Drafting wills

By Jobst Bodenstein

11.1 Introduction

The professional responsibilities attached to drafting of wills are highlighted by the obvious fact that it is impossible to ascertain a testator's true mindset after death. This point is underscored, if not always appreciated by laypersons, by Gest's warning that "every man who knows how to write thinks he knows how to write a will and long may this happy hallucination possess the minds of our lay brethren".

This chapter is aimed at engendering a professional approach towards the drafting of wills, whilst providing practical guidance with regard to the entire process, commencing with the general approach to drafting, important prior considerations, and ultimately the execution of the will. Being primarily concerned with practical aspects of the drafting of wills, the discussions will be limited to the more common concepts of the law of succession. It is, however, imperative that readers acquaint themselves with the prescribed formalities for the execution of wills[1] and other equally important but less common concepts (for example massing, collation, revocation and *fideicommissa*).

The chapter also contains a useful interviewing checklist when taking instructions, as well as two examples of simple wills.

11.2 General approach to drafting

11.2.1 *Professionalism*

☐ *Be prepared*: Drafters should have the necessary knowledge, skills and experience in drafting techniques, law of succession, administration of estates and estate planning.

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1 Wills Act 7 of 1953 (as amended by Acts 48 of 1958, 80 of 1964, 41 of 1965 and 43 of 1992).

- *Take proper instructions*: Drafters should have a clear understanding of the testator's wishes.[2] The wishes can best be determined by consulting directly with the testator, rather than through an intermediary.[3] In *Ex parte Lutchman and Others*[4] an attorney took instructions from the testator's son, who was unaware that his father had already executed a valid will. Based on the son's ignorance and on miscommunication between the attorney and the son, the attorney drafted a will revoking the existing will, whilst only disposing of part of the assets of the testator. This necessitated an application to court after the death of the testator. The court expressed its disapproval at the actions of the attorney.

Drafters should have a clear understanding of the testator's wishes.

- *Be clear*: The drafted will must communicate the testator's wishes in clear, precise and unambiguous language.
- *Be realistic*: The testator's wishes must be translated into terms which make legal sense and which are practically executable. Provision should be made for various contingencies at the time of the testator's death. Satisfactory synchronisation should be attained between the terms of the will and the financial position at the time of the testator's death. The financial needs of the testator's family should be taken care of by means of proper estate planning.

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- *Comply with formalities*: The formalities in terms of the Wills Act for the execution of wills must be complied with. In *Pretorius v McCallum*[5] the court awarded delictual damages against an attorney who had caused a will to fail by not ensuring that the formalities for execution were properly complied with.
- *Consider changing circumstances*: Clients should be advised to have their will regularly reviewed in the light of constant changes to their personal and financial circumstances.
- *Get to know your client*: The more time spent on becoming acquainted with the personal and financial circumstances, the psychological profile and the client's outlook on life, the better equipped the practitioner will be to fulfill a professional task.
- *Be sensitive*: Many persons react quite emotionally when having to face up to their eventual death. The client should be treated with the necessary sensitivity.
- *Counsel the client*: Testators sometimes regard a will as a vehicle to spew anger or to convey vindictive parting shots against those who had slighted or crossed them. Professional drafters should not allow themselves to be used as mere recorders of vented emotions. Under these circumstances, a fine balance

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2 Pace and Van der Westhuizen *Wills and Trusts* LexisNexis Looseleaf Edition A42.
3 Barker (1993) *The Drafting of Wills* at 19.
4 1951 (1) SA 125 (T).
5 2002 (2) SA 423 (C). See also Hutchinson "The disappointed beneficiary smiles at last" 2000 *SALJ* 186.

needs to be maintained between following instructions on the one hand, and acting professionally on the other hand;

- ☐ *Be brief*: Whilst the voluminosity of the document may appear to be impressive, the unnecessary padding of the document increases the chances for potential errors, whilst possibly exposing the integrity of the practitioner who charges per page.
- ☐ *Use precedents with caution*: The practice of "patching" together a will from clauses derived from various precedents is both dangerous and unprofessional. Every will should be seen as a unique document adapted to the special circumstances and needs of each individual testator. There is, on the other hand, no reason why certain phrases, which have withstood the test of time and whose meaning are fully understood by the drafter, should not be used, albeit judiciously.
- ☐ *Follow a logical order*: The order of the will should be logical, dealing with one issue at a time. It is, for example, logical to first deal with all legacies before accounting for the residue of the estate. This will ensure that unnecessary repetition or omissions are minimised.

11.2.2 *Language*

Only plain and simple language should be used.

Since the will represents a personal declaration of its maker, only plain and simple language should be used.[6] The use of Latin phraseology and complex legal words increases the likelihood of the drafted document not being fully understood by the client, thereby unnecessarily compromising the accuracy of the true intention of the testator.[7] A well drafted will should not only be clearly understood, but also not be open to any misunderstanding. Ensure that there are no ambiguities in the will. This presupposes that the draftsperson has carefully considered what is intended to be said and excludes the possibility of different meanings being attached to the text. Punctuation, if correctly used, may be crucial in correctly expressing the testator's intention.[8] It may also "provide the decisive reason for [a court] accepting one construction rather than another".[9]

11.2.3 *Terminology*[10]

- ☐ *Clearly identify classes of people*: When identifying classes of people, it is most important to use precise and legally accepted terms.[11] A bequest, for example

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6 On the use of language in legal documents, see also the relevant paragraphs in the chapters on letter writing, drafting of pleadings and drafting of contracts.

7 Barker (1993) at 5.

8 *Supra* at 98.

9 *Harter v Epstein* 1953 (1) SA 287 (A) at 298.

10 Unit 5 of Van der Walt and Nienaber (2004) *English for Law Students* provides a useful and practical insight into the use of legal terminology in the drafting of wills.

11 *Estate Watkins v CIR* 1955 (2) SA 437 (A) at 448, where the court criticised the use of tautologous language. See also Pace "Wills" in Pace and Van der Westhuizen *Wills and Trusts* LexisNexis Looseleaf Edition A31.

