context of the law of succession:
    - A revocatory document
    - A document making provision for organ donations
    - An “etihical will” (US)
    - A will – in essence
    - A traditional will
- Possible (practical) solutions.

It is important to have a good understanding of the concept “living will” – with the focus on the concept “will” – in order to utilize it to its full potential.

Part 1 – The legal position

- What is a living will?
  - a narrow and a broad definition (and living wills in the context euthanasia)
- What is the legal position (legal status) of living wills in SA law currently and how are living wills dealt with in practice in terms of the current legal position?
- Why is it important to have a living will and what is the general criticism against living wills?

End-of life decisions

“A patient can always request the withdrawal or withholding of treatment if he or she is mentally competent at the time the request is made. This would amount to a contemporaneous refusal of medical treatment. Mentally competent patients are free to refuse medical treatment even if it would have the effect of hastening death. If a doctor were to disregard the patient’s refusal of treatment and proceed with medical treatment, the doctor could be held liable for assault.” Grové 2020:278

End-of life decisions

Point of departure:

- “The right to refuse medical treatment by a patient who has the necessary mental capacity is recognized in our common law. This stems from the fundamental right to self-determination (viz *Castell v De Greef* 1994 (4) SA 408 (C)).” Jacobs 2012:61

- “The Constitution of the Republic of South Africa, 1996 guarantees the right to self-determination [section 12]. This right translates in the right to personal autonomy.” Slabbert & Venter 2019:463

- “When patients are mentally competent to express their medical instructions contemporaneously, those instructions are given effect to, and the instructions contained in the living will are not enforced. It is thus only in a situation of mental incompetence that a living will becomes relevant.” Grové 2020: 278

End-of life decisions – when a legal subject is not legally competent

Current legal remedies:

- *Curator personae* – High Court can appoint a curator to act on behalf of legal subject
  - See *Clarke v Hurst* 1992 (4) SA 630 (D) – the now somewhat 'notorious' case where the court did not recognise or rule on the status of a living will.
  - Unfortunately Dr Clarks' living will was only discover after he had been subjected to life-sustaining measures – although the court did take note of the living will, the living will was not determinative in the court's decision.
  - This prompted Taitz 1993:445 to conclude that a living will is "a written directive having no force of law."
  - Issues: Patient autonomy/best interest or wishes of the patient?

- Administrator – An administrator can be appointed in terms of the Mental Health Care Act 17 of 2002.

- Advance directives – still used in practice

An advance directive

- “An advance directive is a document prepared by a person while competent in anticipation of a situation when he no longer has the legal capacity to make legal decisions.” Jacobs 2012:61
- It is instructions of a person’s wishes in advance.

Two forms of the advance directive:

- The living will (narrow and broad definition)
  - narrowly defined – with the focus on the main function – to refuse medical treatment (“refusal of artificial life support when dying”).
  - Broader definition – a living will might, in addition, contain specific directions (for example, instructions for active care to be implemented).
- Proxy directive – in terms of a power of attorney

- A Living will

"A 'living will' is an advance directive which states that if at any time a person suffers from an incurable disease or injury which cannot be successfully treated, life-sustaining treatment should be withheld and the patient left to die naturally." See Mcquoid-Mason 2005:25

- History – US attorney, Luis Kutner, suggested the concept of a living will in 1967. By 1992, all 50 states in the USA, had passed legislation to legalise some form of advance directive. (See Bull & Mash 2012:507)

- Proxy

A patient can provide an advance directive by way of a proxy directive. In this instance, a health care proxy is appointed in terms of a power of attorney with decision-making power regarding the principle's medical treatment. Grové 2020:274 and Jacobs 2012:63

- Law of agency – agent would make decisions for principle and communicate them on principle's behalf
- Power of attorney lapses when the principle becomes incompetent (SALC – recommended an enduring power of attorney (to endure the subsequent incapacity))

Living will – legal status

- "[L]iving wills have not yet been legally recognised in South African law. Living wills, furthermore, have neither been found to form part of the common law nor has any living wills-specific legislation been enacted." Grové 2020:271, 275. They are therefore not legally enforceable.

