

Tutorial Letter 201/2/2014

Law of Succession

PVL2602

Semester 2

Department of Private Law

This tutorial letter contains feedback on the assignments and important information about the examination

Bar code

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Dear Student

1 COMMENTARY ON ASSIGNMENT 01: SEMESTER 02

This assignment covers chapters 1 to 6 of the textbook as well as the information in Tutorial Letter 101 and the prescribed cases.

QUESTION 1

In May 2007, John and William entered into a civil union (in terms of the Civil Union Act 17 of 2006) that was out of community of property, but subject to the accrual system. In January 2008, John died intestate and left the following relatives:

- William, who is entitled to R100 000 as accrual;
- Samuel and Dina, the adopted children of John and William (Dina refuses to inherit any part of John's estate);
- Frans, the grandson of John (Frans is the son of John's predeceased son, Gerald who was born from John's first marriage to Kathy);
- Mary, John's mother;
- Ben, John's brother.

The total value of John's estate is R900 000. Calculate how his estate is going to devolve and indicate how much each person will receive. Give reasons for your calculations. Also indicate which relatives will not inherit, giving reasons. (15)

ANSWER:

[Please note: Information in square brackets provides further explanation and need not have formed part of your answer.]

- (1) William is entitled to R100 000 as accrual in terms of matrimonial property law; this amount is subtracted from John's estate: $R900\ 000 - R\ 100\ 000 = R800\ 000$ (1)

[NOTE: You would have received a mark of 0 for the entire question if you divided the estate in half in terms of a marriage in of community of property as this marriage was concluded out of community of property. Note further that the accrual is **deducted** from John's deceased estate because **William** is entitled to accrual. John's estate has to pay the accrual to William. If **John** was entitled to accrual, the accrual would have been added to John's estate.]

- (2) The total value of John's estate to be divided in terms of intestate succession law: R 800 000.
(1)
- (3) William is entitled to inherit **either** a child's portion **or** a statutory determined minimum amount of R125 000, whichever is the most (s 1(1)(c)). (1)
- (4) A child's portion is calculated as follows: the value of the estate is divided by the number of children (1)
- (5) who have either survived the deceased (1)

- (6) as well as the children who have predeceased him but are survived by descendants, (1)
- (7) plus the number of spouses (one in this instance). (1)

[If you did not give the correct definition of the calculation of a child's portion *in toto*, you would not have received any marks – that is, 0/4. Note that a child's portion is NOT calculated by simply dividing the value of the estate by the number of children plus the number of spouses – the calculation has four elements.]

- (8) A child's portion = R800 000 divided by 4 (S, D, G + 1) = R 200 000. (1) (Although D repudiated, she has to be counted for purposes of determining a child's portion.)
- (9) Thus a child's portion (R200 000) is more than R125 000; therefore W inherits a child's portion of R200 000 (1).
- (10) The remaining R600 000 (R 800 000 – R 200 000) has to be divided equally between the 3 children S, D and G (1) = R 200 000 each
- (11) but because G is predeceased his share of R 200 000 will go to W's grandson F (1)
- (12) by way of representation. (1)
- (13) D refuses to inherit, consequently her share of R 200 000 must go to W in terms of section 1(6) of the Intestate Succession Act (1)
- (14) which provides that if a descendant refuses to inherit, his/her share goes to the spouse.(1)
- (15) M and B inherit nothing because M is an ascendant and B is a relative in the collateral line; there are closer relatives who exclude them. (1)

QUESTION 2

T committed suicide on 10 December 2011. He left a letter in which he wrote that he revokes all previous wills and leaves all his possessions to his two children from his first marriage, S and D. This is only signed with T's signature. It appears that T executed a valid will in 2003 in which he left all his possessions to his second wife and nothing to his children. S and D approach you for advice. They want to know what their position with regard to any inheritance is. Explain fully any possible action available to them. (15)

ANSWER:

The letter that T left behind is not a valid will because it does not comply with the formalities in terms of section 2(1)(a)(ii) of the Wills Act 7 of 1953.(1) The letter was signed only by T and not also by two competent witnesses in the presence of each other and in the presence of the testator.(1) As a result the second wife will inherit the entire estate in terms of the valid second will and S and D will inherit nothing.

S and D will have to bring a court application in terms of section 2(3) for the court to order the Master to accept the second will as the testator's will. (1) In terms of section 2(3) the court is empowered to order the Master to accept a document as a valid will if the court is satisfied that the document concerned was drafted or executed by a person, (1) who has since died (1) and who intended that document to be his or her will (1), although it does not comply with all the formalities for the execution of wills. The court is obliged to give the order if it is satisfied that the testator intended the document to be his will. (1)

The first requirement, namely that the document concerned must have been **drafted or executed** by a person who has since died, caused interpretation problems. The question was whether it means that the deceased had to **personally** draft the document. (1) At first the courts followed a contradictory approach. In *Webster v The Master* 1996 (1) SA 34 (D) (1) the court held that the wording indicated that section 2(3) calls for conduct of the testator personally, and

does not encompass conduct through an agent.(1) This is called the strict approach and was followed in a few cases (see *Jamneck & Rautenbach* at 79).