"to my sons' children", begs the question whether the testator had intended to limit the bequest to those of his sons' children born at the time of his death, on the one hand, or any children that may ever be born to his sons, on the other hand. The words "family" or "relations" have no precise legal connotation and should be avoided. It could be intended to include one or all of the children, spouse, brothers and sisters, parents, uncles and aunts.[12] Unless otherwise indicated in the will, an adopted child and a child born out of wedlock are regarded as "children of the testator".[13]

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- *Clearly identifying classes of objects*: Take note that the term "money" includes notes and coins as well as the proceeds of savings, current, call and short-term deposit accounts.[14] The use of the term "business" may also give rise to uncertainty. This term may, for example, refer to the goodwill of the business only, or to the assets of the business only, or to the assets and liabilities of the business. If the testator wishes to bequeath a business as a going concern, it is suggested that the will specifically mentions all the constituent parts of such business.
- *Clearly distinguish between a direction and a wish of the testator*: A direction is a condition that is binding on the beneficiaries and the executor and which has to be enforced as, for example, a bequest. A wish, on the other hand, is something that the testator would like a beneficiary or the executor to do, without binding such person.
- *Avoid the use of empty or rhetorical words or phrases*: The phrase sometimes used in the heading of a will, "being of a sound and disposing mind, memory and understanding, and capable of any act that required thought, judgment, or reflection", is not only tautologous, but altogether meaningless and superfluous (in view of the presumption in favour of the testator).[15]

11.3 Prior considerations

11.3.1 *Capacity to make a will*

Persons over the age of 16 have the capacity to make a will.

Persons over the age of 16 have the capacity to make a will unless, at the time of making of the will, they were mentally incapable of appreciating the nature and effect of such act.[16] This requirement could disqualify a person who is either drunk or so ill that his/her capacity to correctly express his/her true intention is impaired. In determining a person's general physical and mental condition at the

12 Pace A34.
13 S 2D of the Law of Succession Amendment Act 43 of 1992.
14 Pace A41.
15 *Supra* A46.
16 S 4 of Act 7 of 1953.

time of execution of the will, our courts have considered various criteria, including intelligence, memory and capacity to understand.[17]

The onus of proof that the testator lacked the required capacity to make a will rests on the person alleging it.[18] A will made by a mentally incapacitated person may, however, be valid if made during a lucid interval.[19] A certificate provided for by a general practitioner or psychiatrist, attached to the will, may assist a court in deciding whether the testator possessed the necessary capacity at the time of execution of the will.

11.3.2 *Claims for maintenance*

The surviving spouse of a marriage dissolved by death enjoys a right against the deceased spouse's estate for reasonable maintenance needs.[20] A minor child has a claim for maintenance and education against the deceased estates of either the father[21] or the mother.[22] Estate debts enjoy preference over claims for maintenance, whilst claims for maintenance, in turn, enjoy preference over claims by residuary heirs or legatees.

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Regarding the duration of maintenance obligations, our courts have distinguished between two situations: first, in the case of maintenance orders, in terms of a written agreement made an order of the court, the obligation may survive the death of the maintenance debtor, provided that the maintenance creditor has neither remarried nor predeceased the debtor;[23] and second, where an order for maintenance was made in the absence of an agreement between the parties, the maintenance obligations do not survive the death of the maintenance debtor.[24]

11.3.3 *Surviving spouses*

A spouse married out of community of property and subject to the accrual system has, on dissolution of the marriage by death, a claim for one half-share of the accrual if such surviving spouse has either been disinherited or inherits less then his/her half-share.[25]

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17 *Essop v Mustapha and Essop NNO* 1988 (4) SA 213 (D) and *Kirsten v Bailey* 1976 (4) SA 108 (C); Pace A8.
18 Corbett, Hahlo and Hofmeyr (1980) *The Law of Succession in South Africa* at 5 6 7.
19 *Supra* fn 18.
20 S 2 of the Maintenance of Surviving Spouses Act 27 of 1990; Van Zyl "Maintenance" in Schäfer *Family Law Service* Butterworths C24.
21 *Van Zyl v Serfontein* 1992 (2) SA 450 (C); Van Zyl C21.
22 *Goldman v Executor Estate Goldman* 1937 WLD 64.
23 S 7(2) of the Divorce Act 70 of 1979; *Owens v Stoffberg* 1946 CPD 226 and *Milne v Estate Milne* 1967 (3) SA 362 (C).
24 Van Zyl C37; *Hodges v Coubrough* 1991 (3) SA 58 (D).
25 Matrimonial Property Act 88 of 1984.

11.3.4 *Divorced spouses*

A divorced spouse is, for a period of three months from the date of divorce, excluded from inheriting from the will of the former spouse, which was executed prior to the divorce.[26]

11.3.5 *Bequests to minors*

A cash bequest to which a minor becomes entitled must be paid into the Guardian's Fund,[27] unless provision has been made for the creation of a trust. Funds in the Guardian's Fund earn nominal interest and are only released when such beneficiary reaches the age of 21 years. The natural guardian is entitled to receive the movable property on behalf of the minor to whom it has been bequeathed.

11.3.6 *Pension funds*

A benefit accruing from a pension fund is excluded from the estate of the deceased member. In deciding which of the testator's dependants should receive benefits from the fund of a deceased contributor, the fund trustees have the authority to deviate from the nominations made by such deceased.[28] Dependants include both "legal" and "factual" dependants, and may thus also include a cohabitee or partner in a universal partnership.[29]

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11.3.7 *Disqualified beneficiaries*

The following persons are disqualified from benefiting from a will:[30]

- ☐ a witness;
- ☐ a person who signs a will in the presence and by the direction of the testator; and
- ☐ a person who writes out the will or a part of it in its own handwriting and the latter's spouse.

The disqualifications, however, fall away under the following three circumstances:

- ☐ first, a court may declare such person to be competent to inherit, if satisfied that such person neither defrauded nor exerted undue influence on the testator;
- ☐ second, if such person would have been entitled to inherit according to the laws of intestate succession, but not exceeding what would have been its intestate share; and
- ☐ third, if the will has been signed by at least two other competent witnesses who do not benefit from it.

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26 S 2(B) of Act 7 of 1953.
27 S 43 of the Administration of Estates Act 66 of 1965.
28 S 37 (c) of the Pension Fund Act 24 of 1956, as amended by s 21 of the Financial Institutions Second Amendment Act 54 of 1989.
29 Schwellnus "Cohabitation" in Schäfer *Family Law Service* Butterworths N16.
30 S 4 of Act 7 of 1953.

