# INTESTATE SUCCESSION

INTESTATE SUCCESSION ACT 81/1987

AS AMENDED BY LAW OF SUCCESSION AMENDMENT ACT 43/1992

2012 COURSE NOTES Pages 25, 26 Examples - Page 153 Act – Page 178

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SECTION 1

1. DECEASED DIES --- SURVIVED BY :

(a) SPOUSE, NO DESCENDANT → SPOUSE

(b) DESCENDANT, NO SPOUSE → DESCENDANT

(c) SPOUSE + DESCENDANT :

(i) SPOUSE → CHILD'S SHARE / R125 000,00 WHICHEVER GREATER

(ii) DESCENDANT → RESIDUE

EXAMPLE 1

**H ---- W**

**/ **

**S D**

H DIES – ESTATE = R600 000,00

WIFE → CHILD'S SHARE = R600 000,00 ÷ 3 = R200 000,00

OR R125 000,00 WHICHEVER GREATER

→ R200 000,00

SON → R200 000,00

DAUGHTER → R200 000,00

EXAMPLE 2

**H ---- W**

**/ **

**S D**

H DIES – ESTATE = R325 000,00

WIFE → CHILD'S SHARE = R325 000,00 ÷ 3 = R108 333,33

OR R125 000,00

→ R125 000,00

SON → R100 000,00 } RESIDUE

DAUGHTER → R100 000,00 } R200 000,00

(d) NO SPOUSE, NO DESCENDANT – BUT :

(i) BOTH PARENTS → BOTH PARENTS → ½ EACH

(ii) ONE PARENT →

→ SURVIVING PARENT → ½

→ DESCENDANTS OF DECEASED PARENT → ½

(SIBLINGS)

IF NO DESCENDANTS, THEN DECEASED'S PARENT'S ½ GOES TO SURVIVING PARENT i.e. SURVIVING PARENT GETS ALL

EXAMPLE :

**M ---- F**

**/ **

**X Y Z**

EXAMPLE 1 X DIES → M + F INHERIT ½ EACH

EXAMPLE 2 X DIES but F PREDECEASED

M → ½

F's ½ → Y + Z

Y → ¼

EXAMPLE 3 X DIES but F & Y PREDECEASED

M → ½

Z → ½

EXAMPLE 4 X DIES but F, Y & Z PREDECEASED

M → INHERITS ENTIRE ESTATE

(e) NO SPOUSE, NO DESCENDANT, NO PARENT – BUT SURVIVED BY : -

(i) (aa) DESCENDANTS OF DECEASED MOTHER ONLY +

DESCENDANTS OF DECEASED FATHER ONLY

□ HALF BROTHERS & HALF SISTERS

(bb) DESCENDANTS OF BOTH PARENTS

□ BROTHERS & SISTERS

(cc) BOTH (aa) & (bb)

□ BROTHERS, SISTERS, HALF BROTHERS & HALF SISTERS

ESTATE DEVOLVES

→ ½ TO MOTHER'S DESCENDANTS

→ ½ TO FATHER'S DESCENDANTS

■ EXPLANATION OF SIBLINGS, HALF SIBLINGS, STEP SIBLINGS

VICTOR + ANNA THOMAS + MARY

/ / \

MARGE SUE SALLY

ANNA + THOMAS

/ \

CAROL CLAIRE

MARGE = ½ SISTER to CAROL & CLAIRE (SAME MOTHER)

SUE & SALLY = ½ SISTERS to CAROL & CLAIRE (SAME FATHER)

MARGE, SUE & SALLY = STEP SISTERS – NO BLOOD RELATION

(e) NO SPOUSE, NO DESCENDANT, NO PARENT

– BUT SURVIVED BY : -

(ii) ONLY DESCENDANTS OF 1 PARENT

→ SUCH DESCENDANTS INHERIT EVERYTHING

(f) NO SPOUSE, NO DESCENDANT, NO PARENT, NO DESCENDANT OF PARENT

i.e. NO HUSBAND / WIFE

NO CHILDREN

NO MOTHER / FATHER

NO BROTHERS / SISTER / ½ BROTHERS / ½ SISTERS

→ NEAREST *BLOOD* RELATIVE

EXAMPLE :

**M --------- F**

**/ **

**S D ½B**

MOTHER & FATHER HAVE 2 CHILDREN

FATHER HAS 1 CHILD FROM PREVIOUS MARRIAGE

I.E. DECEASED HAS A SISTER & 1 HALF-BROTHER

DECEASED DIES → ½ TO MOTHER & ½ TO FATHER

IF MOTHER PRE-DECEASED :

→ ½ TO SISTER (MOTHER'S SHARE)

→ ½ TO FATHER

IF MOTHER & FATHER PRE-DECEASED :

→ MOTHER'S ½ SHARE GOES TO S

→ FATHER'S ½ SHARES GOES TO S & ½B – EACH GETS ¼

THEREFORE : S INHERITS → ½ + ¼ = 3/4s

½B INHERITS → ¼

IF S ALSO PRE-DECEASED, THEN ½B INHERITS EVERYTHING.

SECTION 1 CONTINUES…

2. ILLEGITIMACY DOES NOT AFFECT CAPACITY OF BLOOD RELATIONS TO INHERIT FROM EACH OTHER.

3. AMOUNT (R125 000,00) PROMULGATED IN GOVERNMENT GAZETTE FROM TIME TO TIME IS NOT RETROSPECTIVE

4. (a) IN RELATION TO :

→ DESCENDANTS OF DECEASED

(I.E. CHILDREN & GRANDCHILDREN)

→ DESCENDANTS OF PARENTS OF DECEASED

(I.E. SIBLINGS – BROTHER & SISTERS)

DIVISION OF DECEASED'S ESTATE TAKES PLACE *PER STIRPES* & REPRESENTATION IS ALLOWED

(not anyone else – *per capita* then applies e.g.cousins, grandparents)

4. (b) INTESTATE RULES APPLY WHERE DECEASED DIES :

→ TOTALLY INTESTATE (NO WILL)

→ PARTIALLY INTESTATE (IS A WILL, BUT PORTION LEFT OUT)

EXAMPLE :

D EXECUTES A WILL & BEQUEATHS SPECIFIC BEQUESTS BUT MAKES NO MENTION OF THE RESIDUE –

- RESIDUE WILL THEN DEVOLVE ACCORDING TO RULES OF INTESTACY

4. (c) …

4. (d) DEGREES OF RELATIONSHIP OF BLOOD RELATIONS :

DIRECT LINES & COLLATERAL LINES

4. (e) ADOPTED CHILD IS DEEMED TO BE A DESCENDANT OF THE ADOPTIVE PARENT(S)

I.E. - ADOPTED CHILD INHERITS FROM ADOPTIVE PARENTS

- ADOPTIVE PARENTS INHERIT FROM ADOPTED CHILD

NATURAL PARENTS FALL OUT OF PICTURE

4. (f) CHILD'S PORTION = THE NUMBER OF CHILDREN + 1

5. ADOPTIVE PARENT IS DEEMED TO BE ANCESTOR OF ADOPTED CHILD.

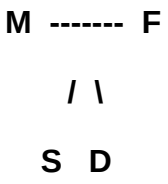
- NATURAL PARENT IS NOT AN ANCESTOR.