A flexible approach to section 2(3) was, however, followed in *Back v Master of the Supreme Court* [1996] 2 All SA 161 (C) (1) in which the court held that the requirement of a document 'drafted' by the deceased must be flexibly interpreted in view of the purpose of section 2(3), which was to prevent the testator's wishes from being nullified by non-compliance with technical formalities. The court decided that there is nothing in section 2(3) to indicate that the testator has to draft the document personally and that there must be very few people who still write out a will by hand. (1)

Finally, in *Bekker v Naude* 2003 (5) SA 173 (SCA), (1) the Supreme Court of Appeal settled the differences of opinion that existed regarding the interpretation that should be given to the word "drafted" in section 2(3) of the Wills Act 7 of 1953. The Supreme Court of Appeal preferred the narrow interpretation in terms of which the testator should have personally (1) drafted the document. The court came to this conclusion based on the basic principle of interpretation of a statute that the ordinary, grammatical meaning of a word must be used unless that would lead to absurdity, inconsistency, or hardship, or result in an anomaly. (1) The Court was of the opinion that section 2(3) contained no absurdities and that in the Act itself there was no indication of inconsistency, hardship or anomaly. (1)

The Court was of the view that the requirement of a document drafted by the testator had been included, in unambiguous language, for good reason, namely to guarantee a degree of reliability by requiring evidence of personal conduct by the testator out of which his or her intention can be clearly deduced. (1)

The requirement of section 2(3) is that there must be a document that was "**drafted or executed**" by the person who has died. Accordingly, if the document was, in fact, **executed** by the testator, it will not matter that it was not personally **drafted** by the testator, and it will be possible to use section 2(3) to give effect to the document if the formalities have not been strictly followed, provided that it can be shown that the testator intended the document to be his or her will. (1) *In casu* the testator had signed the document and had therefore made an attempt at execution. The court will therefore be obliged to order the Master to accept the document as a valid will if it is shown that the last requirement, namely that the testator intended the document to be his will, is complied with.

The most important requirement which has to be satisfied before a court will grant an order in terms of section 2(3) is the requirement that the court has to be satisfied that the testator **intended** the document to be his will. (1) The facts of each case must be considered to ascertain the testator's intention (1) (*Van Wetten v Bosch* 2004 (1) SA 348 (SCA)). (1)

The Supreme Court of Appeal held that for the grant of relief under section 2(3) a court must be satisfied that the deceased person who drafted or executed the document **intended the specific document to be his will, and not merely instructions to an attorney** to draft a will for him or her. (1) That intention must have existed concurrently with the execution or drafting of the document (see *Van Wetten v Bosch* 2004 (1) SA 348 (SCA)). (1)

On the authority of *Van Wetten v Bosch*, one would argue that the children would be successful in their application based on section 2(3).

(max. 15)

Total Assignment 01: [30]

2 COMMENTARY ON ASSIGNMENT 02: SEMESTER 02

- This assignment covers the whole textbook, the prescribed cases and the information in Tutorial Letter 101.
- Select only **one** answer per question. **Each answer counts two marks.**

Question 1

Which one of the following persons will **not** be able to claim maintenance from the deceased in terms of the Maintenance of Surviving Spouses Act 27 of 1990?

- [1] The deceased's wife in a monogamous Muslim marriage.
- [2] The deceased's wife in a polygamous Muslim marriage.
- [3] The deceased's heterosexual life partner.**
- [4] The deceased's homosexual life partner in a civil union.

See *Jamneck en Rautenbach (J & R)* par 2.5.2 – 2.5.3.

Question 2

Mr X dies intestate and is survived by his grandparents, P and Q on his father's side and his uncle Z on his mother's side only. How will his estate devolve?

- [1] Z will inherit one half of the estate and P and Q will share the other half of the estate.
- [2] P, Q and Z will each inherit one-third of the estate.
- [3] The uncle, Z will inherit the whole estate.
- [4] The grandparents, P and Q, will inherit the whole estate**

See *J & R* par 2.6.8.

Question 3

According to *Rhode v Stubbs* 2005 (5) SA 104 (SCA) estate massing takes place when...

- [1] the surviving testator accepts a benefit in terms of a mutual will, irrespective of the intention of the parties to the mutual will.
- [2] a testator in a mutual will disposes of his/her own estate as well as of the estate of the other testator.
- [3] testators join their estates or portions of their estates, with the purpose of disposing of the joint unit in a will and the surviving testator then accepts a benefit in terms of the will.**
- [4] testators married in community of property mutually benefit each other in a mutual will.