11.3.8 *Bequests contrary to public policy*

According to common law, a condition imposed in a bequest, which is illegal, against public policy (*contra bonos mores*) or too vague, is regarded as *pro non-scripto* (as if not written). Examples of conditions considered by our courts to have been *contra bonos mores* include the following:[31]

- ☐ a condition aimed at the break-up of a marriage.[32] However, a condition restraining the remarriage of the testator's surviving spouse has been held to be valid;[33]
- ☐ a condition excluding the jurisdiction of the court. In *Yenapergasan v Naidoo*[34] the testator had directed in his will that any dispute between legatees and the executor, or between the executors themselves, be submitted to a specified attorney for arbitration. The court ruled that the said provision was void on the basis that it sought to oust the jurisdiction of the courts and was thus against public policy.
- ☐ It is possible that certain bequests, which may previously not have been regarded as contentious, would now be invalidated on the ground that they negate or infringe on constitutionally protected rights. In terms of section 36 of the Constitution,[35] as envisaged by section 8 (3) (b), a court is obliged to balance constitutional rights against the testator's right to freedom of testation.[36] In an as yet unreported judgment, delivered in March 2006, the Cape High Court ruled that the terms of a will, creating a bursary exclusively for white males not of Jewish decent, were deemed to be discriminatory on the basis of race, gender and religion and thus void.[37]

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11.3.9 *The application of African customary law*

The apparent conflict between the constitutional recognition of culture[38] and customary law[39] on the one hand, and the equality clause on the other,[40] coupled with the application of the limitation clause,[41] add to the complexity in resolving these cases.

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31 Pace A55; De Waal, Schoeman and Wiechers 2001 *Law of Succession* 92.
32 *Oosthuizen v Bank Windhoek Ltd NO* 1991 (1) SA 849 (NHC).
33 *Rubin v Altschul* 1961 (4) SA 251 (W).
34 1932 NPD 96.
35 Constitution of the Republic of South Africa, 1996, formerly cited as Act 108 of 1996.
36 Du Toit "The constitutionally bound dead hand?" 2001 *Stell LR* (1) 222 at 234 *et seq.*
37 *The Minister of Education and University of Cape Town v Syfrets Trust Ltd NO and The Master of the High Court* CPD Case 2544/04 Unreported (25 March 2006) and *Saturday Star* 25 March 2006.
38 Ss 30 and 31 of the Constitution.
39 S 211 of the Constitution.
40 S 9 of the Constitution.
41 S 36 of the Constitution.

In customary law intestate succession is the norm.

In customary law intestate succession is the norm. Upon the death of the family head, his eldest son inherits the deceased's property. He also assumes the duties to support the surviving family members to the status of the family members, who include the deceased's surviving spouse(s).[42] Although persons subject to customary law are free to make wills,[43] there are certain assets which cannot be bequeathed by will. For example, "house property" (being movable property allotted by the deceased or accruing under custom to a woman with whom the deceased lived in a customary union) must devolve according to customary rules to the deceased's eldest son.[44] Land allocated by traditional authorities for residential and agricultural purposes, is extinguished on the death of the person in whose name it has been allocated. Upon the death of the person to whom such land has been allocated, it reverts back to the traditional authority.[45]

Practitioners drafting a will for a person who adheres to African customs must decide which legal system applies. In determining whether customary law applies, our courts have developed two guiding principles:[46]

- ☐ individuals are free to use common-law legal institutions, such as the execution of a will. Individuals may therefore subject themselves to common law, depending on their personal inclination as determined by their social interactions and the nature of previous transactions;
- ☐ customary law applies to those who, depending on their participation in cultural activities, can be said to adhere to an African culture[47] and who embrace a "characteristically African way of life".[48]

11.3.10 *Substitution*

Substitution provides for the appointment of one beneficiary in place of another.

A bequest only takes effect if the nominated beneficiary is alive, willing or able to inherit upon the death of the testator. Substitution provides for the appointment of one beneficiary in place of another. Failure to provide for substitution of an heir or legatee who predeceases the testator may either result in a legacy falling into the residue of the estate, or in the inheritance devolving by intestate succession.[49]

There are different forms of substitution:

- ☐ *Direct substitution*: Here the substitute steps into the shoes of the original beneficiary. Where a number of beneficiaries are named, the linking of their

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42 Bennett (1995) *Human Rights and African Customary Law* at 126.
43 Bennett (2004) *Customary Law in South Africa* at 364.
44 S 23 (1) of the Black Administration Act 38 of 1927. See also Kernick (1998) *Administration of Estates and Drafting of Wills* at 87 and Bennett *op cit* 364.
45 Bennett *op cit* 365.
46 *Supra* at 52.
47 Currie "Indigineous Law" in Chaskalson *et al Constitutional Law of South Africa* 36–18.
48 *Supra* at 54.
49 Corbett *et al* (1980) *The Law of Succession in South Africa* at 558.

names with the word "or" normally indicates that the testator intended direct substitution, whereas the linking with "and" normally indicates an intention of the beneficiaries inheriting jointly.[50] If testators leave their estate, for example, to their three children and only one child survives the testator, the two predeceased children leaving two and three children respectively, the question arises whether the five grandchildren should inherit equally *(per capita)* or should share only in the portion which their deceased parent would have got (*per stirpes* or "by representation"). The difference between substitution *per capita* and "by representation" must be made clear in the will.[51]

- ☐ Section 2C(2) of the Wills Act provides for direct substitution by presumption. Where descendants appointed in a will predecease the testator, repudiate their share or are disqualified from inheriting, their descendants would be entitled to their share by representation, unless there are indications to the contrary in the will.[52] For example, X bequeaths her estate in equal shares to her three children A, B and C. Upon her death, X is survived by A and B as well as by Y and Z, her grandchildren of her predeceased child C. Unless X provided for substitution *per capita,* A and B will be entitled to a third-share each and Y and Z to a sixth-share each. The latter principle applies both to bequests to individuals (for example "to my granddaughter") and to class bequests (for example "to all my children").
- ☐ *Indirect or fideicommissary substitution*: Here the intention of the testator is to bequeath a benefit, usually fixed property, to a specific person (the fiduciary heir), subject to the fulfillment of a condition (usually the death of the fiduciary), that the benefit will pass on to another beneficiary (the fideicommissary heir).
- ☐ *Substitution of a surviving spouse in a joint will*: It is advisable to provide for the eventuality that both spouses succumb to a calamity and where it is difficult to determine who died first, or where the survivor dies shortly after the first-dying spouse without making a new will.[53] By providing a time period within which the spouses are deemed to have died simultaneously, for the purpose of the administration of their joint estate, the testators can ensure that the joint estate immediately passes to their substitute beneficiaries. The latter can result in considerable savings in time and in unnecessary fees and legal and administrative costs.