6. IF THE DECEASED IS SURVIVED BY DESCENDANT & SPOUSE

– BOTH ENTITLED TO INHERIT, BUT <u>DESCENDANT RENOUNCES</u> INHERITANCE - THEN DESCENDANT'S INHERITANCE VESTS IN THE <u>SURVIVING SPOUSE</u>

7. IF HEIR IS DISQUALIFIED / RENOUNCES INHERITANCE,

SUCH INHERITANCE, SUBJECT TO (6) ABOVE (NO SURVIVING SPOUSE), DEVOLVES AS IF HEIR HAD PREDECEASED.




EXAMPLE 1

M = PREDECEASED

D DIES

F → ½ D'S ESTATE

S → OTHER ½

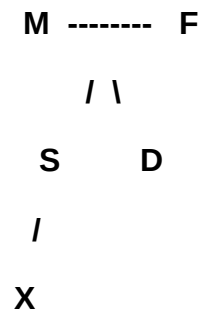
EXAMPLE 2

M = PREDECEASED

S MURDERS D

S = DISQUALIFIED

F → INHERITS ALL




EXAMPLE 3

M = PREDECEASED

S HAS SON X

S MURDERS D

S = DISQUALIFIED

(DEEMED PREDECEASED)

F → INHERITS ½

S's SON X → INHERITS OTHER ½

EXAMPLE 4

M MURDERS D

F → INHERITS ½

S → INHERITS ½

SUMMARY

INTESTATE SUCCESSION IS BASED ON BLOOD RELATIONS

+

SPOUSE AND ADOPTED CHILDREN

# MEANING OF " SPOUSE " - CASE LAW

**BHE & OTHERS v. MAGISTRATE KHAYELITSHA & OTHERS 2005 (1) SA 580 CC**

WHERE A DECEASED DIES INTESTATE & IS SURVIVED BY MORE THAN ONE SPOUSE OF A POLYGAMOUS UNION IN ACCORDANCE WITH CUSTOMARY LAW, EACH SURVIVING SPOUSE IS ENTITLED TO A SPOUSE'S SHARE FOR THE PURPOSES OF INHERITING & DETERMINING A CHILD'S SHARE IN ACCORDANCE WITH THE INTESTATE SUCCESSION ACT.

INTESTATE SUCCESSION ACT APPLIES TO BLACK ESTATES

**DANIEL v. CAMBELL N.O. & OTHERS 2004 (5) SA 331 (CC)**

INTESTATE SUCCESSION ACT MUST BE INTERPRETED TO INCLUDE A PARTY TO A MONOGAMOUS MUSLIM MARRIAGE AS A SPOUSE

I.E. PERSONS MARRIED IN TERMS OF A MONAGAMOUS MUSLIM MARRIAGE WILL QUALIFY AS A SPOUSE MAKING THEM ENTITLED TO THE BENEFITS OF INHERITANCE BY INTESTATE SUCCESSION.

**GORY v. KOLVER N.O. & OTHERS CCT28/2006**

SECTION 1(1) INTESTATE SUCCESSION ACT – THE WORD SPOUSE IS TO BE READ AS INCLUDING " OR PARTNER IN A PERMANENT SAME-SEX LIFE PARTNERSHIP IN WHICH THE PARTIES HAVE UNDERTAKEN RECIPROCAL DUTIES OF SUPPORT "

**RICHARD GORDON VOLKS N.O. v. ETHEL ROBINSON & OTHERS CCT12/2004**

HELD THAT HETEROSEXUAL LIFE PARTNERS ARE NOT DEEMED / CONSIDERED TO BE SPOUSES

REASONING – THAT THEY HAD THE CHOICE TO MARRY BUT DID NOT.

**VOLKS v. ROBINSON - HETROSEXUAL PARTNERSHIP = NOT SPOUSES**

**GORY v. KOLVER – SAME SEX PARTNERSHIP = SPOUSES (NO CHOICE)**

- **SINCE GORY / KOLVER DECISION – THE CIVIL UNIONS ACT 17/2006**
- **SAME SEX PARTNERS NOW ALSO HAVE THE CHOICE OF GETTING MARRIED**

HETROSEXUAL & SAME SEX COUPLES NOW ALL HAVE CHOICE TO MARRY

**FATIMA GABIE HASSAM v. JACOBS N.O. & OTHERS**

18 JULY 2008 CASE NO. 5704/2004

POLYGAMOUS MUSLIM MARRIAGE

– ALL SPOUSES = SPOUSE

CAPE TIMES : THURSDAY 16 JULY 2009

THE CONSTITUTIONAL COURT ORDERED THAT THE WORDS “OR SPOUSES” BE READ INTO THE INTESTATE SUCCESSION ACT, & THAT THE CHANGE BE MADE RETROSPECTIVE TO 27 APRIL 2009

**SOLOSHINIE GOVENDER V. NARAINSAMY GOVENDER NO & OTHERS**

DURBAN HIGH COURT CASE NO : 675/2008 HEARD : 29 OCT 2008

SOLOSHINIE GOVENDER APPLIED TO COURT FOR RECOGNITION AS A SPOUSE IN TERMS OF THE INTESTATE SUCCESSION ACT.. SHE & BALASUNDRAN NARAINSAMY WERE MARRIED IN 2004 IN ACCORDANCE WITH THE CUSTOMS & TRADITIONS OF THE HINDU RELIGION. THE MARRIAGE WAS NOT REGISTERED. BALASUNDRAN NARAINSAMY DIED ON 1 JANUARY 2007 – INTESTATE

MARRIAGE NOT LEGALLY RECOGNISED. NO CHILDREN. THEREFORE, DECEASED'S PARENTS WERE CONSIDERED TO BE THE BENEFICIARIES ITO INTESTATE SUCCESSION ACT.

COURT GRANTED AN ORDER INTERPRETING THE WORD "SPOUSE" AS USED IN THE INTESTATE SUCCESSION ACT TO INCLUDE THE SURVIVING PARTNER TO A MONOGAMOUS HINDU MARRIAGE, RECOGNISING SOLOSHINIE GOVENDER AS A SPOUSE & ENABLING HER TO INHERIT FROM THE DECEASED ESTATE.

**REFORM OF CUSTOMARY LAW OF SUCCESSION AND REGULATION OF RELATED MATTERS ACT No 11 OF 2009**

CAME INTO OPERATION ON 20 SEPTEMBER 2010

BY PROCLAMATION NO. R.54, 2010 GOVERNMENT GAZETTE VOL. 543 NO. 33576

"SPOUSE" INCLUDES EVERY SPOUSE & EVERY WOMAN IN A SUPPORTING UNION.

