

Reason: Section 2C(1) is applicable, because A is a descendant of the testator, she is entitled to a benefit in terms of the will together with the surviving spouse, and she repudiates the benefit. Presumably section 2C(1) does not allow for a contrary intention in the will to override the provisions thereof. (If the courts in future were to interpret this section differently, and were to decide that the testator's contrary intention can override the applicability of section 2C(1), D will inherit A's share since he was expressly nominated as a direct substitute.) B does not inherit in terms of section 2C(2), because section 2C(1) excludes section 2C(2).

### **Example 7**

Facts: "I leave my car to A and my house to B. The residue of my estate must go to my brother J." A dies before the testator and leaves a child C.

Solution: The share that A would have inherited will be inherited by J.

Reason: Where the testator has completely separated the interests of the beneficiaries, as in this case, the *ius accrescendi* (right of accrual) does not operate and no accrual can take place. So if A cannot take, the house will not accrue to B, but the legacy will fail and the house will constitute part of the residue of the estate to be inherited by J. Section 2C(2) will not be applicable, since it is not indicated that A and B are descendants of the testator.

### **Example 8**

Facts: "I leave my house to my child A. I leave my car to my child B. If A does not take, B is to inherit the house. If B does not take, A is to inherit the car. My wife W inherits the residue of the estate." B predeceased the testator, but is survived by his daughter M.

Solution: The share that B would have inherited will be inherited by A.

Reason: The will makes provision for a direct substitution - A is appointed as a direct substitute for B and will, therefore, inherit in B's place. Section 2C(2) is not applicable, because the will contains a contrary intention. Section 2C(1) is not applicable, because B did not repudiate the benefit, but predeceased the testator. Section 2C(1) is only applicable if the descendant has repudiated his benefit.

### **Example 9**

Facts: "I leave my house to my children." The testator have three children: A, B and C. A murders the testator. A has a child, D.

Solution: The share that A would have inherited will be inherited by D.

Reason: Section 2C(2) is applicable, because A is a descendant of the testator who is incapable of inheriting from the testator and the will does not contain a contrary indication, such as an express direct substitution. Section 2C(2) creates an implied direct substitution in favour of A's child, D. Note that section 2C(2) applies to bequests that are made to a class of beneficiaries ("my children"). Section 2C(2) excludes the *ius accrescendi*, therefore A's share will not accrue to B and C.

NOTE: It would have made no difference if the testator left behind a wife, because section 2C(1) is not applicable where the descendants are incapable of inheriting.

### Example 10

Facts: "I leave my house to my children." The testator had three children, A, B and C, but A died before the testator had made his will. A leaves behind a child, D.

Solution: B and C will inherit the house.

Reason: B and C were appointed in the will to inherit the house. D will not represent A, because a descendant may be represented in terms of section 2C(2) only if he or she **would have become entitled to a benefit** under the will. If a testator appointed his or her "children" as heirs, the testator's children who **died before the execution of the will** would not have been entitled to a benefit under the will and cannot be represented (also see *Nel v The Master* 1975 (3) SA 271 (T) and *Verseput v De Gruchy* 1977 (4) SA 440 (W) in Cronjé & Roos).

## 2 QUESTIONS FOR REVISION

During this year we have worked out more questions for inclusion in Tutorial Letter 102 for 2003. However, since you can also benefit from this, we now include them in this tutorial letter.

Tutorial letter 102 contains questions for revision. Add the following questions to them.

### LECTURE 1

- (1) True or false: In South African law, succession by virtue of a contract is never allowed.  
[False - may be regulated in an antenuptial contract.]
- (2) Mary and John are siblings. In his will, John appointed his sister Mary to inherit his whole estate. In her will, Mary appointed her husband Peter, to be her heir. Mary and John are killed in the same car accident, and no evidence exists as to who died first.

John leaves behind both his parents. Mary leaves behind her parents and her husband Peter.

- (a) Who will inherit John and Mary's respective estates? Briefly explain your answer.