11.3.11 *Conditional bequests*

There are various types of conditional bequests in wills. These are discussed below, with some examples:

- ☐ *Suspensive conditions*:

> I bequeath my 1965 Porsche 976 to my son Patrick, provided that he attains a LLB degree within one year after my death, failing which, I direct that this bequest shall devolve upon my son Ian.

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50 Pace A61.
51 Kernick LA 111.
52 Pace A62.
53 Shrand (1973) *The Administration of Deceased Estates in South Africa* at 30.

It is clear that the Porsche will only vest in Patrick on fulfillment of the condition (that he attains a LLB degree). The condition imposed may, however, for obvious reasons, cause considerable delay in the winding-up of the estate. Without the substitution clause in favour of Ian, the bequest would become a *nudum praeceptum* (nude prohibition or gift-over), resulting in the condition falling away.[54]

☐ *Resolutive conditions*:

> I bequeath my jewellery to my daughter, Tembisa. Should she, however, marry Charlie Shotgun, the jewellery shall devolve on my daughter Nkosinati.

In the event of the testator's death, the bequest vests immediately on Tembisa She will, however, be divested of the jewellery should the resolutive condition (marriage to Charlie Shotgun) be fulfilled. Again, in the absence of substitution (gift-over), the condition will fall away.[55]

☐ *Conditions containing nude prohibitions*: Conditions containing nude prohibitions are regarded as *pro non-scripto* and are unenforceable.[56] Examples of nude prohibitions include: the failure of the will to indicate consequences in the case of the breach of a prohibition; the expression of a wish or a direction by the testator, without granting someone the right of enforcing such wish or direction;[57] and a prohibition attached to a bequest, without providing for a person, by gift-over, to enforce such prohibition.

☐ *Vague and uncertain conditions*: Conditions must be stated clearly and unambiguously. If a condition is vague and uncertain, it may be regarded as *pro non-scripto*.[58]

> *Conditions must be stated clearly and unambiguously.*

☐ *Usufruct and fideicommissum*:[59] It is important to clearly understand the difference between these two modes of conditional bequests, especially as regards restrictions on the use and ownership of bequeathed property.

In the case of a usufruct, property is bequeathed to a third party, subject to the rights of possession and use and enjoyment in favour of the usufructuary. The usufructuary does not become the owner, and the right ceases upon the death of the usufructuary or the occurrence of an event stipulated in the will.

However, in the case of a *fideicommissum*, property being bequeathed to the first taker (the fiduciary) would be subject to the condition that, on the occurrence of a specified event (for example the death of the fiduciary), the property will pass on to the fideicommissary heir. The fiduciary then becomes

54 Wiechers (1988) *Testamente* at 74.
55 *Supra* at 75.
56 *Supra* at 22.
57 *Jewish Colonial Trust Ltd v Estate Nathan* 1940 AD 163.
58 De Waal *et al* at 93.
59 Pace A63.

the owner but is prohibited from alienating the property and has a duty to pass on the full value of the property to the fideicommissary heir. Fideicommissary bequests are limited to two successive fideicommissary heirs.[60]

It is also possible for the testator to impose a condition providing for similar substitution, whilst permitting the fiduciary to alienate or use the property (fideicommissum residue).

11.3.12 *Testamentary trusts*

- *Types of testamentary trusts*: There are two types of trusts created by will. First, in the case of the "testamentary bewind trust", the testator bequeaths assets to beneficiaries but, due to their incapacity (for example, minority) appoints trustees to administer such assets.[61] Here limited ownership is vested in the beneficiaries, with the control and management of the trust assets being vested in the trustees. Second, in the case of the "testamentary trust" (in the narrow sense of the word), the testator bequeaths assets to the trustees to administer for the benefit of beneficiaries.[62] This type of trust is usually created to provide for the education of testator's children who are no longer minors, or to cover living/medical expenses of dependants deemed to be unable to look after themselves. In the case of a testamentary trust, in the narrow sense, ownership, including management and control, normally vests with the trustees, but only for the purposes of the administration of the trust.[63]
- *Powers of trustees*: A trust operates through its appointed trustees who hold and administer the trust assets and affairs in a fiduciary capacity on behalf of the trust beneficiaries. Normally, wide powers are granted to trustees, including powers to invest trust funds as they deem fit. In formulating these powers, a fine balance has to be struck between protecting the trust against abuse and empowering the trustees to sustain capital growth as a hedge against inflation. It is thus advisable to allow trustees sufficient flexibility.[64] The obligations imposed upon the administrators should be realistic. Where fixed property is held in trust for a surviving spouse, it should be considered that such survivor may at a later stage wish to move closer to the children, into a more manageable abode or to a more secure environment.
- *Duration and the termination of the trust*: A number of issues need to be considered as regards the termination of a trust created for the maintenance and education of more than one child and with considerable age gaps. It is difficult for testators to foresee at what age their children will be responsible enough to manage their finances independently, especially if they are still young. One solution would be to stipulate that the trust terminates when the youngest child reaches the age of twenty-five, with the provision that the trustee has the

60 Suspension or Amendment of Limitations of Immovable Property Act 94 of 1965.
61 "Trusts" in Pace and Van der Westhuizen *Wills and Trusts* LexisNexis Looseleaf Edition.
62 *Supra*.
63 Van der Westhuizen B 5.4; Honore and Cameron (1992) *Honore's South African Law of Trusts* at 248–249 257–258 402.
64 Pinkerton (1971) *The Drafting of Wills with Precedents* at 29.

discretion to pay capital to a child before it reaches the stipulated age, if there are good reasons to do so.[65] Should the trust be terminated only when the youngest beneficiary attains the stipulated age or until all children have completed their tertiary education? This may be prejudicial to the older siblings who, due to age differences, may have to face a lengthy wait before receiving their share of the capital. On the other hand, it may not make sense to break up a trust and to pay a beneficiary's share of the capital. This would especially be true were there are fixed properties which provide an income.