# WILLS – FORMALITIES & DRAFTING

WILLS – TESTATE SUCCESSION

FREEDOM OF TESTATION SUBJECT TO

- PUBLIC MORALS
- MAINTENANCE OF SURVIVING SPOUSES ACT

# FORMALITIES

2012 COURSE NOTES Pages 9 to 17

WILLS ACT 7/1953 AS AMENDED BY THE LAW OF SUCCESSION AMENDMENT ACT 43/1992 2012 Course Notes - Page 179

SECTION 1 - DEFINITIONS

AMENDMENT = DELETION, ADDITION, ALTERATION, INTERLINEATION

COMPETENT WITNESS = PERSON OF 14 YEARS + COMPETENT TO GIVE EVIDENCE IN COURT

DELETION = DELETION, CANCELLATION, OBLITERATION, EXCLUDING THAT WHICH CONTEMPLATES REVOCATION OF ENTIRE WILL

SIGN = INCLUDES INITIALS
+ IN THE CASE OF A TESTATOR ONLY - INCLUDES MAKING OF A MARK

WILL = INCLUDES CODICIL / OTHER TESTAMENTARY WRITING

SECTION 2 - FORMALITIES

§ 2(1)(a)

(1) WILL MUST BE

→ SIGNED AT END BY THE TESTATOR OR BY SOME OTHER PERSON IN HIS PRESENCE & AT HIS DIRECTION

→ SIGNED IN THE PRESENCE OF 2 / MORE COMPETENT WITNESSES PRESENT AT THE SAME TIME

→ ATTESTED & SIGNED BY WITNESSES IN PRESENCE OF TESTATOR / TESTATOR & OTHER PERSON & IN PRESENCE OF EACH OTHER

→ IF MORE THAN 1 PAGE TESTATOR / OTHER PERSON MUST SIGN EACH PAGE – ANYWHERE

EXAMPLE :

LAST WILL & TESTAMENT
OF
EDWARD WINDSOR

……..……..……
……..……..……
……
……
……
……
……
…

AS WITNESSES :

1. E BOWLES

2. C PARKER E WINDSOR
EDWARD WINDSOR

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*Page 2*

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IN WITNESS WHEREOF I HAVE SIGNED THIS MY LAST WILL AND TESTAMENT AT CAPE TOWN ON THIS 19TH DAY OF JUNE 2009 IN THE PRESENCE OF THE UNDERSIGNED WITNESSES, WHO, IN MY PRESENCE AND IN THE PRESENCE OF EACH OTHER, HAVE AFFIXED THEIR SIGNATURES HERETO.

AS WITNESSES :

1. E BOWLES

2. C PARKER E WINDSOR
EDWARD WINDSOR

SIGNATURES COULD ACTUALLY JUST BE :

LAST WILL & TESTAMENT

OF

EDWARD WINDSOR

……..……

……..…

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……..

E W

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*Page 2*

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EB

CP EW

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IF THE TESTATOR SIGNS BY MAKING A MARK / OTHER PERSON SIGNS OBO TESTATOR ---------- A COMMISSIONER OF OATHS MUST CERTIFY :

- THAT HE HAS SATISFIED HIMSELF AS TO THE IDENTITY OF THE TESTATOR
- THAT THE WILL SO SIGNED IS THE WILL OF THE TESTATOR

THE COMMISSIONER OF OATHS MUST :

- SIGN EACH PAGE & PUT HIS CERTIFICATE AT THE END

NOTE : THE WILL MUST BE SIGNED IN THE PRESENCE OF THE C/O, BUT C/O DOES NOT HAVE TO CERTIFY IN THE PRESENCE OF THE TESTATOR – C/O MUST CERTIFY AS SOON AS POSSIBLE AFTER THE TESTATOR HAS SIGNED, EVEN IF TESTATOR HAS DIED IN THE INTERIM.

CERTIFICATE ITO SECTION 2(1)(a)(v)

I, KEVIN JENKINS, OF 140 ST GEORGE'S MALL, CAPE TOWN, *IN MY CAPACITY AS COMMISSIONER OF OATHS,* CERTIFY THAT : -

1. I HAVE SATISFIED MYSELF AS TO THE IDENTITY OF THE TESTATOR, JOE BLOGGS; AND

2. THIS WILL IS THE WILL OF THE TESTATOR.

DATED AT CAPE TOWN THIS 3RD DAY OF JUNE 2009.

K Jenkins

KEVIN JENKINS
COMMISSIONER OF OATHS

§ 2(1)(b) - AMENDMENTS

SAME RULES APPLY

TESTATOR / OTHER PERSON MUST SIGN TO IDENTIFY IN THE PRESENCE OF 2 / MORE COMPETENT WITNESSES. WITNESSES MUST SIGN IN THE PRESENCE OF TESTATOR IF TESTATOR MAKES A MARK / OTHER PERSON SIGNS – NEED CERTIFICATE OF C/O

§ 2(2) – AMENDMENTS ARE PRESUMED, UNLESS THE CONTRARY IS PROVED, TO HAVE BEEN MADE AFTER THE WILL WAS EXECUTED – REBUTTABLE PRESUMPTION.

SECTION 2(3)

§ 2(3) - IF A COURT IS SATISFIED THAT A DOCUMENT / AMENDMENT OF A DOCUMENT WAS INTENDED TO BE THE TESTATOR'S WILL –

THE COURT SHALL ORDER THE MASTER TO ACCEPT IT AS A WILL EVEN THOUGH IT DOES NOT COMPLY WITH ALL THE REQUIRED FORMALITIES.

§ 2A – POWER OF COURT TO DECLARE A WILL TO BE REVOKED

IF A COURT IS SATISFIED THAT A TESTATOR HAS BEFORE HIS DEATH : -

- MADE A WRITTEN INDICATION ON HIS WILL / CAUSED SUCH INDICATION TO BE MADE;

- PERFORMED ANY ACT / CAUSED TO BE PERFORMED,

WHICH IS APPARENT FROM THE FACE OF THE WILL;

- DRAFTED / CAUSED TO BE DRAFTED ANOTHER DOCUMENT;

BY WHICH HE INTENDED TO REVOKE HIS WILL / PART THEREOF, THE COURT SHALL DECLARE THE WILL / PART TO BE REVOKED

SECTION 2B – EFFECT OF DIVORCE / ANNULMENT OF MARRIAGE ON WILL

IF A PERSON DIES WITHIN 3 MONTHS AFTER MARRIAGE WAS DISSOLVED (DIVORCE / ANNULMENT) & THAT PERSON HAD EXECUTED A WILL PRIOR TO SUCH DISSOLUTION – SUCH WILL SHALL BE IMPLEMENTED AS IF THE EX-SPOUSE HAD DIED BEFORE THE DISSOLUTION,

UNLESS IT APPEARS FROM THE WILL THAT THE TESTATOR INTENDED TO BENEFIT THE EX-SPOUSE NOTWITHSTANDING THE DISSOLUTION OF THE MARRIAGE.