J & R par 9.6.

Question 4

T provides in his will:

“I leave R 20 000 to my daughter, F. She must receive this amount before any other benefit is paid out.”

The bequest to F is called ...

- [1] a modus.
- [2] **a prelegacy.**
- [3] an inheritance.
- [4] a bequest price.

J & R par 9.3.1 (p 136).

Question 5

When interpreting a will, which of the following sources may NOT be used?

- [1] The will itself.
- [2] Armchair evidence.
- [3] Extrinsic evidence to identify a beneficiary.
- [4] **Evidence as to a statement made by the testator himself or herself as to what he or she intended.**

J & R par 13.4.3.

Question 6

T provided as follows in his will:

“I leave my farm to my brother, B and I bequeath the residue of my estate to my two sisters, M and N.”

T leaves behind his mother, his brother B and his sisters M and N. B refuses to inherit. Who will inherit the farm and why?

- [1] The mother, because of section 2C(1) of the Wills Act 7 of 1953.
- [2] **The sisters because they are the heirs of the residue.**
- [3] The sisters because accrual takes place.
- [4] The mother and the sisters in terms of intestate succession.

J & R par 9.3.1.1 (read with par 10.3.2 and par 10.9).

Question 7

Which one of the following bequests provides an example of a joinder *re et verbis*?

- [1] "I bequeath my farm to John and Peter. John is to get the portion which lies north of the river, while Peter is to get the portion which lies south of the river."
- [2] "I bequeath my farm to John and Peter."**
- [3] "I bequeath my farm to John and Peter in equal shares."
- [4] "I bequeath my farm to John and my car to Peter."

J & R par 10.9.2.

Question 8

Which one of the following provisions in a will creates a fideicommissary substitution?

- [1] "I bequeath my farm to my son, John. If John predeceases me, my son Peter should inherit the farm."
- [2] "I bequeath my farm to my sons, John and Peter, in equal shares."
- [3] "I bequeath my farm to my son, John. If John dies without children, the farm must go to my son Peter."**
- [4] "I bequeath the residue of my estate in trust to my sons, John and Peter."

J & R par 10.4.1.2.1.

Question 9

Testator T provides as follows in his will:

"I leave my estate in trust to my trustee, Mr X. My wife, W, must receive the income from the trust during her lifetime. At her death, my children P and J must receive the capital of the trust."

Who is the owner of the trust property after T's death?

- [1] W
- [2] X**
- [3] P and J
- [4] W, P and J.

J & R par 11.3 and par 11.7.

Question 10

What is the principle called according to which the executor of an estate must, under certain circumstances, take benefits given to certain heirs by the deceased during his lifetime into account when distributing the estate among certain beneficiaries?

- [1] Bequest price
- [2] Ademption
- [3] Collation**
- [4] Prelegacy

J & R par 12.1.

Question 11

What is the process called where a court adds, deletes or changes something in a will because the testator had made a mistake when making the will and the will does not reflect his intention correctly?

- [1] Rectification**
- [2] Deletion
- [3] Alteration
- [4] Ratification

J & R par 13.6.

Question 12

B and C were married in 2000. Shortly thereafter they made a mutual will, indicating that the survivor will inherit everything. Two children, D and S, were born from the marriage. In January 2009 they were divorced and in February 2009 B married W. Two weeks later B died in a car accident without changing his will. Who will inherit B's estate?

- [1] C
- [2] W
- [3] D and S
- [4] W, D and S**

J & R par 13.3.1.

Question 13

A pactum successorium in an antenuptial contract...

- [1] is valid in our law.**
- [2] is invalid in our law.
- [3] has to comply with testamentary formalities.
- [4] may be revoked in a later will by one of the parties to the contract.

J & R par 14.3.2.2.

Question 14

A donatio mortis causa...

- [1] is invalid in our law.
- [2] **is valid if it complies with testamentary formalities.**
- [3] may not be revoked by the donor.
- [4] restricts the freedom of testation of the donor.

J & R par 14.3.2.1.

Question 15

Testator Tom provided as follows in his will:

“I leave my house to my wife, Wendy. The residue of my estate I bequeath to my sisters, Mary and Nina.”

Tom and Wendy were killed in the same car accident. Tom’s only surviving relatives were his sisters, Mary and Nina, and his brother Ben. Wendy was survived by her sister, Susan. Who inherited Tom’s house?

- [1] Wendy, since that was what Tom provided in his will.
- [2] Susan, since she inherited the house from Wendy.
- [3] **Mary and Nina, since they are Tom’s testate heirs.**
- [4] Mary, Nina and Ben, since they are Tom’s intestate heirs.

J & R par 1.6.1 (p 14).