- ☐ *Nomination of trustees*: In the case of a trust created for the protection of minors, it is prudent to consider appointing a close family member as co-trustee together with a professional (for example an attorney or accountant). The family member will be in a better position to determine the day-to-day needs of minor beneficiaries. A spouse, parent or child, nominated by the testator as trustee, is exempt from furnishing security. A person nominated as trustee, falling outside the said group, would have to be specifically exempted in the will from having to furnish security.[66]

11.3.13 *Nomination of a guardian*

The term "guardianship" includes both access to and custody of a child. These two functions are, however, divisible.[67] The guardian administers a child's estate on its behalf and assists the child in entering into contracts.[68] Custody on its own also involves the day-to-day control over the child, including choice of religious upbringing, language and education. It is preferable that the nominated guardian should be a trusted relative or family friend who would be in a position to act in the best interests of the child. Testators should be advised to discuss their intention with the person whom they wish to nominate.[69]

The nominated guardian should be a trusted relative or family friend.

In terms of section 1(1) of the Guardianship Act,[70] both spouses enjoy equal rights and powers over their children. In the event of the death of one of the child's parents, the survivor becomes the sole guardian. In the absence of any order to the contrary, both parents retain such rights and powers after divorce.[71] Such rights and powers cannot be excluded by a will. When drafting a joint will for spouses, it is advisable to nominate someone as guardian of the minor children in the event of simultaneous death or the survivor dying without making a new will. It is also advisable to provide for substitution in the event that the nominated guardian is unable to accept the appointment.

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65 *Supra* at 30.
66 Trust Money Protection Act 34 of 1934; Honore *et al* (1992) at 194.
67 Hawthorne (1998) *Children and Young Persons* E19; Schäfer *Family Law Service* Butterworths.
68 *Supra* fn 67.
69 Pinkerton 9.
70 192 of 1993.
71 Hawthorne E31.

11.3.14 *Nomination of executor*

The classes of persons competent to act on behalf of an executor include attorneys, trust companies and accountants.[72] Such an arrangement will ensure that the family retains close contact with the professional.

Nominated executors are exempt from having to furnish security to the Master of the High Court, provided that they are a spouse, parent or child of the testator, or anyone assumed by anyone of them[73] or have been exempted in the will.

To enable the executor to act efficiently, the executor should be granted all the necessary powers in the will. This includes the power of assumption (the power to appoint someone to act as co-executor) in the event that the nominated executor is prevented from administering the estate (for example for health reasons).[74]

An executor is entitled to a set fee.

An executor is entitled to a set fee, which presently constitutes a flat rate or 3,5% of the gross value of the assets in the estate and 6% on any income collected/accruing after the death.[75]

11.3.15 *Exclusion of community of property*

One of the legal consequences of a marriage in community of property is the creation of a single joint estate for the spouses. In *Du Plessis v Pienaar*[76] the Supreme Court of Appeal had to consider the effect of a clause in a will, excluding a bequest from a joint estate, against subsequent claims by creditors of the beneficiary's spouse. The court held that in an a marriage in community of property, both spouses were liable for the debts incurred by one of them. The court concluded that creditors could thus recover the debt from the estates of both spouses, including the separate property of one of the spouses.

11.3.16 *Estate planning*

Estate planning is necessary to ensure that proper provision has been made for the following exigencies:

- ☐ liquidity for expenses arising immediately upon death,[77] including medical ("deathbed") and funeral expenses as well as the costs for the administration of the estate;
- ☐ creditor's claims, including bonds over fixed property, credit agreements and income tax;[78]
- ☐ maintenance and education of dependants;[79]
- ☐ countering the diminishing effect of inflation on the financial needs of the testator's dependants at the time of death; and[80]

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72 Shrand 95; Pace A45.
73 S 23 (2) of Act 66 of 1965.
74 Corbett *et al* at 57; Barker at 23.
75 Reg 5(1)(a).
76 2003 (1) SA 671 (SCA).
77 Davis, Beneke and Jooste "*Estate Planning*" 1–7 LexisNexis Butterworths Looseleaf Edition.
78 *Supra* 1–5.
79 *Supra* 1–7 and 1–8.
80 *Supra* 1–7.

☐ minimising estate duty.[81]

In determining the liquidity of the estate, it is important to assess the life assurance portfolio of the client: is there sufficient cover against the client's indebtedness in terms of a mortgage bond or credit agreements and to provide financially for the family after death? If necessary, the client should be referred to a life assurance broker for specialist advice on life assurances and to an accountant for advice on taxation.

11.4 Interviewing checklist

Before embarking on drafting the will, the drafter should obtain all documentation which may impact on the client's legal entitlements or obligations, for example divorce or maintenance orders, antenuptial contracts, partnership agreements or suretyships. In addition, all relevant information must be obtained. The following interviewing checklist may be useful:

Personal Details

☐ Full names
☐ ID Number
☐ Marital status
☐ If married: civil or customary marriage; full names of spouse; date and place (if married outside South Africa, state which country) of marriage; marital property regime
☐ If married out of community of property with the accrual system: the net commencement value of the spouses estate[82]
☐ Domiciliary address
☐ Full names and dates of birth of children

Assets in the estate

Fixed Property

☐ Full property description and title deed number
☐ Nature of ownership, for example freehold, communal property or allocation by tribal authority
☐ In whose name(s) is the property registered?
☐ If the property is leased: name of lessee; expiry date of lease
☐ Details of bond: name of bondholder; outstanding bond debt

Businesses

☐ Type of legal entity (for example close corporation; sole proprietary; partnership; private company);

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81 *Supra* 1–5 and ch 2.

82 The commencement value is determinable from either the declaration appended to the antenuptial contract or from a separate declaration made by the spouses married out of community of property.

- ☐ The extent of interest enjoyed by Testator (for example the share percentage in a partnership);
- ☐ Are the Testators' rights to bequeath their shares or interests limited by the terms of any agreement?
- ☐ Discuss the legal implications of a bequest of shares/interest:
- ☐ If the business is a sole proprietary: has provision been made for the continuation of the business after the death of the testator?
- ☐ Partnership: is there insurance cover on the lives of the testator's partners?

Movable Property

- ☐ Motor vehicle(s): does the testator wish the vehicle to be transferred to a beneficiary or to be sold?
- ☐ Are furniture and household effects to be distributed between a number of beneficiaries? Then discuss ways of achieving this, which both minimise potential conflict and are not too onerous for the executor

Claims in favour of the estate

- ☐ Debts owed: obtain full names and addresses of debtor; date of indebtedness; conditions of loan; copy of loan agreement or other instrument
- ☐ Shares: list the name of company and extent of shareholding

Insurance Policies

- ☐ Names of companies, types of policies, policy numbers, amount of cover.