EXAMPLE :

H + W MARRIED 1980

H EXECUTES WILL 1990 – LEAVES ESTATE TO W & CHILDREN

GET DIVORCED JUNE 2005

H DIES JULY 2005

(1 MONTH AFTER DIVORCE I.E. WITHIN 3 MONTH PERIOD)

EX-W IS PRESUMED TO HAVE PREDECEASED

CHILDREN INHERIT EVERYTHING

AFTER EXPIRATION OF 3 MONTH PERIOD – WILL WILL BE IMPLEMENTED AS IS – i.e. EX-W WILL INHERIT.

VERY IMPORTANT TO INFORM DIVORCE CLIENTS OF THIS PROVISION

SECTION 2 C – SURVIVING SPOUSE & DESCENDANTS

(1) IF THERE IS A DESCENDANT & A SURVIVING SPOUSE WHO BENEFIT

- & DESCENDANT RENOUNCES HIS RIGHT TO BENEFIT IN TERMS OF THE WILL - SUCH BENEFIT SHALL VEST IN THE SURVIVING SPOUSE.

(2) IF DESCENDANT HAS PREDECEASED / IS DISQUALIFIED FROM INHERITING / HAS RENOUNCED BENEFIT

SUBJECT TO (1) ABOVE, SUCH DESCENDANT'S DESCENDANTS SHALL INHERIT *PER STIRPES*

SECTION 2 D – INTERPRETATION OF WILLS

(a) ADOPTED CHILD IS REGARDED AS BORN OF THE ADOPTIVE PARENTS & IS NOT REGARDED AS THE CHILD OF THE NATURAL PARENTS OR ANY PREVIOUS ADOPTED PARENT

(b) FACT THAT A PERSON IS BORN OUT OF WEDLOCK DOES NOT AFFECT HIS RELATIONSHIP TO THE TESTATOR

(c) ANY BENEFIT ALLOCATED TO THE CHILDREN OF A PERSON / MEMBERS OF A CLASS – SHALL VEST IN THOSE CHILDREN / MEMBERS WHO ARE ALIVE AT THE TIME OF THE DEVOLUTION OF THE BENEFIT OR WHO HAVE ALREADY BEEN CONCEIVED & WHO ARE LATER BORN ALIVE (*NASCITURUS* RULE)

SECTION 3 bis – FOREIGN WILLS

A WILL SHALL NOT BE INVALID MERELY BY REASON OF THE FACT THAT IT DOES NOT COMPLY WITH OUR SA FORMALITIES, IF IT COMPLIES WITH THE LEGAL REQUIREMENTS OF THE COUNTRY IN WHICH IT WAS EXECUTED / IN WHICH THE TESTATOR WAS DOMICILED / RESIDENT / A CITIZEN

SECTION 4 – COMPETENCY TO MAKE A WILL

ANY PERSON AGED 16+ CAN MAKE A WILL AS LONG AS HE IS MENTALLY CAPABLE OF APPRECIATING THE NATURE & EFFECT OF HIS ACT

BURDEN OF PROVING HE WAS MENTALLY INCAPABLE RESTS ON THE PERSON ALLEGING HE WAS INCOMPETENT.

SECTION 4A – COMPETENCY OF OTHER PERSONS INVOLVED

(1) ANY
- WITNESS
- PERSON SIGNING OBO TESTATOR
- WRITER / DRAFTER
- SPOUSE OF ANY OF THE ABOVE

SHALL BE DISQUALIFIED FROM BENEFITING, UNLESS :

(2)(a) A COURT DECLARES SUCH PERSON COMPETENT

– IF SATISFIED THAT SUCH PERSON / SPOUSE DID NOT DEFRAUD / UNDULY INFLUENCE THE TESTATOR

(2)(b) SUCH PERSON / SPOUSE IS AN INTESTATE HEIR

– THEN ONLY TO THE EXTENT ENTITLED ITO INTESTATE SUCCESSION

(2)(c) RE WITNESSES – WHERE WILL WAS ALSO SIGNED BY 2 OTHER COMPETENT WITNESSES WHO DO NOT RECEIVE ANY BENEFIT.

EXCEPT FOR (b) (INTESTATE HEIR), APPOINTMENT AS :

EXECUTOR, TRUSTEE, GUARDIAN - IS REGARDED AS A BENEFIT

# WILLS CASE LAW 2012

IS THE DOCUMENT ACTUALLY A WILL ?

IS IT ACTUALLY THE LAST WISH OF THE TESTATOR ?

**SECTION 2(3) – RESCUE PROVISION**

HIGH COURT HAS THE POWER TO ORDER THE MASTER TO ACCEPT A DOCUMENT AS A WILL IF IT IS CLEAR THAT

-- THE DOCUMENT WAS INTENDED TO BE THE WILL OF THE TESTATOR

+ IT REPRESENTS THE TESTATOR'S TRUE INTENTION.



**MacDONALD & OTHERS v. MASTER, HIGH COURT**

**ORANGE FREE STATE PROVINCIAL DIVISION 2002 (5) SA 65 (O)**

► VALIDITY OF WILL CONTAINED IN FILE ON PERSONAL COMPUTER

FACTS :

ON OR AROUND 14 DECEMBER 2000, MALCOLM SCOTT MacDONALD (THE DECEASED) COMMITTED SUICIDE. ON HIS BEDSIDE TABLE, HE LEFT 4 HANDWRITTEN NOTES, ALL DATED 13 DECEMBER 2000.

ONE NOTE READ :

**“ I, MALCOLM SCOTT MacDONALD, ID 5609065240106, DO HEREBY DECLARE THAT MY LAST WILL AND TESTAMENT CAN BE FOUND ON MY PC AT IBM UNDER DIRECTORY C : \ windows \ my stuff \ my will \ personal “**

IBM = IBM GLOBAL SERVICES, WELKOM, THE FIRM WHERE THE DECEASED WAS EMPLOYED. EMPLOYEES DID NOT HAVE ACCESS TO EACH OTHER’S PERSONAL COMPUTERS. THEY CHOSE THEIR OWN PASSWORDS, WHICH WERE CHANGED MONTHLY, PLACED IN SEALED ENVELOPES & LOCKED UP IN A CONTROLLED FACILITY WITH EXTREMELY LIMITED ACCESS.

THE DECEASED’S WIFE REQUESTED THE FIRM’S PROFESSIONAL DEVELOPMENT MANAGER, CHRIS DIMMICK, TO OBTAIN THE DECEASED’S COMPUTER PASSWORD – WHICH HE DID. DIMMICK THEN ACCESSED THE RELEVANT FILE ON THE DECEASED’S COMPUTER – MADE A PRINT-OUT & DELETED THE FILE. HE PLACED THE PRINT-OUT IN A SEALED ENVELOPE & HANDED IT TO THE DECEASED’S WIFE. THE COURT WAS SATISFIED THAT THERE HAD BEEN NO FRAUD OR TAMPERING.