[Remember that a person can inherit from another person only if he or she survived that other person.]

- (b) Would it have made a difference to your answer had John died at the scene of the accident and Mary died two hours later in hospital? Briefly explain your answer.

[Note that since Mary survived John she could have inherited from him before she herself died.]

- (3) Give the name of a case that serves as authority for the following statement: "Commorientes may not inherit from each other."

## LECTURE 2

- (1) Define the following terms:
- stirps*
  - parental
  - cleaving
- (2) What is the difference between inheriting with "a half hand" or "a full hand"?
- (3) What is the difference between inheriting "*per stirpes*" and "*per capita*"?
- (4) True or false: "The stepchildren and adoptive children of a deceased person cannot inherit intestate from him/her since they are not related to him/her." Explain your answer.
- (5) True or false: When Ben married Susan, she had a child from a previous marriage. This child can inherit intestate from Ben.
- (6) Whom of the following intestate heirs can be represented by their descendants? An intestate heir who (i) is predeceased, (ii) refuses to inherit, or (iii) is incompetent to inherit.
- (7) X dies intestate and leaves behind the following relatives: H, his half-brother on his mother's side, and P and Q his grandparents on his father's side. Who will inherit his estate? H, *PER CAPITA*
- (8) X dies intestate and is survived by the following relatives: B and C, the children of his predeceased half-brother, H, on his mother's side, and S, his half-sister on his father's side. Who will inherit his estate? B, C, & S → S = 50% B & C = 50%
- (9) (a) True or false: In terms of section 1(1)(c) of the Intestate Succession Act 81 of

1987, the surviving spouse always inherits a child's share.

[False - he or she inherits either a child's share or R125 000, depending on whichever amount is the bigger.]

- (b) True or false: In terms of section 1(1)(c) of the Intestate Succession Act 81 of 1987, a child's share amounts to R125 000.

[False: The R125 000 referred to in the Act is a statutory amount determined by the Minister of Justice. A child's share, on the other hand, is calculated by dividing the value of the intestate estate by the number of children of the deceased who have either survived him or her, or have predeceased him or her but are survived by their descendants, plus one (for the surviving spouse).]

- (10) True or false: The reason why it is said that it is important to distinguish between whether the spouses were married in community of property or out of community of property, is because different intestate succession rules apply in each case.

[False - the same intestate succession rules apply. However, before the estate can be divided, it must first be determined what amount is available for division. In determining the extent of the intestate estate, it is important to know how the parties were married. If they were married in community of property, for example, there is a joint estate which must first be divided. If they were married out of community of property, on the other hand, it must be determined whether an amount has to be added to or subtracted from the estate of the deceased because the system of accrual was applicable. Only once the appropriate matrimonial property-law rules have been applied, will the rules of intestate succession be applied. These rules are always the same, irrespective of the matrimonial regime that applied.]

### LECTURE 3

- (1) What is the significance of a finding that a document is a testamentary writing?

[It must comply with testamentary formalities in order to be valid.]

- (2) A testator executes a will complying with testamentary formalities. After that he attaches a list of all his assets that are referred to in the will. Must this list also comply with testamentary formalities? Yes. LIST OF DISTRIBUTION HAVE NO EFFECT UNLESS THEY TOO ARE EXECUTED WITH THE FORMALITIES REQUIRED FOR A VALID WILL.  
[See par 3.3.2.] OOSTHUIZEN VS DIE WEESHEER

- (3) True or false: A testator need not sign the will in the presence of the witnesses. [See *Bosch* case.]

- x(4) Does a witness to a will have to read the will?

- (5) Does a witness have to know that he or she is witnessing a will? Give authority for your answer.