Estate Liabilities

Cash needs of family on death of testator:

- ☐ Has the testator made provision for the eventuality of extended medical treatment?
- ☐ What are the projected costs of the funeral?
- ☐ Has provision been made to cover the testator's funeral expenses and for the maintenance of the family after death?

Mortgage bonds

- ☐ Will the financial position permit the surviving spouse to continue living in the family residence?
- ☐ Name(s) of bondholder(s) and total amount owing under the bond
- ☐ Is the outstanding indebtedness covered by a mortgage insurance policy?

Credit agreements

- ☐ Name(s) of credit grantor(s)
- ☐ Amounts outstanding
- ☐ Are the outstanding amounts insured?

Others

- ☐ Names and addresses of creditors
- ☐ Date of indebtedness
- ☐ Conditions of loan
- ☐ Outstanding amount of debt

Bequests

Legacies and residuary heirs

- ☐ Full names
- ☐ What is the relationship to the testator (for example "son" or "niece")?
- ☐ Dates of birth
- ☐ Postal addresses
- ☐ Details of bequests (for example "the sum of R1000,00" or "one third of th residue of my estate")

Creation of a Trust

- ☐ Is there a need to provide for the creation of a trust in order to provide for th maintenance and education of the testator's children or the living/medical e> penses of dependants unable to look after themselves?
- ☐ If so, give the full names and dates of birth of such beneficiaries
- ☐ At what stage should the trust be terminated?
- ☐ Discuss the function and possible powers of trustees
- ☐ Discuss whom to nominate as trustee(s) and obtain full names

Substitution

- ☐ Names of substitute beneficiaries
- ☐ Should, in the case of a bequest to the testator's children, substitution be b representation or *per capita*?

Appointment of Executor

- ☐ Discuss the functions of an executor
- ☐ Full names of nominated executor(s)

Appointment of Guardian

- ☐ Discuss the functions of a guardian
- ☐ Discuss the possibility of also nominating a substitute guardian
- ☐ Full names of nominated and substitute guardians

Special Directions

- ☐ Regarding donation of organs, burial, cremation or others.

11.5 Contents and order of a will

There is no prescribed formula regarding the contents or sequence of clauses in will.[83] The following is merely a suggested order based on logic and commo sense. In some instances, draft clauses are provided which are intended to b useful guidelines:

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83 The Wills Act 7 of 1953 merely prescribes the formalities that have to be complied wit regarding the execution of wills. The inclusion or exclusion of clauses does not, accordingl affect the validity of a will.

11.5.1 *Declaration of testamentary intent*

This is the Last Will and Testament of me .....(Full names),
(Marital status) (For example married out of community of property).....formerly
.....(*maiden name*),
Identity Number ..... Presently residing at
.....(physical address)
or
This is the Last Joint Will and Testament of us, Sizwe Modise, Identity Number .....
And Thamsanqa Modise (formerly Ndhlovu), (Identity Number) married in community of property
Presently residing at .....(physical address)

11.5.2 *Revocation clause*

The clause revoking all previous wills, codicils or other testamentary writings, is aimed at ensuring that the testator has a "clean slate" and to exclude any uncertainty regarding the possible existence of more than one valid will or codicil.[84] A typical example is as follows:

I/We hereby revoke all previous Wills, Codicils and other Testamentary Acts made by me/ either of us.

11.5.3 *Appointment of beneficiaries*

There are generally two categories of beneficiaries, namely legatees (to whom a specific asset or cash amount is bequeathed) and residuary heirs. Since the rights of legatees enjoy preference over those of the residuary heirs, the will should first deal with the former, before disposing of the residue of the estate, for example:

Legacy: I bequeath a cash amount of R200 and my coin collection to X.
Residuary bequest: I bequeath my estate or "the residue of my estate" to Y.

The beneficiaries should be clearly identifiable from the will. It is thus advisable to reflect their correct names, their relationship to the testator (for example "my niece Roshni Naicker") and their residential addresses.[85] This will assist the executor to identify and trace the beneficiaries.

11.5.4 *Substitution*

An example of direct substitution:

I bequeath R500 to my friend Pregs Moodley or to her husband Anil Moodley, should she predecease me.

---

84 S 2A of Act 7 of 1953 regarding the formalities for revocation.
85 Meyerowitz (1990) *The Law and Practice of Administration of Estates* at 40.

It is clear from the wording that Anil will only replace his wife Pregs in the event that Pregs predeceases the testator, is disqualified as beneficiary or repudiates her right.

An example of a *fideicommissum*:

> I bequeath my farm "Aseko-Amanzi" to my oldest daughter Lerato. Upon her death, my said farm shall devolve upon my youngest son Jabu.

An example of a *fideicommissum* residue:

> I bequeath the residue of my estate to my daughter Kathryn. Upon her death, whatever shall remain of my estate shall devolve upon my granddaughter Wynona.

An example of excluding substitution by representation (*per stirpes*):

> I bequeath the residue of my estate to those of my children A, B and C who survive me. Should any of my said children predecease me, I direct that his/her share shall devolve upon my remaining children.

An example of substitution of a surviving spouse in a single will:

> I bequeath the residue of my estate to my partner Ike, provided that he survives me for a period of 30 days. Should my said partner predecease me or die within a period of 30 days of me, I direct that my estate shall devolve as follows.

An example of substitution of a surviving spouse in a joint will:

> We bequeath the residue of our estate to the survivor of us, provided that he/she survives the first-dying for a period of 30 days. Should the survivor die within a period of 30 days of the first-dying of us, we bequeath the residue of our estate as follows.

11.5.5 *Categories of assets*

An example of a voluntary division between the beneficiaries:

> I bequeath my furniture, household and personal effects in equal shares to those of my children who survive me, with the exclusion of the issue of a predeceased child. I direct that the division of the items shall be effected between my children themselves and that their joint receipt shall constitute a proper discharge of my Executor, who shall not be concerned with the division thereof.

An example of a distribution in terms of a list attached to, but not forming part of, the body of the will:

> It is my wish, without imposing any obligation on my Executor, that these assets be divided in terms of a list, which I attach to this my Will. I direct that a receipt, signed jointly by the said beneficiaries, shall suffice.