- "In the absence of the promulgation of law or the pronouncement of a court of law on the validity of a living will, the status of these documents remain uncertain." Jacobs 2012:62

- Development:
  - The SALC has done research and recommended that legislation should be enacted in South Africa
  - Draft Bill – The Rights of the Terminally Ill Act (End of Life Decisions Act) – must still be debated
  - National Health Amendment Bill, 2019 (Private Member's Bill) – Bill lapsed in 2019

- Possible (legal) recognition:
  - Common law – the doctrine of informed consent
  - Legislation – statutory interpretation of the National Health Act
  - Ethical guidelines – SA Medical Association and Health Professional Council of SA

Arguments for the use of living wills:

- They respect and promote patient autonomy (fundamental human rights) – wishes, choices and decisions (and, especially if those were embodied in acts in legally relevant ways).
- They require informed consent.
- They are perceived as important by doctors.
- They enhance doctor-patient relationship.
- They are valuable to medical personnel and family members who are faced with difficult medical and end-of-life decisions of a patient.

Criticism of living wills:

- There is a lack of individualisation if a template type of living will document is used.
- They might not represent the patient's true and current wishes.
- There originality, applicability, legality and validity would have to be assessed.
- They are automatically interpreted as a "do not resuscitate" order.
- They are not always readily available, especially in an emergency situation.

(See Bull & Mash 2012:508 and Grové 2020:270)

Part 2 – The status of successions documents

- The legal status of living wills is still uncertain. Living wills "have not yet been held to be legally enforceable in any court of law in South Africa. On the other hand, these documents have also not been held legally unenforceable in South Africa." Grove 2020:275
- The legal position of the traditional will:
  - Although South African scholars have offered various definitions of a will, no single, uniform understanding of the concept exists.
  - The Wills Act contains no extensive definition of a will (s 1 merely stipulates that a will includes a codicil and any other testamentary writing).
  - Therefore, when exactly a document is or becomes a will is unclear.

Revocatory document

A validly executed document stating (containing) only the following provision:

"I hereby revoke all previous wills made by me."

[Valid execution – all the statutory requirements (Wills Act 7 of 1953) have been complied with.]

THE ACT OF REVOCATION

- Revocation implies an act of revocation, which needs to be carried out with the necessary intention to revoke (*animus revocandi*) – a juristic act.
- In order to facilitate an effective revocation, the document containing the revocation clause must comply with the formality requirements (Wills Act).
- Once the formalities have been satisfied, the act of revocation is effective immediately.
- Although a clause of revocation – as an independent juristic act – may form part of a will, it is important to keep in mind that a document containing *only* an act of revocation is not considered a will – *Marais v The Master* 1984 (4) SA 288 (D)

A will or document making provision for organ donation

A validly executed will or document containing the following provision:

"I hereby make this anatomical gift to take effect upon my death. I give any needed organs to be used for transplantation …".

The National Health Act 61 of 2003 (section 62) makes provision for 3 valid forms to donate organs after death:

- In a will (part of a will)
- In a document
- Oral statement

- See Slabbert & Venter 2019:458:
  - The right to self-determination of the deceased (patient autonomy)
  - Hospitals should respect the wishes of the deceased and act accordingly

“Ethical wills” (US)

The writing can include:

- Family history,
- cultural and spiritual values,
- life-lessons,
- request for forgiveness,
- stories about the objects the beneficiaries will receive,
- ALSO clarification about and personalization of advance health directives

- “Only recently has America begun to take note of the idea that a will might do something other than dispose of property, namely, state one’s philosophy and views…”
- An ethical will can be in the form of a letter, video recording, or part of the actual will.
- See Scalise 2011:359

A will – in essence

A validly executed document containing only the following provision:

“all for mother”