- (6) Where do the witnesses have to sign the will?  
[See par 3.3.3.1; *Liebenberg v The Master* 1992 (3) SA 57 (D).]
- (7) Where does the testator have to sign the will? [See par 3.3.3.1.]
- (8) Does the testator have to sign the will in the presence of the witnesses? [See par 3.3.3.1]
- (9) Name three requirements with which a witness to a will must comply. [See par 3.3.3.1.a.]
- (10) What is an "attestation clause" and what is its value?
- (11) True or false: "A certificate as required by section 2(1)(a)(v) of the Wills Act 7 of 1953 has to be attached to all wills."  
[False: The certificate has to be attached only if the testator has signed with a mark, or if someone has signed on behalf of the testator.]
- (12) Must the certifying officer mention his or her office in the certificate? [See the *Jeffrey* case.]
- (13) Must a will be executed *uno contextu*? [See par 3.3.3.2.iii.]
- (14) True or false: Section 2(3) of the Wills Act 7 of 1953 may be applied even if the deceased has not personally drafted or executed the particular document, but has asked an attorney to do so. Refer to a decided case as authority.
- (15) True or false: Section 2(3) of the Wills Act 7 of 1953 cannot be applied where the particular document consists of instructions to an attorney or advisor in terms of which a will must be drawn up and which must then still be approved by a testator. (Refer to a decided case as authority.) [*Ep Maurice* - see the note on the *Back* case.]
- (16) True or false: "Our law recognises one privileged will, namely the soldier's will." [See par 3.6.]
- (17) Discuss the rules of interpretation in the Wills Act. [See par 3.7.]
- (18) Write a note on lost wills. [See par 3.8.]
- (19) In a case where the validity of a will is contested, on whom does the onus of proof rest?

SUPERFLUOUS -  
IF THE WILLS ACT  
IS RECALLED/RECALLED  
USELESS

#### LECTURE 4

- (1) While making a will, T realises that he has made a mistake with the name of a beneficiary. He scratches out the name and inserts a new name. What formalities must this amendment to the will comply with in order to be valid?
- (2) Which formalities must be complied with where an amendment is made to a will after

the completion of the will?

- (3) What is the main difference between amending and revoking a will?

[When amending a will, the formalities of the Wills Act have to be complied with. A will can be revoked, however, without complying with any formalities, for example by destroying the will.]

- (4) In what circumstances does the court have the power to declare that a will shall be revoked? [See s 2A of the Wills Act.]

- (5) Can section 2A of the Wills Act be applicable if only a part of a will is revoked?

- (6) (a) In the case of *Marais v The Master* 1984 (4) SA 288 (D), how did the particular testator attempt to revoke his or her will?

(b) What did the court decide in the above-mentioned case - was the will validly revoked? Explain in one sentence what the court held.

(c) If section 2A of the Wills Act had been in operation when the *Marais* case was decided, would it have made a difference to the court's decision? Briefly explain your answer by referring to the provisions of the section.

[No, because this section now empowers the court to declare a will, or part of it, to be revoked if the testator's intention to revoke is apparent from the will or from a separate document. In this case his or her intention to revoke was evident from another document.]

- (7) H and W were divorced on 1 April 1998. In his will, H left his entire estate to W and his two children. *LAW OF SUCCESSION AMENDMENT ACT 43 OF 1992. S2B*

(a) Had H died on 1 June 1998, how would his estate have devolved? *IF A PERSON DIES WITHIN 3 MONTHS AFTER HER MARRIAGE OR DIVORCE OR A DIVORCE IS ANNULLED, HER PREVIOUS SPOUSE WILL NOT INHERIT UNDER HER WILL.*

(b) Had H died on 1 September 1998, how would his estate have devolved?

[See par 5.2.]

- (8) True or false: In our law, a change in the status of a testator, for example by his or her divorce, results in the revocation of his or her will.

- (9) Can section 2A of the Wills Act be applied if only a part of a will has been revoked? [Look at the wording of this section.] *TRUE*

- (10) What happens when a testator leaves behind two wills, and the second will does not expressly revoke the first will? To which of the will's provisions must be given effect? [See par 5.7.]

## LECTURE 5

- (1) What does the term "*animus revocandi*" mean? [See ch 6.]