An example of a bequest of a business:

> I bequeath the goodwill, stock-in-trade, furniture and fittings, bank balances, book debts, fixed property, liabilities of my business "Crash and Curry Trading Store" to . . .

11.5.6 *Conditional bequests*

An example of a *usufruct*:[86]

> I bequeath my farm "No hope" to my son Jannie, subject to the lifelong usufruct in favour of my wife Marie.

An example of a *fideicommissum*:[87]

> I bequeath my farm "Aseko-Amanzi" to my oldest daughter Lerato. Upon her death, my said farm shall devolve upon my youngest son Jabu.

An example of a *fideicommissum* residue:

> I bequeath the residue of my estate to my daughter Kathryn. Upon her death, whatever shall remain of my estate, shall devolve upon my granddaughter Wynona.

11.5.7 *Trusts*

An example of the creation and objectives of a testamentary "bewind" trust:

> I bequeath the residue of my estate to my children X, Y and Z in equal shares. Should any of my said children not have attained the age of 25 years, I direct that my trustees shall, hold the benefit due, in trust for the maintenance, education and general welfare of such child.
>
> My trustees shall be entitled to apply so much of the net income and, in need, capital of the trust as they, in their sole discretion, may deem necessary for the above purposes.

An example of the creation and objectives of a testamentary trust (in a narrow sense):

> I bequeath the residue of my estate to my Trustees to be held in trust for the following purposes; to apply so much of the net income and, in need, capital of the trust as my Trustees in their sole discretion may consider to be reasonable for the maintenance, support and well-being of my husband Fred. My Trustees shall as far as is possible ensure that my said husband be enabled to maintain the standard of living he is accustomed to.

An example of general powers regarding the administration of the assets in a trust:

> I direct that my trustees shall have full powers to invest the capital in equities, interest-bearing securities and/or other investments and to lease fixed properties, to dispose of fixed properties, to bind and to incur liabilities on behalf of the trust as they, in their absolute discretion, may deem necessary.

An example of a termination clause:

> My trustees shall terminate the trust upon such child attaining the age of 25 years and pay the capital and transfer any fixed property, as it then exists, to such child.

---

86 Pace A68.
87 *Supra* A63.

11.5.8 *Mortal remains and funeral arrangements*

Since a will is often read only after the testator's death, testators should be advised to communicate clauses containing directions or wishes regarding the donation of mortal remains, funeral or cremation arrangements, directly to their next-of-kin. The clause should be stated as a wish rather than a directive in order to protect the executor, who may only have sight of the will after the event.

An example of donation of mortal remains:[88]

> I record that I have donated my entire body to the Tissue Bank, Medical Faculty of the University of Cadavria and record that it may be used for dissection or medical research at the complete discretion of the Dean of the Medical Faculty. I direct that such parts of my body as may remain be cremated. I authorise my Executor to sign all prescribed forms in order to carry out my instructions.

An example of directions for the disposal of mortal remains:

> It is my wish that my remains be cremated and scattered at . . .

11.5.9 *Exclusion of community of property*

An example of an exclusionary clause:

> I direct that any beneficiary taking under this my Will, shall take for its sole benefit and remain its free and unencumbered property whether or not married or shall marry in community of property. All benefits received hereunder shall likewise be excluded from any accrual in terms of the Matrimonial Property Act 88 of 1984 and shall be protected against the creditors of their spouses.

11.5.10 *Appointment of a guardian*

An example of the clause nominating a guardian:

> Should any of our children still be minors at the death of the survivor of us, we appoint the Testatrix's brother, Like Kids, to be the guardian of such minor children. We direct that the said guardian shall not be required to furnish security for acting in that capacity.

11.5.11 *Appointment of executor*

An example of the clause nominating an executor:

> I nominate my spouse, Pule Niceface, as the executor of this my Will, granting unto him all such powers and authority allowed in law, more especially, the power of assumption. I direct that my Executor shall be exempt from having to furnish security to the Master of the High Court.

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88 *Supra* A74.2; McLennan "Unworthiness to inherit the 'bloedige hand' rule and euthanasia, what to say in your will" 1996 *SALJ* (1) 143.

11.5.12 *Appointment of trustee*

An example of the clause nominating a trustee:

> We appoint the Testatrix's sister, Jill Goodfella, and Honest Lawyer as Trustees of the Trust created in this our Will with the power of assumption. Our said Trustees or assumed trustees shall not be required to furnish any security for acting in those capacities.

11.5.13 *Attestation clause*

The purpose of this clause is to ensure certainty and compliance with the Wills Act. A will is no longer required to be dated and in view of a presumption in favour of the validity of a will, the clause is not necessary. The date of execution may, however, assist in determining the competence of the testator to make a will and of the witness to witness it. It also serves as a useful "checklist" for ensuring proper attestation.

An example of attestation clause:

> Signed by me at .....this ..... day of.....200.. in the presence of the undersigned Witnesses, all of us being present at the same time.
>
> SIGNED at.....on this.....day of.....20 .....
>
> .....
>
> (Testator)
>
> AS WITNESSES:
>
> 1. .....
>
> 2. .....
>
> (It is important that the full names of the witnesses are printed on the testator's copy of the will.)

11.6 Formalities

The Wills Act 7 of 1953 and the Law of Succession Amendment Act 43 of 1992 regulate the formalities regarding the execution and alteration of wills. The more important formalities are discussed below:

11.6.1 *The will must be in writing and be signed*

A testator may sign the will in any one of the following manners:

- ☐ by full signature;
- ☐ by initials;
- ☐ by the making of a mark (X); or
- ☐ by some other person in the testator's presence and by his directions.

The testator must sign each page of the will and sign the last page of the will as close as possible to the end.[89]

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90 *Kidwell v The Master* 1983 (1) SA 509 (E).

11.6.2 *Will signed by a mark or "by another person"*

The following formalities apply:

- ☐ a commissioner of oaths must certify that he has satisfied himself as to the identity of the testator and that it is the will of the testator;[90]
- ☐ the will must also be signed in the presence of the commissioner of oaths, who must sign each page of the will;
- ☐ the certificate by the commissioner need not, however, have been completed at the same time as the signing of the will, but as soon as possible thereafter;
- ☐ the formalities referred to above and pertaining to the positioning of the testator's signature on the will, equally apply if the will is signed by "such other person".