THE WILL CONTAINED CERTAIN DISPOSITIONS & THE RESIDUE WAS BEQUEATHED IN TRUST TO HIS DAUGHTER FROM A PREVIOUS MARRIAGE.

AT THE TIME OF THE DECEASED’S DEATH, HE & HIS WIFE WERE IN THE PROCESS OF GETTING DIVORCED.

THE PARTIES WHO APPLIED FOR THE WILL TO BE DECLARED VALID = THE DECEASED’S BROTHERS & HIS MOTHER.

THE COURT FOLLOWED THE CASE OF

BACK & OTHERS N.N.O. v MASTER, SUPREME COURT [1996] 2 ALL SA 161(C)

AND HELD THAT THE APPLICANTS HAD ESTABLISHED ON A BALANCE OF PROBABILITIES :

1. THAT THE DOCUMENT, THE “PRINT-OUT” WAS DRAFTED BY THE DECEASED. [THE ACT DOES NOT DEFINE THE WORD “DRAFT”]
2. THAT THE DECEASED HAD DIED SINCE THE DRAFTING OF THE DOCUMENT.
3. THAT THE DOCUMENT WAS INTENDED BY THE DECEASED TO BE HIS WILL. [NOT A DRAFT / PRELIMINARY NOTES]

THE COURT ACCORDINGLY ORDERED THAT THE PRINTOUT WAS THE LAST WILL & TESTAMENT OF THE DECEASED & ORDERED THE MASTER TO ACCEPT IT AS SUCH.

PAGES 11 TO 13 COURSE NOTES 2012– LISTS NUMEROUS CASES WITH EXAMPLES WHERE THE COURTS HAVE ACCEPTED / REJECTED A DOCUMENT AS BEING A WILL.

**NDEBELE & OTHERS NNO v. THE MASTER & ANO 2001 (2) SA 102 (C)**

SECTION 2(3) WILLS ACT

MEANING OF THE WORDS "INTENTION" & "DRAFTED"

THE DECEASED = MR BHEKIZULU HERMAN TSHABALALA

EACH OF APPLICANTS 1, 2 & 3 = MOTHER & NATURAL GUARDIAN OF A MINOR CHILD

APPLICANT 4 = ATTORNEY OF THE DECEASED

FIRST RESPONDENT = THE MASTER (AGREED TO ABIDE THE DECISION OF THE COURT)

SECOND RESPONDENT = MRS VIRGINIA NOMONDE TSHABALALA, WHO WAS THE SURVIVING SPOUSE OF THE DECEASED, & WHO OPPOSED THE APPLICATION

DURING JUNE 1991 THE DECEASED'S ATTORNEY PREPARED

-- A DEED OF TRUST "THE B V TSHABALALA TRUST"

- DECEASED & 2ND RESPONDENT = INCOME BENEFICIARIES

- THEIR CHILDREN = CAPITAL BENEFICIARIES

- TRUSTEES = DECEASED, 2ND RESPONDENT & ATTORNEY

-- JOINT WILL

- DECEASED APPOINTED 2ND RESPONDENT AS HIS SOLE HEIR & IF SHE SURVIVED HIM & FAILED TO EXECUTE ANOTHER WILL, THEN THEIR CHILDREN WOULD BE THE HEIRS

- DECEASED APPOINTED 2ND RESPONDENT AS HIS EXECUTOR, ALTERNATIVELY HIS ATTORNEY

- DECEASED APPROINTED 2ND RESPONDENT AS TRUSTEE OF A TESTAMENTARY TRUST

BOTH THE TRUST DEED & THE JOINT WILL WERE DULY SIGNED & EXECUTED ON **7 JUNE 1991**

IN APRIL 1996 THE DECEASED DISCOVERED HIS WIFE WAS HAVING AN AFFAIR & INSTRUCTED HIS (SAME) ATTORNEY TO :

1. COMMENCE DIVORCE PROCEEDINGS AGAINST 2ND RESPONDENT.
2. REMOVE 2ND RESPONDENT AS A TRUSTEE OF THE B V TSHABALALA TRUST & DRAFT NECESSARY RESOLUTION.
3. REDRAFT HIS WILL

   - TAKE OUT 2ND RESPONDENT

   - ATTORNEY TO BE THE EXECUTOR

   - 3 MINOR CHILDREN – 2 OF WHOM WERE NOT 2ND RESPONDENT'S AS RESIDUARY HEIRS

THE ATTORNEY DRAFTED EVERYTHING & SENT ALL DOCUMENTS TO THE DECEASED ON 16 MAY 1996.

ON 20 MAY 1996 THE DECEASED MET WITH HIS INSURANCE BROKER & CHANGED HIS NOMINATED BENEFICIARIES (EXCLUDING THE 2$^{ND}$ RESPONDENT) & ADVISED THAT HE WAS GETTING DIVORCED & HAD MADE A NEW WILL.

ON 23 MAY 1996 THE DECEASED TELEPHONICALLY INFORMED HIS ATTORNEY THAT THE WILL HE HAD DRAFTED CORRECTLY REFLECTED HIS INTENTIONS & WAS WHAT HE WANTED. THE DECEASED HAD TO TRAVEL TO JHB & ARRANGED THAT HE WOULD CONTACT HIS ATTORNEY WHEN HE RETURNED, ABOUT MONDAY 3 JUNE 1996.

**THE DECEASED WAS MURDERED ON 2 JUNE 1996.**

2ND RESPONDENT'S LOVER, XOLANI HOBONGWANA, WAS CONVICTED OF HIS MURDER BY THE TIME OF THIS APPLICATION.

THE POLICE DISCOVERED AT THE MURDER SCENE – THE DECEASED'S BRIEFCASE WHICH CONTAINED THE TRUST RESOLUTION & THE WILL.