TOTAL: [30]

3 INFORMATION ABOUT THE EXAMINATION

To assist you with your preparation for the examination, we provide you with an old examination paper which should be viewed purely as a guide to the types of questions that could be asked. Please note that this does not necessarily mean that the same topics will be covered again in this semester’s examination paper. Also note that this paper was set on tutorial material that became outdated and was replaced by new tutorial material. **In short, don’t rely on the previous examination paper or any of the older examination papers provided on myUnisa.**

3.1 Study material

The study material which you have to study for this examination consists of:

- the prescribed textbook: Jamneck, Rautenbach, Paleker, Van der Linde, Wood-Bodley *The Law of Succession in South Africa* (2012) Oxford University Press Cape Town [Prescribed sections are indicated in your Study Guide]
- the prescribed cases, with the relevant notes in the *Casebook on the Law of Succession* – see the list of cases in Tutorial letter 101/2013
- the tutorial letters

PLEASE NOTE:

- **Please do not phone to ask us if you can leave anything out, since there is nothing that you may leave out!** All the information in your Law of Succession study material forms a unit and the relevant sections have been indicated in your Study Guide. You have to know and understand **everything** to be able to answer problem type questions.
- No particular part of the work is more important than any other part. In other words, **do not try to "spot" for the examination!** Furthermore, **do not underestimate the amount of material you have to study for this module.**
- **Direct questions can be set on the prescribed cases (and the casebook's notes thereon)** in the examination. Many a student who did not pass the examination has admitted afterwards that they did not really study the cases. Do not make the same mistake! Even if, in a particular examination, there is no question on a particular case, **you have to refer to relevant prescribed case law in all your other answers.** (An order form for the casebook is attached to Tutorial Letter 101.)

3.2 Format of examination

Note the following information on the examination:

- (1) The examination lasts **2 hours** and it counts **100 marks**.
- (2) The paper consists of two sections which have to be completed. **Section A contains multiple choice questions** and has to be **answered on a mark-reading sheet**. (It is recommended that you also mark the answers that you choose on the examination paper itself. Should your mark reading sheet were to get lost, we can establish your answers by looking at your examination paper.)
- (3) **When answering Section B, you must write the answers on the examination paper.** We leave sufficient open space for you in which to write your answers. You therefore hand in the whole examination paper when you have completed the questions. The space provided for each answer, is an indication of the amount of information needed to answer the question. As students' handwriting may differ in size, however, we usually provide more space than is required.
- (4) In Section B, a question may count anything from 1 to 20 marks.
- (5) Always **refer to relevant case law** even if the question does not state that you have to do so.
- (6) The instructions below are the same as those that will appear on the examination paper. Read them through carefully beforehand so that you do not have to spend time doing so when writing the examination.

- (7) You will note that the instructions are in English and Afrikaans. This is also the format throughout the paper. Please ensure that you answer every question and do not accidentally skip over one, thinking that it is only the Afrikaans version of one that you've already answered.
- (8) You will be allowed to use a **non-programmable pocket calculator** to do the calculations for the intestate succession questions.

The instructions page of the paper will look as follows:

UNIVERSITY EXAMINATIONS



UNIVERSITEITSEKSAMENS

UNISA | 
 university of south africa
PVL2602

(495070)

October/November 2012
Oktober/November 2012
**LAW OF SUCCESSION
ERFREG**
Duration : 2 Hours
Tydsduur : 2 Uur100 Marks
100 Punte

EXAMINERS / EKSAMINATORE :

FIRST / EERSTE : PROF J JAMNECK
SECOND / TWEDE : MRS/MEV M WIESE

PROF A ROOS

Use of a non-programmable pocket calculator is permissible.
Gebruik van 'n nie-programmeerbare sakrekenaar is toelaatbaar.

Closed book examination.
Toeboek eksamen.

This examination question paper remains the property of the University of South Africa and may not be removed from the examination venue.

Hierdie eksamenvraestel bly die eiendom van die Universiteit van Suid-Afrika en mag nie uit die eksamenlokaal verwyder word nie.

INSTRUCTIONS

1. This paper consists of **Section A: Multiple-choice questions (to be answered on the mark-reading sheet) and Section B: Fill-in questions (to be answered on the fill-in question paper)**. You will not receive an examination book.
2. You must hand in the complete examination paper plus the mark-reading sheet.
3. The unique number to be filled-in on the mark-reading sheet is 475441.
4. Answer all the questions in the designated spaces only. Answers outside such spaces will not be read.
5. **Do not write in the margins** - this space is reserved for the examiners.
6. **Do your rough work on page 2.** This page will not be read by the examiners.
7. The English version of each question is followed by the Afrikaans version.
8. This paper counts **100 marks**. Divide your time accordingly.
9. Plan each answer carefully before you write it down and refer to the relevant authority whenever possible.