11.6.3 *Blind or illiterate testators*

Despite recommendations to the Law Reform Commission, The Law of Succession Amendment Act 43 of 1992 does not specifically provide for blind or illiterate testators. It is, however, recommended that the contents of the will be read to this type of testator prior to allowing the will to be signed.[91]

11.6.4 *The testator's signature must be witnessed*

A witness is defined as a person over 14 years of age who is competent to give evidence in court.

The testator or "such other person" must sign the will in the presence of two or more competent witnesses and, where applicable, before the commissioner of oaths. A witness is defined as a person over 14 years of age who is competent to give evidence in court.[92] The witnesses must attest and sign either by their initials or full signature (a mark is not acceptable), but only have to sign the last page of the will. The testator witnesses and the commissioner of oaths (if necessary) must all be present and sign at the same time. The commissioner of oaths may not act as a witness as well.

11.6.5 *Non-compliance with formalities*

Section 2(3) of the Wills Act provides for a "safety valve" that permits a court to accept a document as a will, notwithstanding that it does not comply with all the required formalities.[93] Three requirements have to be met: First, the document must have been drafted and executed by the deceased; second, such person must subsequently have died; and third, there must be proof that it was the deceased's intention for such document to be her will.

Our courts have interpreted the requirements in section 2(3) on a number of occasions. In interpreting these provisions, the intention of the testator is decisive.

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90 The wording of Schedule 1 to the Wills Act 7 of 1953 should be followed.
91 Pace A5(c).
92 S 2(a)(ii) and (iii) of Act 7 of 1953.
93 Pace A7; Keightley "Law of Succession" 2001 *Annual Survey South African Law* at 485.

- In *Ex parte Loxton*[94] the court held that it is not necessary for the document to be "written out by the testator in his own hand".
- In *Logue v The Master*[95] the testator made a will in his own handwriting, but only signed the will on the last page. The will was also not witnessed. The court accepted the document as the deceased's will in terms of section 2(3).
- In *Ramlal v Ramdhani's Estate*[96] an attorney drafted a will in accordance with a client's instructions, but the client died before having read and approved it. The court held that on the facts, it cannot be proved that the document as it stood was intended by the client to be his will.
- In *Ndebele and Others NNO v The Master and Another*[97] it was held that telephonic approval of the contents of a will drafted by an attorney, on the testator's instructions, constitutes sufficient proof of acceptance of the terms, and was declared to be a valid will under section 2(3).

11.6.6 *The amendments of wills*

Amendments are defined in section 1 of the Wills Act to mean a deletion, addition, alteration or inter-lineation. Any such amendments must comply with the normal formalities for execution, as set out in the Wills Act.

11.7 Conclusion

From the above, it should be clear that the drafting of wills is an area of practice, which, if taken lightly, may severely compromise the professional image of a practitioner. To the practitioner who is, however, prepared to develop a methodical approach, keeping abreast of the latest developments in the laws of succession, administration of estates, taxation and family and customary laws, this field of practice can become most satisfying and rewarding.

94 1998 (3) SA 238 (N).
95 1995 (1) SA 199 (N).
96 2002 (2) SA 643 (N) at 647.
97 2001 (2) SA 102 (C).

EXAMPLE OF A SIMPLE WILL
(Testator from rural area)

This is the last Will of me Surprise Hlope, ID No 4622830507, residing at Lekoneng Village, Kuruman district, and married to Lindiwe Hlope (born Moseki) according to customary law, which marriage was registered in terms of s 4(1) of Act 120 of 1998.

1. I revoke all my previous wills, codicils and other testamentary writings.
2. I record that the dispositions contained in this Will are what I consider to be in the best interest of my family.
3. I record that both my homestead at Lekoneng Village and my cattle ranch at Nkomo's Post, Kuruman district, are situated on land allocated to me by the isiBambatha Tribal Authority. Whilst I am aware that I do not have the right to dispose of such properties, I direct that my Executor request the said tribal authorities to consider my wishes.
4. I bequeath the residue of my estate to my wife Lindiwe, provided that she survives me for a period of 30 days. In the event of my said wife failing to survive me for a period of 30 days, my estate shall devolve as follows:
   - 4.1 My Chevrolet pickup, registration number NC 234 GT to my son Vusi Hlope;
   - 4.2 My cattle ranch at Nkomo's Post, together with all my livestock, in equal shares to my sons Vusi Hlope and Jabulani Hlope. Should either of my said sons die before me, I direct that his share shall go to those of his sons who are alive at the time of my death;
   - 4.3 My homestead at Lekoneng Village, together with all my furniture and household effects to my daughter Mayabuye Hlope, or in equal shares to those of her children who are alive at my death, should Mayebuye die before me.
5. I direct that no benefits inherited in terms of this Will shall form part of joint estates of beneficiaries married in community of property and shall be protected against the creditors of their spouses.
6. I nominate my sister-in-law Rosemary Maseko as the executor of this my Will. I direct that my Executor shall have the power to appoint a professional to assist her and shall be exempt from having to furnish security to the Master of the High Court.

SIGNED at.....this.....day of..... 200.....

AS WITNESSES:

1. ....
(Full Names:.....) (TESTATOR)
2. .....
(Full Names:.....)

EXAMPLE OF A SIMPLE WILL
(Testator from urban area)

This is the last Will of me Francinah Maria Visagie (born Blaauw), ID No 50060955009, residing at 133 Herzelia Smallholdings, Bela Bela district, widow.

1. I revoke all my previous wills, codicils and other testamentary writings.
2. I bequeath the residue of my estate in equal shares to those of my children Katharina Smith (born Visagie) and Stefanus Visagie who survive me. Should any of my said children predecease me, I direct that his or her share shall devolve upon my remaining child.
3. I direct that no benefits inherited in terms of this Will shall form part of joint estates of beneficiaries married in community of property and shall be protected against the creditors of their spouses.
4. I nominate my daughter, Katharina Smith, as the executor of this my Will. I direct that my Executor shall have the power to appoint a professional to assist her and shall be exempt from having to furnish security to the Master of the High Court.
5. I direct that my estate should not be burdened with funeral expenses. The proceeds of my funeral policy with Happy Acres Insurance Company are sufficient to cover such expenses.

SIGNED at.....this.....day of..... 200....

AS WITNESSES:

1. ....

(Full Names:.....) (TESTATOR)

2. .....

(Full Names:.....)