THE ATTORNEY & APPLICANTS 1, 2 & 3 BROUGHT THIS APPLICATION TO THE HIGH COURT TO :

DECLARE THE UNSIGNED WILL TO BE THE LAST WILL & TESTAMENT OF THE DECEASED IN TERMS OF SECTION 2(3)

ALTERNATIVELY

THAT THE 1991 WILL WAS REVOKED IN TERMS OF SECTION 2A SECTION 2(3)

" IF A COURT IS SATISFIED THAT A DOCUMENT ….. DRAFTED OR EXECUTED BY A PERSON WHO HAS DIED SINCE THE DRAFTING OR EXECUTION THEREOF, WAS INTENDED TO BE HIS WILL ….. THE COURT SHALL ORDER THE MASTER TO ACCEPT THAT DOCUMENT ….. FOR THE PURPOSES OF THE ADMINISTRATION OF ESTATES ACT 66 OF 1965 AS A WILL, ALTHOUGH IT DOES NOT COMPLY WITH ALL THE FORMALITIES FOR THE EXECUTION ….. OF WILLS REFERRED TO IN SUBSECTION (1). "

APPLICANTS MUST ESTABLISH ON A BALANCE OF PROBABILITIES :

THAT THE DOCUMENT WAS DRAFTED BY THE DECEASED AND

THAT THE DECEASED HAD SINCE DIED AND

THAT THE DOCUMENT WAS INTENDED BY THE DECEASED TO BE HIS LAST WILL & TESTAMENT

**"DRAFTED"**

CLEARLY, THE DECEASED HIMSELF HAD NOT PHYSICALLY WRITTEN OR TYPED THE DOCUMENT BUT – THE WORD "DRAFTED" IS NOT DEFINED IN THE ACT

THE COURT CONSIDERED DIFFERENT APPROACHES OF CASE LAW –

STRICT LITERAL INTERPRETATION

VERSUS LIBERAL FLEXIBLE INTERPRETATION

THE COURT REFERRED TO THE BACK CASE

WITH ALL THE EVIDENCE – THE COURT ACCEPTED THAT THE DOCUMENT WAS "DRAFTED" BY THE DECEASED. **IT HAD BEEN DRAFTED ON HIS INSTRUCTIONS & CONFIRMED TO HIS ATTORNEY AS BEING CORRECT.**

**"INTENTION"**

IT IS OF UTMOST IMPORTANCE THAT THERE IS NO SCOPE FOR THE FRAUDULENT INTRODUCTION OF A DOCUMENT IN A SITUATION WHERE THE AUTHOR IS UNABLE TO VERIFY THE DOCUMENT.

THE COURT WAS HAPPY THAT THERE WERE NO CONCERNS IN THIS REGARD & NO REASON TO DOUBT THE ATTORNEY'S VERSION OF EVENTS

- THE APPLICANT WAS AN EXPERIENCED ATTORNEY & AN OFFICER OF THE COURT

- THE 2ND RESPONDENT DID NOT SEEK TO IMPUGN THE ATTORNEY'S INTEGRITY OR SUGGEST THAT THERE WAS ANY FRAUD INVOLVED

THE DOCUMENT IS NOT AN INSTRUCTION TO HIS ATTORNEY TO CHANGE HIS WILL – THE DECEASED GAVE ORAL INSTRUCTIONS. THE DOCUMENT IS A COMPLETE DOCUMENT WHICH THE DECEASED CONFIRMED WAS CORRECT & WAS GOING TO SIGN IT

- IT WAS IN ACCORDANCE WITH HIS INSTRUCTIONS & WAS WHAT HE WANTED
- HE ALSO INFORMED HIS INSURANCE BROKER THAT HE HAD EXECUTED A NEW WILL

THE COURT HELD THAT

THE APPLICANTS HAD ESTABLISHED ON A BALANCE OF PROBALITIES THAT THE DECEASED HAD INTENDED THE DOCUMENT TO BE HIS "FINAL INSTRUCTION WITH REGARD TO THE DISPOSAL OF HIS ESTATE".

THE COURT THEREFORE ORDERED :

THAT THE DOCUMENT = THE WILL OF THE TESTATOR

THAT THE MASTER IS DIRECTED TO ACCEPT THE DOCUMENT AS THE WILL OF THE DECEASED

COURT DID NOT HAVE TO DEAL WITH THE SECTION 2A ALTERNATIVE (REVOCATION)

**GILES N.O. AND ANOTHER v. HENRIQUES AND OTHERS 2008 (4) SA 558**

APPLICATION BY THE EXECUTOR FOR THE RECTIFICATION OF THE WILL OF THE DECEASED

MR & MRS CAMMISA HAD SEPARATE WILLS DRAFTED & ON 15 SEPTEMBER 1999, INADVERTANTLY SIGNED EACH OTHER'S WILLS INSTEAD OF THEIR OWN.

MR CAMISSA DIED ON 19 OCTOBER 2004.

MRS CAMISSA'S MENTAL ABILITY AT THIS TIME = QUESTIONABLE. MRS CAMISSA'S WILL – LEFT EVERYTHING TO HUSBAND, ALT. TO THEIR SON / ISSUE *PER STIRPES*

MR CAMISSA'S WILL –

- 2 LEGACIES
- HOUSE TO BE SOLD – FUNDS TO BE INVESTED TO PROVIDE INCOME FOR WIFE (SOLD PRIOR TO DEATH)
- RESIDUE TO SON

COURT ORDERED WILLS TO BE RECTIFIED BY THE DELETION & SUBSTITUTION OF NAMES & MAIN CLAUSES.

**SUICIDE NOTE**

**SMITH v. PARSONS N.O. & OTHERS**

**HIGH COURT SA DURBAN & COAST LOCAL DIVISION 29 JANUARY 2009**

WALTER PERCIVAL SMITH – WILL 7 MAY 2003 – SON = SOLE HEIR. SON ALSO NOMINATED BENEFICIARY OF WALTER'S TRANSNET PENSION FUND

WIFE RUBY HAD DIED 2002

WALTER THEN HAD ON-OFF RELATIONSHIP WITH YOUNGER WOMAN, HEATHER SMITH (NO RELATION)

WALTER SMITH COMMITTED SUICIDE ON 25 FEBRUARY 2007 LEFT A SUICIDE NOTE :

"Dear Heather

Thanks for all you have done…I'm sorry I've been miserable – I do love you…please forgive me..

Heather, you can have this house, you will obviously ? sell it and should meet your future needs. Also I authorise Standard Bank to give you immediate access to Plusplan – there is about R570,000 which will not leave you battling. …..

There is also several thousand Rands in the bottom drawer of safe. ….

My Will is in the Brown envelope in the safe. I leave everything else to J as stated therein. …"

DATED 25/2/2007 & SIGNED "WALLY"

SHOULD THE MASTER BE DIRCTED TO ACCEPT THE SUICIDE NOTE AS A CODICIL TO THE DECEASED'SWILL ito SECTION 2(3) ?

- THE COURT HELD :

- EVIDENCE SHOWS THAT THE SUICIDE NOTE WAS PERSONALLY WRITTEN BY THE DECEASED

- INTENTION ASPECT – NOTE WAS PERSONALLY WRITTEN TO HEATHER, NOT ADDRESSED TO EXECUTORS,

- LANGUAGE TOO "LOOSE",

  - DECEASED WAS AN ASTUTE BUSINESSMAN – COULD NOT HAVE BEEN THINKING RATIONALLY OR LOGICALLY AT THE TIME – EXPECT BANK TO ACT ON SUCH A NOTE ?

