



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA





THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



ESTATE PLANNING TRUSTS WILLS ESTATES BENEFICIARY FUNDS

The application and implementation of obligations in testamentary dispositions – the *modus*

April 2025, Cape Town

Dr Eben Nel FPSA® TEP®



Introduction

The principle of freedom of testation allows a testator to dispose of his assets at his own discretion.

Van der Merwe and Rowland famously summarised this right as follows:

“No matter how fickle, imaginative, egotistical and unreasonable a testator was, as appears from the terms of his will, no matter how complicated and subtle those terms may seem, the point of departure of our law remains to carry out the wishes of the testator as these are embodied in his will.”

The testator may nominate heirs and legatees and make bequests subject to substitution, *dies* (time clauses), conditions or obligations (referred to a *modus* or a modal clause).

But: effect will not be given to impossible, unlawful, vague, uncertain, or *contra bonos mores* (against public policy) dispositions.

Principles of a bequest subject to an obligation

- * An inheritance or legacy may be burdened with a duty to perform in respect of the whole or part of the bequest.
- * The testator can impose on the heir or legatee an instruction in terms whereof the legacy must be used for a specific purpose or duty of doing something.
- * The obligation may have the effect of restricting or diminishing the extent of the legacy.
- * When the beneficiary accepts a bequest subject to a *modus*, an obligation comes in to existence, which he is compelled to fulfil; he cannot receive the benefit without also accepting the obligation.
- * The purpose of the *modus* may be for the benefit of the beneficiary or a third party, or may be of an impersonal nature.
 - A *modus* is more than a wish or desire – it creates a legally enforceable obligation.
 - A *modus* may have a religious or educational objective, as long as it is enforceable.

Types of conditions

Suspensive condition: suspends the vesting of the right until the condition is fulfilled, without obliging the beneficiary. Example: “my son inherits my share portfolio if he obtains a degree within three years after my death.”

Resolutive condition: terminates the bequest by an uncertain future event. Example: “my son inherits my share portfolio, but if he fails to obtain a degree within three years after my death, the share portfolio pass to my daughter.”

Versus

Modus: burdens the beneficiary with a duty to perform; it obliges the beneficiary without postponing the inheritance. Example: “my son inherits my share portfolio, but he must obtain a degree within three years after my death.” (Presumption applicable)

Difference between *modus* and condition

- * In case of a bequest subject to a condition, *dies cedit* is suspended until the occurrence of the event.
- * In the case of a bequest subject to a *modus*, the legatee has a vested right on the death of the testator.
- * The *modus* is not conditional and the vesting of the right is not postponed.
- * When it is uncertain whether a bequest is subject to a *modus* or a condition, there is a presumption in favour of *modus*, because it constitutes a clear bequest.
- * As in the case of other testamentary stipulations the *modus* will be regarded as *pro non scripto* (as though it has not been written) if it is unlawful, *contra bonos mores* or impossible to perform.
- * Even if the will use the term 'condition', a *modus* may still have been created.

Example: *Wessels v DA Wessels* 1987 3 SA 530 (T)

The testator bequeathed a farm to a company on the condition that the company pays a cash amount to the testator's daughters (modus), and subject to a usufruct for life in favour of his spouse.

Preferential shares in the company were bequeathed to the spouse, subject to the condition that, upon her death, the shares would devolve upon their two sons (fideicommissum), who also held shares in the company.

- This is an example of a *modus* as it imposes an obligation upon the company without making its rights conditional. Vesting took place before the cash amount has been paid to the daughters. The word 'condition' is used without the bequest necessarily being subject to a condition in the true sense (suspensive or resolutive).

Example of combination:

"My son inherits my share portfolio if he obtains a degree within three years after my death (suspensive condition). On acquiring the share portfolio he must pay my daughter one million rand in cash (*modus*). If he fails to pay my daughter within one year, he will forfeit the share portfolio (resolutive condition) and it will go to a non-profit organisation (*fideicommissum*) elected by my executor (delegation of power of appointment)."