INSTRUKSIES

1. Hierdie vraestel bestaan uit **Afdeling A: Multikeusevrae (wat op die merkleesblad beantwoord word) en Afdeling B: Invulvrae (wat op die invulvraestel beantwoord word)**. U ontvang geen eksamenboek nie.
2. U moet die hele vraestel inlewer, asook die merkleesblad.
3. Die unieke nommer wat op die merkleesblad ingevul moet word, is 475441.
4. Beantwoord al die vrae net in die ruimtes daarvoor aangedui. Antwoorde buite sodanige ruimtes sal nie gelees word nie.
5. **Moenie in die kantlyne skryf nie** - dié ruimte is vir gebruik deur die eksaminatore.
6. **Doen u rofwerk op bladsy 2.** Dié bladsy sal nie deur die eksaminatore gelees word nie.
7. Die Afrikaanse weergawe van elke vraag volg direk na die Engelse weergawe.
8. Die vraestel tel **100 punte**. Deel u tyd daarvolgens in.
9. Beplan u antwoord deeglik voordat u dit neerskryf en verwys waar moontlik na relevante gesag.

4 OLD EXAMINATION PAPER AND MEMORANDUM

The reason why we include an old examination paper here is for you to see the type of questions that you can expect in the examination. The memorandum gives you an idea of what your answers should entail if you want to pass. **When preparing for the examination, you may find it useful to first answer the questions without looking at the answers.**

In order to conserve paper, we do not include the Afrikaans version of each question or the lines provided for the answers. Also note that in most instances we have provided more facts in the memorandum than would be required. In other words, even if a student does not cover all the facts in the memorandum, he or she may still earn a good mark.

SECTION A

1 Mr X made a will in which he appointed his wife, Mrs X, as his sole heir. He also appointed her as the executor of the estate. Which one of the following statements regarding Mrs X's position is correct?

- [1] Mrs X may only inherit in terms of the will if she rejects her appointment as executor.
- [2] Mrs X may only inherit in terms of the will if she would have been an intestate heir had Mr X died without a will.
- [3] **Mrs X may inherit in terms of the will because her appointment as executor has no influence on her capacity to benefit under the will.**
- [4] Mrs X may only inherit in terms of the will if she brings an application to this effect before the High Court and the Court finds in her favour.

(2)

2 *Animus testandi* refers to ...

- [1] **the testator's intention to make a will.**
- [2] the testator's capacity to make a will.
- [3] the testator's freedom to make any provision, whatever he or she pleases, in a will.
- [4] the testator's right to exercise his or her testamentary capacity freely in a will.

(2)

3 Which of the following statements regarding estate massing are correct?

- (a) In order for estate massing to take place, the testators must intend to consolidate their estates, or part thereof.
- (b) The testators involved in the estate massing must be married in community of property.
- (c) The first-dying testator must have disposed of the survivor's share of the massed estate as well as of his or her own share.
- (d) The survivor must adiate the massing.
- (e) If the survivor adiates, he or she loses his or her freedom of testation regarding his or her share of the massed estate.

[1] All of the statements.

[2] Only (a), (c), (d), and (e).

[3] Only (a), (b), (c) and (d).

[4] Only (a), (c) and (d). (2)

4 Which of the following statements regarding the legal position of the fiduciary are correct?

- (a) The fiduciary is the owner of the fideicommissary property.
- (b) The ownership of the fiduciary is subject to a suspensive condition.
- (c) The fiduciary's ownership is limited in duration.
- (d) The fiduciary may only alienate or mortgage the fideicommissary property with the cooperation of the fideicommissary.
- (e) The fiduciary is not liable to the fideicommissary for damage caused by him or her to the fiduciary property.

[1] Only (b) and (e).

[2] Only (a), (c) and (d).

[3] Only (a), (b) and (c).

[4] All the statements. (2)

5 In his will testator T provided:

“I leave my estate to the children of my daughter, Emma.”

At the testator’s death, Emma was married to Sam. She was pregnant with a child of which she was a surrogate mother in terms of a valid surrogacy agreement with Mr and Mrs Smith. Emma and Sam had an adopted son Carel and a daughter, Brenda. Emma also had an adult daughter, Anna, who was born out of wedlock from a relationship she had before she married her husband Sam.

Who will inherit T’s estate?

[1] Brenda, Carel, Anna and the unborn child, provided he/she is born alive.

[2] Brenda and Carel.

[3] Brenda.

[4] Brenda, Carel and Anna. (2)

6 The capacity given to an existing trustee to appoint an additional trustee is called:

[1] Power of appointment

[2] Substitution

[3] Power of assumption

[4] Treuhand (2)

7 Which of the following statements are recognised principles in our law that can be used when interpreting a will?

(a) Words should be given their usual grammatical meaning.

(b) Technical terms should be given their legal-technical meaning.

(c) If a person has drafted a will, there is a presumption that he or she intended to deal with his or her entire estate.

(d) There is a presumption that the testator wanted to treat his or her children equally.

(e) When interpreting a will, no evidence of any nature should be taken into consideration – only the wording of the will should be looked at.

