

# THE WILL THAT WON'T\*

## Uncertainties in testamentary succession law (and how to address (some of) them)

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## Wills: what we thought we knew (30+ years ago)

- Testators possess maximum freedom of disposition
- Non-compliance with testamentary execution formalities voids a will
- Only a surviving spouse can claim maintenance from a deceased spouse's estate under the Maintenance of Surviving Spouses Act 27 of 1990
- Only a testator can cancel testamentary bequests

# Freedom of disposition

## Limitation of freedom of testation in terms of public policy

- Charitable bequests
  - *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) and *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal* 2010 (6) SA 518 (SCA)
- Private bequests
  - *King v De Jager* 2021 (4) SA 1 (CC) and *Wilkinson v Crawford* 2021 (4) SA 323 (CC)

## Unresolved issues

- Conditions in partial restraint of marriage
  - *Aronson v Estate Hart* 1950 (1) SA 539 (A)
- Conditions restricting freedom of association
  - *Ex parte Dessels* 1976 (1) SA 861 (D)
- Avoid:
  - Ruling from the grave
  - Bequests that centre on non-discrimination grounds in s 9 Constitution

## Testamentary execution formalities

- S 2(1)(a) Wills Act
  - Signed by testator or *amanuensis*
  - Attested and signed by two competent witnesses (see definition in s 1)
  - Certified by commissioner of oaths when signed by *amanuensis* or with a mark

# Rescue of formally- irregular documents (1992)

- S 2(3) Wills Act
  - Document
  - Drafted or executed by someone who has since died
  - Intended as a will or an amendment to a will
- Conflicting judgments have created uncertainty
- *Van der Merwe v The Master* 2010 (6) SA 544 (SCA) and *Dryden v Harrison* (unreported judgment by High Court, Western Cape Division Case No 11912/17)
- *Mabika v Mabika* [2011] ZAGPJHC 109 and *Estate Late Elaine Ilesia Williams v Hendricks* [2021] ZAWCHC 66 (19 April 2021)

## Maintenance of Surviving Spouses Act (1990)

- S 2(1): Survivor has a claim against the deceased spouse's estate for the provision of the survivor's reasonable maintenance needs
- S 1: 'Survivor' means the surviving spouse in a marriage dissolved by death

- *Daniels v Campbell* 2004 (5) SA 331 (CC);  
*Hassam v Jacobs* [2008] 4 All SA 350 (C)
- *Volks v Robinson* 2005 (5) BCLR 446 (CC)
- *Bwanya v The Master* 2022 (3) SA 250 (CC)



Judicial  
Matters  
Amendment  
Act 15 of 2023  
(commenced 3  
April 2024)

Effected important changes to the Maintenance of Surviving Spouses Act

S1:

“‘marriage’ for the purposes of this Act includes a permanent life partnership in which the partners undertook reciprocal duties of support”

“‘spouse’ for the purposes of this Act, includes a person in a permanent life partnership in which the partners undertook reciprocal duties of support”

“‘survivor’ means the surviving spouse in a marriage dissolved by death, and includes -

(a) the surviving partner of a permanent life partnership terminated by the death of one partner in which the partners undertook reciprocal duties of support and in circumstances where the surviving partner has not received an equitable share in the deceased partner’s estate”

- Did a permanent life partnership exist in which the deceased and the (alleged) surviving partner undertook reciprocal support duties?
- If yes, did the surviving partner receive an equitable share of the deceased partner's estate?

*National  
Coalition for Gay  
and Lesbian  
Equality v  
Minister of Home  
Affairs 2000 (2)  
SA 1 (CC)*

- Whether the partners took part in a ceremony manifesting their intention to enter into a permanent partnership, what the nature of that ceremony was and who attended it
- How the relations and friends of the partners view the partnership
- The respective ages of the partners
- The duration of the partnership
- Whether the partners share a common abode
- Whether the partners own or lease the common abode jointly
- Whether and to what extent the partners share responsibility for living expenses and the upkeep of the joint home
- Whether and to what extent one partner provides financial support for the other
- Whether and to what extent the partners have made provision for one another concerning medical, pension and related benefits
- Whether there is a partnership agreement and what its contents are
- Whether and to what extent the partners have made provision in their wills for one another

## Meaning of “equitable share”?

- *Ryland v Edros* 1997 (2) SA 690 (C): tangible and intangible contributions to the growth of another’s estate
- Relationship-induced dependence  
S 7(2) Divorce Act 70 of 1979:
  - The existing or prospective means of each of the parties
  - Their respective earning capacities, financial needs and obligations
  - The age of each of the parties
  - The duration of the marriage
  - The standard of living of the parties before the divorce

## S 3 MSSA

“In the determination of the reasonable maintenance needs of the survivor, the following factors shall be taken into account in addition to any other factor which should be taken into account:

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

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

(c) the standard of living of the survivor during the subsistence of the marriage and his age at the death of the deceased spouse.”

## Cancellation

### S 2B Wills Act (1992)

“If any person dies within three months after his marriage was dissolved by a divorce or annulment by a competent court and that person executed a will before the date of such dissolution, that will shall be implemented in the same manner as it would have been implemented if his previous spouse had died before the date of the dissolution concerned, unless it appears from the will that the testator intended to benefit his previous spouse notwithstanding the dissolution of his marriage.”

- *Louw v Kock* 2017 (3) SA 62 (WCC)
- *Wallage v Williams-Ashman* 2023 (4) SA 113 (SCA)

# Taking instructions

- Know the law
- Explain the pitfalls
- Persuade
- Draft clearly and precisely



*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. This is by no means a recent phenomenon. Some 60 years ago, in *Ex parte Kock NO*, a high court decried the number of instances in which wills had to be rejected as invalid due to a lack of compliance with prescribed formalities and the regularity with which the courts were being approached to construe badly drafted wills, before urging intending testators ‘in their own interests as well as in the interests of those whom they intend to benefit when they die . . . to consult only persons who are suitably trained in the drafting and execution of wills and other deeds containing testamentary dispositions’. Despite this, the courts continue all too often to be called on to deal with disputed wills which are the product of shoddy drafting or incompetent advice.”



Thank you