ACT OF TESTATION

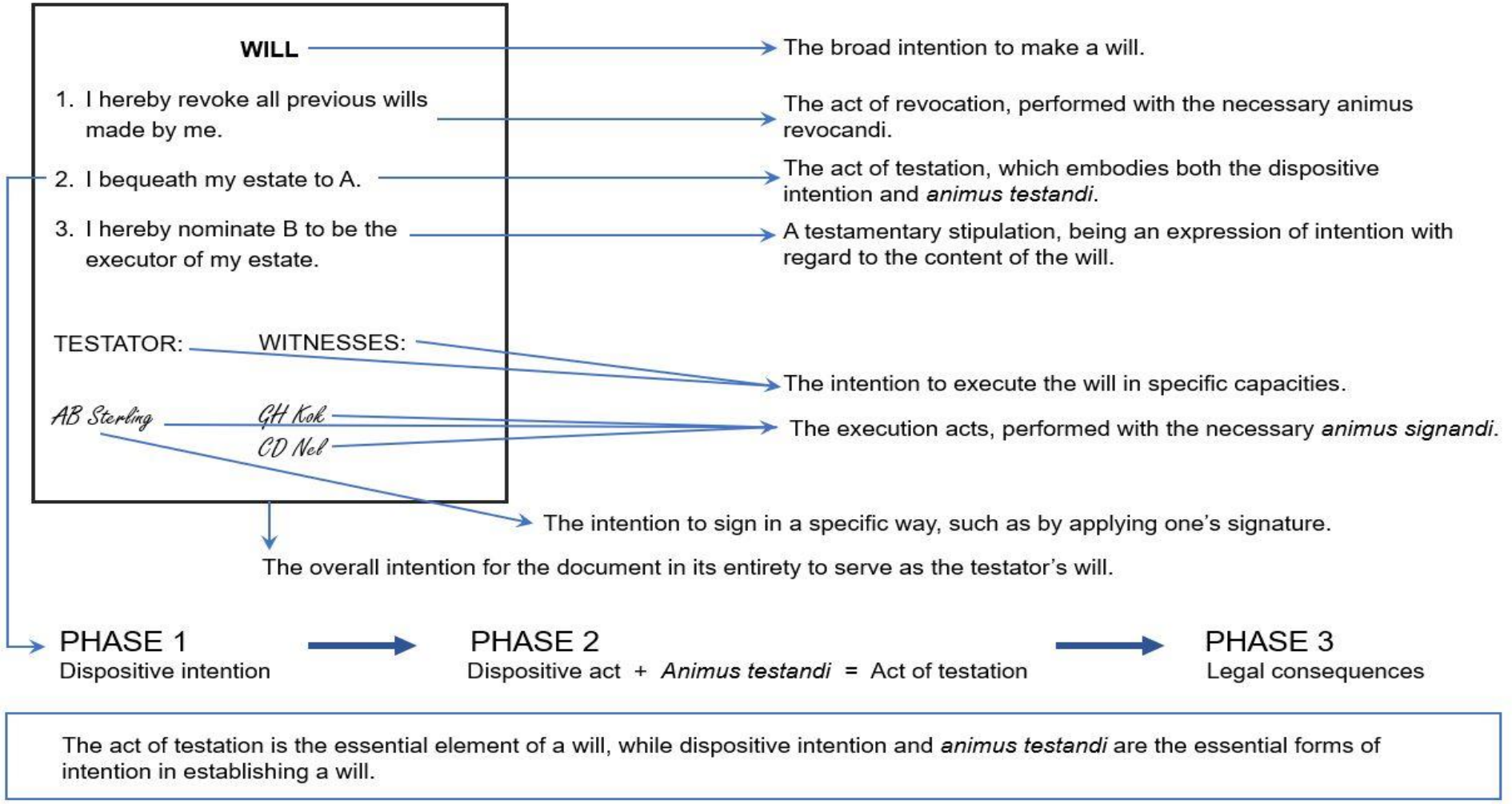
- The three-word will illustrates that a will, in essence, is about the disposition of assets (a testamentary disposition – *Ex parte Estate Davies*). The testator intended for all his assets to be inherited by his wife (whom he called “mother”) in the event of his death.
- If the testator’s disposition was accompanied by the necessary *animus testandi*, (being the intention for the dispositions to be given legal effect upon the testator’s death) he performed an act of testation, as a juristic act.
- The act of testation must be contained in a written document and must comply with the formality requirements of the Wills Act to be considered valid in law.