  - STATED INTENTION IN THE NOTE THAT THE EXISTING WILL SHOULD REMAIN VALID

**NOTE IS NOT GENUINE EXPRESSION OF DECEASED'S INTENTION CONCERNING THE DISPOSAL OF HIS ESTATE**

SMITH CASE ON APPEAL 2010

**SMITH v PARSONS (187/07) [2010] ZASCA 39 (30 March 2010)**

APPEAL COURT OVERTURNED DECISION OF COURT *A QUO* & ACCEPTED THAT THE SUICIDE NOTE WAS A VALID RECORDAL OF THE DECEASED'S LAST WISHES & ORDERED THE MASTER TO ACCEPT THE NOTE AS AN AMENDMENT TO THE WILL.

APPEAL COURT PLACED A LOT OF WEIGHT ON THE FACT THAT THE DECEASED HAD SHOT HIMSELF IN THE BATHROOM, BUT HAD LEFT THE NOTE IN THE KITCHEN AT A PLACE WHERE IT COULD BE SEEN UNDER A CRUCIFIX. (THE DECEASED WAS APPARANTLY A COMMITTED CHRISTIAN.)

**CONDITIONAL BEQUESTS**

**MINISTER OF EDUCATION & ANOTHER v. SYFRETS TRUST LTD N O & ANOTHER 2006 (4) SA 205 (C)**

FREEDOM OF TESTATION v. PROVISIONS OF CONSTITUTION

DECEASED – DR EDMUND WILLIAM SCARBROW - DIED ON 7 JULY 1921

WILL DATED 23 APRIL 1920 – PROVIDED THAT THE RESIDUE OF HIS ESTATE SHOULD BE HELD IN TRUST – AFTER THE DEATH OF HIS WIFE & IN THE EVENT THAT BOTH HIS SONS DIED WITHOUT ISSUE, THEN SUCH RESIDUE SHOULD BE APPLIED FOR THE PURPOSE OF FORMING A TRUST – THE "SCARBROW BURSARY FUND"

– "THE INCOME WHEREOF SHALL BE USED …… TO PROVIDE BURSARIES FOR **DESERVING STUDENTS WITH LIMITED OR NO MEANS OF EITHER SEX (BUT OF EUROPEAN DESCENT ONLY)** OF THE UNIVERSITY OF CAPE TOWN WHO HAVE PASSED THE MATRICULATION EXAMINATION & WHO DESIRE TO PROCEED WITH & COMPLETE THEIR STUDIES"

A CODICIL WAS LATER ADDED ON 2 DECEMBER 1920

– **"PERSONS OF JEWISH DESCENT & FEMALES OF ALL NATIONALITIES" WOULD NOT BE ELIGIBLE** TO COMPETE FOR ANY SCHOLARSHIPS FUNDED BY THE UNIVERSITY OF CAPE TOWN

BOTH HIS SONS DIED (RESPECTIVELY IN 1953 & 1965) WITHOUT ISSUE, THUS CAUSING THE SCARBROW BURSARY FUND TO COME INTO EXISTANCE

HOWEVER, IN 1969, THE COUNCIL OF UCT DECIDED, BY REASON OF THE DISCRIMINATORY PROVISIONS, THAT IT COULD NOT ACCEPT THE DUTY OF ADMINISTERING THE BURSARIES IN QUESTION

- THE ROLE OF ADMINISTERING THE BURSARIES & SELECTING THE RECIPIENTS WAS THEN PERFORMED BY SYFRETS IN ITS CAPACITY AS TRUSTEE OF THE TRUST.

IN MARCH 2002 – AN ADVERTISEMENT APPEARED IN A WEEKEND NEWSPAPER CAME TO THE ATTENTION OF THE MINISTER OF EDUCATION – REQUIREMENTS FOR APPLICANTS OF BURSARIES –

MUST BE "OF **EUROPEAN DESCENT, MALE & GENTILE**

THE MINISTER QUERIED THIS WITH SYFRETS, WHO ADVISED THAT THE PRINCIPLE OF FREEDOM OF TESTATION PRECLUDED IT FROM DEVIATING FROM OR VARYING THE WISHES OF THE TESTATOR AS CONTAINED IN A WILL, UNLESS A COURT ORDER COMPELLED IT TO DO SO

APPLICATION WAS BROUGHT TO THE HIGH COURT :

| | |
|---|---|
| MINISTER OF EDUCATION | FIRST APPLICANT |
| UNIVERSITY OF CAPE TOWN | SECOND APPLICANT |
| SYFRETS TRUST LTD | FIRST RESPONDENT |
| MASTER, HIGH COURT | SECOND RESPONDENT |

APPLICANTS CONTENDED THAT THE COURT WAS EMPOWERE TO DELETE THE DISCRIMINATORY PROVISIONS ON THE GROUNDS : -

SECTION 13 OF THE TRUST PROPERTY CONTROL ACT 57/1988, WHICH PERMITS THE COURT, IN CERTAIN CIRCUMSTANCES, TO DELETE OR VARY PROVISIONS IN A TRUST INSTRUMENT.

THE COMMON LAW, WHICH PROHIBITS BEQUESTS THAT ARE ILLEGAL OR IMMORAL OR CONTRARY TO PUBLIC POLICY.

DIRECT APPLICATION OF THE CONSTITUTION, MORE PARTICULARLY, THE EQUALITY AND ANTI-DISCRIMINATORY PROVISIONS OF SECTION 9.

THE RESPONDENTS AGREED TO ABIDE THE DECISION OF THE COURT

IN HIS REPORT THE MASTER REFERRED TO :

- PRINCIPLE OF FREEDOM OF TESTATION
- THESE TYPES OF PRIVATE TRUSTS ARE NOT UNCOMMON
- PRINCIPLE OF PRIVATE OWNERSHIP & PRIVATE SUCCESSION

COURT CONSIDERED :

- PUBLIC MORALS – WHAT WAS ACCEPTABLE THEN IS NOT ACCEPTABLE NOW
- MORALS ARE NOT STATIC
- FREEDOM OF TESTATION HAS ALWAYS BEEN SUBLECT TO LEGALITY & MORALS
- PUBLIC POLICY – NOW ROOTED IN THE CONSTITUTION – BASED ON HUMAN DIGNITY, THE ACHIEVEMENT OF EQUALITY & THE ADVANCEMENT OF HUMAN RIGHTS & FREEDOMS, NON-RACIALISM & NON-SEXISM
- UNFAIR DISCRIMINATION – AGAINST PEOPLE WHO HAVE SUFFERED IN THE PAST FROM PATTERNS OF DISADVANTAGE

- FACT ALSO THAT THE INSTITUTION APPOINTED TO DISTRIBUTE THE REWARDS OF THE TESTATOR'S BENEFICENCE WAS A PUBLIC AGENCY OR QUASI-PUBLIC BODY

- A TRUST, ALTHOUGH USUALLY CREATED PRIVATELY, IS AN INSTITUTION OF PUBLIC CONCERN – EVEN MORE SO WITH A CHARITABLE TRUST

COURT HELD :

THE TESTAMENTARY PROVISIONS IN QUESTION CONSTITUTE UNFAIR DISCRIMINATION & ARE CONTRARY TO PUBLIC POLICY.