- (2) What does the term "*animus testandi*" mean? [See par 7.1.]
- (3) What are the requirements for the revival of a revoked will?

[(a) The will that must be revived should have been properly executed in accordance with the formalities applicable when it was made; (b) this will should still be in existence (in other words, it should not have been destroyed); (c) it should be revived by a new will (it cannot be revived orally); (d) the reviving will must be properly executed in accordance with the formalities prescribed.]

- (4) What is the minimum age for a testator?
- (5) What did the court hold in *Braun v Blann and Botha* 1984 (2) SA 850 (A) on the granting of a power of appointment to a trustee? [See par 7.2.]
- (6) Explain the difference between a special and a general power of appointment.

## LECTURE 6

- (1) Discuss the importance of section 2D(1)(c) of the Wills Act 7 of 1953. [See par 8.3.]
- (2) Write a note on the "bloody hand" rule. [See par 8.4.1.1.]
- (3) True or false: A general unworthiness to inherit is attached to the murderer.
- (4) Why could the killer in *Gafin v Kavin* 1980 (3) SA 1104 (W) inherit from his victim?
- (5) What did the court hold in *Casey v The Master* 1992 (4) SA 505 (N) on the capacity of a person who negligently caused the death of another to inherit from the deceased?
- (6) Discuss the provisions of section 2D(1)(b) of the Wills Act 7 of 1953. [See par 8.4.1.5.]
- (7) Discuss the provisions of sections 4A(1), 4A(2) and 4(A)(3) of the Wills Act 7 of 1953. [See par 8.4.2.2.]

## LECTURE 7

- (1) Distinguish briefly between *dies cedit* and *dies venit*.
- (2) Which presumption exists in respect of the vesting of rights on the death of the testator? [See par 9.2.]
- (3) How can a testator postpone *dies cedit*?  
[By using a suspensive condition.]
- (4) How can a testator postpone *dies venit*?  
[By using a suspensive time clause.]

- (5) A testator can also postpone *dies cedit* and *dies venit* by using a trust. Explain how. [See par 9.6.]
- (6) True or false: "If *dies venit* is postponed, *dies cedit* must also be postponed".
- (7) Discuss the importance of the court's decision in *Harris v Assumed Administrator Estate MacGregor* 1987 (3) SA 563 (A) regarding vesting on intestate succession.

## LECTURE 8

- (1) Distinguish between "freedom of testation" and "testamentary capacity". [See par 10.2 & 7.1.]
- (2) In modern South African law, does a child have a claim for a specific portion as inheritance (legitimate portion) out of the deceased estate of his or her parent? [See par 10.2.2.]
- (3) Which factors may be considered in order to determine a spouse's reasonable maintenance needs in terms of the Maintenance of Surviving Spouses Act 27 of 1990?
- (4) If the claims for maintenance of the surviving spouse and of a minor against the estate of a deceased compete with each other, whose claim will receive preference?
- (5) In his will, the testator leaves R50 000 to his brother, B, and rest of his estate to his wife, W. Is B a legatee or an heir? And W? [See par 10.3.1.]
- (6) What happens to a legacy where the legatee does not want to take the benefit in circumstances where neither substitution nor accrual take place? [If you are unable to answer this question at this stage, come back to it after completing ch 15.]
- (7) What happens to an inheritance where the heir does not want to take the benefit in circumstances where neither substitution nor accrual take place? [If you are unable to answer this question at this stage, come back to it after completing ch 15.]
- (8) Discuss *Barrow v The Master* 1960 (3) SA 253 (E).
- (9) Does a testator have to appoint an heir, or may he or she divide his or her whole estate by means of legacies? [See par 10.3.1.2.]
- (10) If one makes a will, does one have to divide one's whole estate in the will?  
[No, one can die partly testate and partly intestate. If one does not provide for a specific benefit in one's will, that benefit will devolve in terms of intestate succession rules.]
- (11) What is an absolute bequest? [See par 10.3.2.]
- (12) Define a condition.

[A condition is an uncertain future event.]