Traditional will

- A traditional will consists of different (distinguishable) parts -
- The main function of a will is to dispose of property at the moment of death. A will also has other important functions and deals with various other matters.

  - Even though the act of testation and the act of revocation are traditionally embodied in a single document – the will – *and* the validity of both acts depends on compliance with the formality requirements, they remain two separate and independent juristic acts. They also take effect at different times.

Traditional will: An act-based model, a will-making process and an intent doctrine



The act of testation is the essential element of a will, while dispositive intention and *animus testandi* are the essential forms of intention in establishing a will.

Traditional will – two specific provisions

- Nomination of executor – will nominates, master appoints… Nomination must be in a valid will.
- A testamentary executor may assume this position only following appointment by the master (section 14 of the Administration of Estates Act). Van der Merwe and Rowland (1990:401) clearly state that an executor derives his or her capacity to act from appointment by the master, and not from the will itself. Therefore, the appointment of an executor is not an act of testation as such. So, while the appointment of an executor may be included in the will, the section of the will containing this provision is distinct from the sections of the same will containing the acts of testation and/or revocation.
- The court does not have a general common law power to prevent the appointment of an executor nominated in a will – *Hoofar Investments (Pty) Ltd v Loonat* 1991 (2) SA 222 (N). The circumstances in which the appointment can be prevented is regulated in the Administration of Estates Act. See Abrie *et al* 2015:90.

Traditional will – two specific provisions

- Funeral arrangements – Corbett *et al* (2001:5) state that directions by the deceased in a will or any other document, whether formal or informal, with regard to the "funeral and burial or cremation … are to be observed, so far as they are lawful, permissible and possible". This provision, however, seems to create only a moral obligation, as opposed to the act of testation and the act of revocation, which are juristic acts that need to be carried out in law. [This is also the position in English law – the wishes contained in a will on the disposal of the deceased body are not legally enforceable, but have "effective moral force"].
- In *Schnetler v Die Meester* 1999 (4) SA 1250 (C) – the funeral arrangements contained in the section 2(3)-document was a factor considered by the court to establish that the deceased intended the document to be his will.

Part 3 – Possible (practical) solutions

Estate planning and the drafting of a will – as an open, living document:

- Good – comprehensive estate planning – including open discussions and clear instructions on advance directives and organ donation *inter alia*
- Draft an open, living document – ‘personalize’ your will

Will – an open, living document

1. Keep documents separate (content) – keep the living will, the document containing the instructions on organ donation, the traditional will and the other relevant documents ("ethical will") separate, but compile them in one folder.

2. Make the living will and wishes on organ donation part of the traditional will – one document, one will. On the first page, include the advance directive and the clause on organ donation.

3. Make the living will and wishes on organ donation part of the traditional will and link them to the content (a specific bequest) in the will, for example by attaching it as a condition to a small bequest – "I bequeath R10 000 to my friend A, on condition … (ethical and/or constitutional issues?)

Provisions as part of a will

- The content of a will is the result of the principle of freedom of testation and freedom of testation is the manifestation of private autonomy in the law of succession. It is important to note that private-law concepts such as "freedom of testation" and "freedom of contracting" are mere representations of values. These values – being abstract notions – must be concretised by performing or executing certain acts.
- Freedom of testation enjoys constitutional protection – *inter alia* ss 25 (the property clause) and 10 (right to human dignity). In *In re BOE Trust Ltd* 2013 (3) SA 236 (SCA) par [27]:

> "Indeed, not to give due recognition to freedom of testation, will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away."

Provisions as part of a will

- The fact that the provisions are included in a formally valid will (with the purpose of the formality requirements in mind) – might have an impact on the legal status of the provisions (or might – at least – give more clarity on the intention of the legal subject (testator)).
  - The evidentiary function of a will – provides evidence of the testator's intention
  - The cautionary function – compliance with the formality requirements establishes that the testator comprehends the significance of the action
- See Slabbert & Venter 2019:464-465 and Slabbert 2016:241

To conclude:

“A living will protects the patient’s rights and removes the burden of making decisions from family, friends and physicians. It also represents a means of clarifying decision-making, while empowering patients and enhancing choice.”

Bull & Mash 2012:507

Thank you.

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