THEREFORE, THE COURT IS EMPOWERED TO ORDER VARIATION OF THE TRUST DEED BY DELETING THE OFFENDING PROVISIONS IN THE WILL.

THIS DOES NOT MEAN THAT THE PRINCIPLE OF FREEDOM OF TESTATION IS BEING NEGATED OR IGNORED

– SIMPLY THAT CLAUSES IN WILLS OR TRUSTS THAT DISCRIMINATE UNFAIRLY ON THE GROUNDS OF RACE, GENDER & RELIGION ARE INVALID.

**ESTATE LATE GEORGE STRATES**

JUDGMENT HANDED DOWN DECEMBER 2007 : CAPE TOWN

EXECUTOR, MARTHINUS STEYN BROUGHT APPLICATION

DECEASED'S WILL SIGNED IN 2000 – LEFT THE RESIDUE OF HIS ESTATE TO THE UNIVERSITY OF CAPE TOWN ON CONDITION THAT THE INHERITANCE BE USED TO ESTABLISH A BURSARY FUND FOR WHITE STUDENTS IN THEIR SECOND OR LATER YEARS OF STUDY.

WILL SAID THAT IF UCT WOULD NOT ACCEPT THE BEQUEST, THE EXECUTOR WAS TO OFFER IT TO STELLENBOSCH UNIVERSITY & THEREAFTER TO ANY OTHER UNIVERSITY.

"I SPECIFICALLY RESTRICT THE BENEFICIARIES OF THE AFORESAID BURSARY FUND TO STUDENTS OF THE WHITE RACE BECAUSE OF PREFERENTIAL TREATMENT WITH REGARD TO SIMILAR FUNDS BEING GIVEN TO STUDENTS OF OTHER RACES."

UCT WOULD NOT ACCEPT THE BEQUEST & ADVISED THAT UCT'S CONSTITUTION MADE IT IMPOSSIBLE FOR IT TO ESTABLISH A BURSARY FUND WITH SUCH CONDITIONS ATTACHED TO IT.

THE EXECUTOR THEN OFFERED THE BEQUEST TO STELLENBOSCH UNIVERSITY. STELLENBOSCH AT FIRST ACCEPTED THE BEQUEST, BUT SUBSEQUENTLY INFORMED THE EXECUTOR THAT IT COULD NO LONGER ACCEPT IT.

THE EXECUTOR THEN OFFERED IT TO THE UNIVERSITY OF THE FREE STATE. IT ALSO REFUSED THE BEQUEST BECAUSE OF THE RACIAL RESTRICTIONS.

THE EXECUTOR THEN APPROACHED THE CAPE HIGH COURT TO HAVE THE CLAUSE IN THE WILL AMENDED.

HE INFORMED THE COURT THAT THE REGISTRAR OF UCT HAD ADVISED THAT UCT WOULD ACCEPT THE BEQUEST SHOULD THE CLAUSE BE AMENDED, & UCT DID NOT OPPOSE THE APPLICATION.

THE MATTER WAS HEARD ON 11 DECEMBER 2007 & JUDGE DENNIS DAVIS ORDERED THAT THE CLAUSE BE AMENDED SO THAT IT EXCLUDED ANY RACIAL RESTRICTIONS.

THE CLAUSE IS AMENDED TO READ :

**"TO ESTABLISH A BURSARY FUND FOR THE BENEFIT OF STUDENTS IN THEIR SECOND OR LATER YEARS OF ACADEMIC STUDY."**

**BOE TRUST LIMITED Case No. 211/2009**

DECEASED CONTEMPLATED IMPOSSIBILITY & PROVIDED ALTERNATIVE

WHITE STUDENTS, CHEMISTRY DEPARTMENT

COURT CONFIRMED PRINCIPLE OF FREEDOM OF TESTATION, TESTATOR'S BACKGROUND & REFUSED TO ALTER TERMS & PROVISIONS.

WILL WAS DRAFTED & EXECUTED ON 14 JULY 2002, & THETESTATRIX DID STATE "IN THE EVENT THAT IT SHOULD BECOME IMPOSSIBLE FOR MY TRUSTEE TO CARRY OUT THE TERMS OF THE TRUST, I DIRECT THAT THE INCOME GENERATED BE USED ANNUALLY TO PROVIDE DONATIONS IN EQUAL SIZES TO EACH OF THE FOLLOWING ORGANISATIONS..... SA HEART FOUNDATION, SPCA, BOY'S TOWN, SALVATION ARMY, NSRI.

**OOSTHUIZEN v BANK WINDHOEK LTD 1991 (1) SA 849 NHC**

TESTATOR'S WILL STIPULATED THAT THE RESIDUE OF HIS ESTATE WAS TO DEVOLVE UPON HIS DAUGHTERS IN EQUAL SHARES SUBJECT TO THE CONDITION THAT IF DAUGHTER X WAS STILL MARRIED TO HER PRESENT HUSBAND, HER INHERITANCE WAS TO BE HELD IN TRUST UNTIL THE MARRIAGE WAS TERMINATED.

COURT HELD : THE CONDITION HAD BEEN CREATED WITH THE INTENTION OF ENCOURAGING THE BREAKUP OF X'S MARRIAGE & WAS THEREFORE *CONTRA BONOS MORES & PRO NON SCRIPTO.*

**NAIDOO NO & ANOTHER v CROWHURST NO & OTHERS**

**[2010] JOL 24735 (WCC) Case No. 21732/2009 Judgment date : 1 December 2009**

VALIDITY OF WILL – APPLICANT'S LIFE PARTNER SOUGHT TO CHALLENGE THE DECEASED'S WILL ON THE BASIS THAT AT THE TIME OF MAKING THE WILL, HE WAS CLOSE TO DEATH & ON HEAVY MEDICATION.

MAIN ELEMENTS OF THE TEST FOR DECIDING QUESTION OF TESTAMENTARY CAPACITY :

AT THE TIME OF MAKING HIS WILL THE TESTATOR MUST HAVE BEEN CAPABLE OF :

- COMPREHENDING THE NATURE & EXTENT OF HIS PROPERTY
- RECOLLECTING & UNDERSTANDING THE CLAIMS OF RELATIVES & OTHERS UPON HIS FAVOUR & UPON HIS PROPERTY & OF FORMING THE INTENTION OF GRANTING EACH OF THEM THE SHARE IN THE PROPERTY SET OUT IN HIS WILL OR EXCLUDING THEM FROM ANY SHARE.

APPLICATION WAS DISMISSED.

APPLICANT WAS UNABLE TO PROVE THAT THE DECEASED DID NOT KNOW WHAT HE WAS DOING.