[1] All the statements.

[2] Only (a), (b) and (c).

[3] Only (a), (b), (d) and (e).

[4] Only (a), (b), (c), and (d). (2)

8 Which one of the following statements reflects the decision of the court in *Lello v Dales* 1971 (2) SA 330 (A) the most accurately?

- [1] **Depending on the intention of the testator, accrual could take place between beneficiaries, despite the fact that the beneficiaries were joined *verbis tantum*.**
- [2] Where beneficiaries are to inherit the estate of a testator “in equal shares”, such beneficiaries are not joined *verbis tantum* and consequently accrual may take place between them.
- [3] When co-heirs are joined *verbis tantum*, accrual can never take place between them.
- [4] In the case of joinder *re, re et verbis* or *verbis tantum* there are always a presumption in favour of accrual. (2)

9 In which of the following situations, taking into account the common law and section 2A of the Wills Act 7 of 1953, had T’s will validly been revoked?

- (a) T told his attorney (X) that he wanted her (the attorney) to destroy the original copy of the will in her (X’s) possession, because he wanted to revoke the will. X thereupon destroyed the will.
 - (b) T told his family that he wanted to revoke his will which was in his attorney’s possession. T did not give any instruction to his attorney in this regard.
 - (c) T wrote “cancelled” on all the pages of his will.
 - (d) T had intentionally torn up the only copy of his will.
 - (e) T had the original copy of his will in his possession, as well as a photocopy of the will. After his death, only the original will was found amongst his papers.
- [1] In all the situations.
 - [2] Only in (a), (b), (c) and (d).
 - [3] **Only in (a), (c), and (d).**
 - [4] Only in (c) and (d). (2)

- 10 In terms of section 18(3) of the Administration of Estates Act 66 of 1965, the Master may dispense with the appointment of an executor if
- [1] the surviving spouse has taken over the estate.
 - [2] the value of the estate does not exceed R125 000.**
 - [3] the beneficiaries concluded a redistribution agreement.
 - [4] all the beneficiaries and creditors have agreed thereto. (2)
- 11 An agreement between two parties purporting to regulate the devolution of the estate of one or both of them after the death of such a party, is called a
- [1] *pactum sucessorium***
 - [2] *donatio mortis causa*
 - [3] *fideicommissum residui*
 - [4] *si sine liberis decesserit* clause (2)
- 12 Which of the following statements regarding a trust are correct?
- (a) A trust is a special form of *fideicommissum*.
 - (b) A trust is a juristic person.
 - (c) A trust will come to an end when the only trustee resigns.
 - (d) A trust must have a lawful purpose.
 - (e) A trust may be created for an impersonal purpose.
- [1] Only (d) and (e).**
 - [2] Only (b) and (d).
 - [3] Only (b), (c) and (d).
 - [4] All the statements. (2)
- 13 Testator T provided as follows in his will:
- “I leave my farm to my son, James. If James does not want to inherit the farm, my son Peter must inherit the farm.”
- This provision provides an example of a ...
- [1] tacit *fideicommissum*.
 - [2] *si sine liberis decesserit* clause.
 - [3] fideicommissary substitution.
 - [4] direct substitution. (2)**

14 Which of the following persons will be able to claim maintenance from the deceased in terms of the Maintenance of Surviving Spouses Act 27 of 1990?

- (a) The deceased's wife in a monogamous Muslim marriage.
- (b) The deceased's wife in a polygamous Muslim marriage.
- (c) The deceased's heterosexual life partner.
- (d) The deceased's homosexual life partner in a civil union.
- (e) The deceased heterosexual life partner in a civil union.

[1] Only (a) and (e).

[2] Only (a), (b) and (d).

[3] Only (a), (b), (d) and (e).

[4] Only (d) and (e). (2)

15 T provided as follows in his will:

"I leave my farm to my brother, B and I bequeath the residue of my estate to my two sisters, M and N."

T leaves behind his mother, his brother B and his sisters M and N. B refuses to inherit. Who will inherit the farm and why?

[1] The mother, because of section 2C(1) of the Wills Act 7 of 1953.

[2] The sisters because they are the heirs of the residue.

[3] The sisters because accrual takes place.

[4] The mother and the sisters in terms of intestate succession. (2)

TOTAL SECTION A: [30]

SECTION B:

1 *X dies intestate in February 2012 and is survived by the following relatives:*

- *B, C and D, his wives to whom he was married according to Muslim rites. He had also been married to J according to Muslim rites but she died in 2010.*
- *X and B had two children, E and F. F is still alive but E died in a car accident in 2007 and is survived by a daughter, Y.*
- *X and C had two children, G and H. H is still alive but G also died in the accident in 2007 and is survived by her adopted son, Z.*
- *X and J had one child – a daughter, K.*
- *X's parents, M and P, are still alive as is his brother, S.*

X's estate amounts to R800 000. Calculate how X's estate will devolve and give reasons for your calculations. Remember that your reasons are as important as your calculations.