- (13) What is the difference between a suspensive time clause and a suspensive condition?

[A condition is an uncertain future event, whilst a time clause is always certain to arrive. Consequently, a suspensive condition postpones *dies cedit* and *dies venit*, whilst a suspensive time clause only postpones *dies venit*.]

## LECTURE 9

- (1) True or false (give full reasons for your answers):

- (a) A testator may not leave a benefit to a beneficiary who has never married on condition that he or she does not marry.
- (b) A testator may not leave a benefit to his widow on condition that she does not remarry.
- (c) A testator may not leave a benefit to his daughter on condition that she leaves her husband.

[*Levy v Schwartz* 1948 (4) SA 930 (W); *Barclays Bank DC & O v Anderson* 1959 (2) SA 478 (T)]

- (d) A testator may not leave a benefit to his daughter on condition that she does not marry a specific person.

- (2) Define a *modus*.

- (3) A *modus* can have different objectives. Discuss.

- (4) True or false: A *modus* has no influence on the vesting of the bequeathed benefit in the beneficiary burdened with the *modus*. [See par 10.3.3.]

- (5) Explain the difference in the legal effect between the following bequests:

- (a) T leaves R50 000 to his son, S, on condition that S pays for the schooling of his younger brother, D, otherwise half of the money will go directly to D.
- (b) T leaves R50 000 to his son, S, and provides that S must use the income from the money to pay for the schooling of his younger brother, D.

## LECTURE 10

- (1) What is the basic difference between direct substitution and fideicommissary substitution?

[See par 11.3. In a direct substitution the beneficiaries are appointed in the alternative - either one or the other inherits. Once one of them has inherited, the other loses all hope of ever inheriting. In a fideicommissary substitution, the beneficiaries inherit the same benefit one after the other. If one of them inherits, the other one does not fall away. (Fideicommissary substitution may be conditional, in which case the second

**LECTURE 13**

- (1) Define adiation and repudiation.
- (2) What is meant by the concept of *ius accrescendi* ("right of accrual")?
- (3) Discuss joinder *re*, joinder *re et verbis* and joinder *verbis tantum* and the role the type of joinder plays in determining the intention of the testator regarding accrual.
- (4) Which indications, apart from the wording used by the testator to institute the beneficiaries, can be used to determine whether the testator intended accrual to take place or not? [end of par 15.5.]
- (5) Discuss the importance of the court's decision in *Lello v Dales* 1971 (2) SA 330 (A) regarding the right of accrual (*ius accrescendi*).

**LECTURE 14**

- (1) What is the chief principle or "golden rule" in the interpretation of a will? [See *Cuming v Cuming*.]
- (2) Discuss *Botha v The Master* 1976 (3) SA 597 (E) regarding the rectification of a will by the insertion of words.

**3 DISCUSSION FORUM FOR MODULE**

This module now has its own discussion forum on SOL. You can talk to other students and your lecturer on this discussion forum. As soon as you have registered on SOL, you will have access to this forum. Please keep the postings relevant to the content of this module. The address is: <http://forums.unisa.ac.za/sol/course/pvl202-u>

**4 INFORMATION FOR STUDENTS WRITING EXAMINATIONS IN 2003**

**NB: The information that follows is not of importance for students who will finish this module in 2002!**

Some of the students registered for this module in the second semester of 2002, will only write examination during 2003, either because they will have a supplementary examination, or because they will have decided themselves that they are not ready to write the examination at the end of this year. Since these students will not receive new tutorial material from Unisa, we would like to bring the following to their attention:

**a PRESCRIBED CASES FOR 2003**

- (5) *Ex parte Graham* 1963 (4) SA 145 (D) (*commorientes*)
- (6) *Ex parte Estate Davies* 1957 (3) SA 471 (N) (testamentary writing)
- (7) *Liebenberg v The Master* 1992 (3) SA 57 (D) (place where witnesses must sign)
- (8) *Jeffrey v The Master* 1990 (4) SA 759 (N) (office of certifying officer)