The rights of the beneficiary

- * The beneficiary under a *modus* has a personal right against the legatee on whom the obligation rests.
- * The beneficiary can enforce his right by action in law.
- * If the legacy is damaged or destroyed, the heir or legatee remains obligated to perform towards the beneficiary and must restore the legacy.
- * The *modus* may also be enforced by third parties, such as an executor, guardian or the heir of the beneficiary of the *modus*.
- * The beneficiaries may be specified or ascertainable.
- * The beneficiaries may agree among themselves that the performance will take place in a different way and/or at a different time from that specified in the will.





The duties of the heir or legatee

- * The heir or legatee has a legal duty to perform the obligation and is personally liable to the beneficiary in terms of the *modus*.
- * Where the purpose of the *modus* is to benefit a third party pending due performance of his obligation, the heir or legatee must furnish security to the Master, except if the obligated party is indemnified in terms of the will.
- * If the legacy is damaged or destroyed, the heir or legatee remains obligated to perform towards the beneficiary and must restore the legacy.
- * Non-execution of the *modus* will also result in the restitution of the benefit.
- * If the obligation is of a moral nature only, it may not qualify as a *modus*.
- * If no bearer of rights can be identified, no obligation will exist.



Vesting of rights: *Webb v Davis 1998 2 SA 975 (SCA)*

“I bequeath to Rodney all my assets on the condition that he pays Gary R70 000, which bequest shall be subject to the following: (a) the R70 000 to be paid in equal annual instalments of R10 000, the first being within one year of the date of my death, and thereafter R10 000 per annum. In the event of one payment not being made by the stipulated date, the full balance shall immediately become due and payable; (b) Rodney must register a bond over the fixed property in favour of his brother; (c) if Rodney fails to accept the inheritance, or fails to comply with the terms, the bequest shall fall away, and then I nominate my sons Rodney and Gary as my heirs in equal shares.”

Rodney died three years after his father. He did accept the inheritance and he has sent the first cheque of R10 000 within the stipulated time to Gary. He also sent a second cheque of R10 000 and his attorneys sent a third cheque of R10 000 a few days after Rodney’s death. Gary did not present these cheques for payment. Due to the property being situated in the then Transkei, Rodney could not register the property in his name, neither could he register a bond as required.

Gary submitted that the inheritance never vested in Rodney before his death.



***Webb v Davis* continues**

The court had to determine whether Rodney acquired a vested right to the testator's estate (conditional or modal construction). The court decided as follows:

Vesting depends on the intention of the testator, which must be gathered from the terms of the will. Vesting is usually only postponed if the bequest is made subject to a suspensive condition. Once the interest has vested, the death of the beneficiary normally results in the interest being transmitted to the beneficiary's heir.

The testator's intention could be gathered with relative certainty from the general scheme of the will and the material facts. The testator provided for payment to be made over a lengthy period. It is unlikely that he contemplated Rodney would have a mere *spes* and no vested right over the full seven years while he paid his brother.

If the testator's intention was open to doubt, various presumptions would operate in Rodney's beneficiary's favour: (a) the presumption in favour of immediate vesting; (b) the presumption in favour of an unconditional bequest; (c) the presumption that a provision attached to a bequest is a *modus* rather than a condition.



Conclusion

- It is important for the will drafter to understand the intention of the testator
- It is important for the will drafter to understand the different constructions and to ensure that the wording used will have the intended result
- It may often be better to use the specific term intended, e.g. *modus* or a particular limited right (*fideicommissum*, *habitation*, *usus*, *usufruct*) instead of the word 'condition'
- It is important to explain to the testator in the case of a *modus* that the right of the beneficiary is limited to that of a personal right against the heir or legatee
- A *modus* is often a useful mechanism when the amount applicable is inadequate to make use of a testamentary trust
- The testator can use a *modus* and still empower the executor with oversight as enforcement mechanism
- It is important to protect the heir or legatee receiving a benefit subject to a *modus* against the requirement of security, where applicable



THE FIDUCIARY INSTITUTE OF SOUTHERN AFRICA



ESTATE PLANNING TRUSTS WILLS ESTATES BENEFICIARY FUNDS

Thank you.