(10)

Answer

[Please note:

- (a) In this instance X is married out of community of property, since he cannot have a joint estate with more than one wife. Consequently, students who divided the estate into halves as for a joint estate in a marriage in community of property or into equal shares for the wives and then continued with an intestate division, received 0 (zero) marks for the entire question.
- (b) Students who counted the predeceased spouse for any calculation, received 0 (zero) marks for the entire question as they do not understand the basic principle that a person should be alive in order to inherit.]

(1) In *Hassam v Jacobs* (1)

(2) the court held that the word "spouse or survivor" as used in the Intestate Succession Act 81 of 1987, includes a surviving partner to a polygynous Muslim marriage. As a result **all** the spouses are entitled to inherit. (1)

(3) The deceased is survived by spouses and children - section 1(1)(c) of the Wills Act is applicable and provides that the spouses will inherit either a child's portion or R125 000, whichever is greater. (1)

(4) A child's portion is calculated by dividing the value of the intestate estate by the number of the children of the deceased who have either survived him, (1)

(5) or have predeceased him but are survived by their descendants, (1)

(6) plus the number of surviving spouses. (1)

(7) Therefore, in this case, a child's portion equals $R800\ 000 \div 8 = R100\ 000$ (K, F, H, E G plus B, C and D). (1)

(8) Since a child's portion of R100 000 is less than the statutory minimum amount of R125 000, each wife will receive R125 000. (1)

- (9) The value of the remaining estate is R800 000 – R375 000(R125 000 x 3) = R425 000 (1)
- (10) The residue of R425 000 will be shared by the descendants: Y (representing E) and Z (representing G), F, H and K. (1) $R425\ 000 \div 5 = R85\ 000$
- (11) M and P do not inherit as they are ascendants and are thus excluded by the descendants. (1)
- (12) S does not inherit as he is a collateral and collaterals are excluded by descendants. (1)

(Max 10)

- 2 *Discuss the meaning of the terms “spouse” and “survivor” in terms of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 as decided by the court in Hassam v Jacobs NO 2009 (5) SA 572 (CC). You need not include a summary of the facts of the case.* (10)

Answer:

The Interpretation of the words “spouse” and “survivor” as referred to in the Intestate Succession Act 81 of 1987 as well as the Maintenance of Surviving Spouses Act 27 of 1990 were interpreted by our courts against the background of the Constitution.

- (1) In *Hassam v Jacobs* the Constitutional Court decided that a woman who is a party to a polygynous Muslim marriage concluded under Muslim personal law is a spouse for the purpose of claiming maintenance or inheriting in terms of intestate succession from the estate of the deceased spouse.(1)
- (2) The court *a quo* (the High Court) declared section 1(4)(f) of the Intestate Succession Act to be inconsistent with the Constitution to the extent that it makes provision for only one spouse in a Muslim marriage to be an heir. The declaration of unconstitutionality was referred to the Constitutional Court for confirmation as required by the Constitution. (1)
- (3) The Constitutional Court confirmed the declaration of constitutional invalidity made by the High Court. As to the Maintenance of Surviving Spouses Act, it held that the objective of the Act, which is to lessen the dependence of widows on family benevolence, would be frustrated if the continued exclusion of widows in polygynous Muslim marriages was to persist. (1)
- (4) It held further that the Act violates the applicant’s (the wife’s) right to equality. (1)
- (5) The exclusion of women in the position of the applicant from the protection of the Act unfairly discriminates against them on the grounds of religion,(1)
- (6) marital status (1)
- (7) and gender.(1)
- (8) This exclusion is not justifiable in a society guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.(1)

- (9) In conclusion, the Court held that the word "spouse" in the Act is not reasonably capable of being understood to include more than one spouse in the context of a polygynous marriage. To remedy the defect, the words "or spouses" is to be read-in after each use of the word "spouse" in the Act." (1)
- (10) As to the application of sections 1(1)(c)(i) and 1(4)(f) of the Intestate Succession Act to the estate of a deceased person who is survived by more than one spouse the Court held:
- (a) a child's share in relation to the intestate estate of the deceased shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;(1)
- (11) (b) subject to paragraph (c), each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Minister for Justice and Constitutional Development by notice in the Gazette, whichever is the greater; (1) and
- (12) (c) where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided amongst the surviving spouses. (1)
- (13) The order was madewith retrospective effect from 27 April 1994 (when South Africa's first Constitution came into operation), subject to the proviso that estates that had already been finally wound up would not be affected by the order.(1)

(Max 10)

3 *THIS QUESTION CONTAINS A WILL WHICH STARTS ON THE NEXT PAGE. THE QUESTIONS ON THE WILL APPEAR AFTER THIS DOCUMENT.*

LAST WILL AND TESTAMENT

This is the last will and testament of

JUDY SIMEON

(ID NR 640806 0067 083)

Currently residing at:

333 Jeremy Street, Randjiesfontein

1. REVOCATION

I revoke all wills and codicils previously made by me.

2. EXECUTORS AND ADMINISTRATORS

I nominate as executor of my estate Daniel Poggenpoel of the firm Combrink & Poggenpoel Attorneys of Pretoria with the power of assumption.

I exempt every executor and trustee, whether appointed under this will or assumed or substituted, from the furnishing of security to the satisfaction of the Master for the due and faithful performance of his/her duties as such.

3. BEQUESTS

To my daughter, Samantha, my jewellery as indicated in the photographs attached hereto. The rest of the jewellery is to go to my granddaughter, Gesina.

AS WITNESSES:

1. *Samantha Simeon*

J Simeon

JUDY SIMEON : TESTATRIX

2. *B Muhle*

3.2 The antique grandfather clock that belonged to my grandfather, to my son, Bertus, on condition that it must always go to the eldest son for 99 generations.

3.3 To my son, Kobus, my farm Sandfontein. At his death the farm must go to my grandson, Koos, and so to the eldest son for 99 generations.

3.4 To my daughter Kathryn, my beach house in Ballito.

3.5 The residue of my estate to my husband, Emil SIMEON.

3.6 If my husband and I should die simultaneously or within 30 (Thirty) days of each other, I bequeath my estate to my 4 children in equal shares.

3.7 Should my mentioned husband be predeceased at my death, I leave the residue of my estate to my children Samantha and Bertus in equal shares.

SIGNED by me at PRETORIA on this 2nd day of February 2004 in the presence of the undersigned witnesses who signed in my presence and in the presence of each other, all being present at the same time.

AS WITNESSES:

1. *Samantha Simeon*

2. *B Muhle*

J Simeon

JUDYSIMEON : TESTATRIX

- 3.1 *Assume that all signatures on this will were made by hand and in pen ink. Write a note on the validity of this will.* (5)

Answer

- (1) On the face of it, this will complies with all the formalities. (1)
 - (2) It was signed by the testatrix and two witnesses (1)
 - (3) and it was also signed on all the pages by the testator. (1)
 - (4) It could, however, be argued that it was not signed at the “end” as there is a big space between the last paragraph and the attestation. (1)
 - (5) See *Kidwell v The Master*. (1)
 - (6) It was therefore not signed at the end of the last paragraph as required and is therefore invalid. (1)
- (max = 5)

- 3.2 *Why should the testatrix and witnesses sign the photographs of the jewellery?* (5)

Answer

- (1) The photographs must also comply with the formalities as it identifies the object of the bequest. (1)
 - (2) In *Ex Parte Davies* (1) the court held that a testamentary writing which has to comply with the formalities may contain any one of the following elements:
 - (3) (a) The object (as in this case – the jewellery) (1)
 - (4) (b) The beneficiary (1)
 - (5) (c) The extent of the benefit bequeathed. (1)
- (5)

- 3.3 *Assume the Master accepts the will. Write a note on Samantha’s capacity to inherit in terms of the will.* (3)

Answer

- (1) Samantha signed the will as a witness and can therefore not benefit in terms of the will unless one of the exceptions under s4A of the Wills Act applies, (1)
 - (2) namely if she gets a court order that she didn’t unduly influence the testatrix,(1)
 - (3) or if she inherits as much as she would have inherited intestate, (1)
 - (4) or if two other competent witnesses had signed the will. (1)
- (maks 3)

3.4 To what executor's fee will Mr Poggenpoel be entitled as executor in terms of Clause 2 of the will? (1)

Answer

3.5% of the value of the estate. (1)

3.5 Write a note on the provisions under Clause 3.2 of the will which provides:

"The antique grandfather clock that belonged to my grandfather, to my son, Bertus, on condition that it must always go to the eldest son for 99 generations."

In this note, explain which legal concepts appear in the clause, indicate when dies cedit and dies venit take place for the parties and discuss any problems that you foresee. (4)

Answer

(1) This bequest is a legacy (1)

(2) and although it is possible to bequeath a movable asset for 99 generations (1) (which is not the case for immovable assets),

(3) the bequest is a *nudum praeceptum* as it contains a resolutive condition but does not state a gift over (1). Bertus will thus inherit the benefit unconditionally.

(4) *Dies cedit and dies venit* take place for him at the testatrix' death. (1)

(4)

3.6 Write a note on the provisions under Clause 3.3 of the will which provides:

"To my son, Kobus, my farm Sandfontein. At his death the farm must go to my grandson, Koos, and so to the eldest son for 99 generations."

You have the following additional information available:

(a) *The testatrix had 4 children: Samantha, Bertus, Kobus and Kathryn.*

(b) *At the time of her death, the testatrix owned a residential home in Pretoria and a farm called Sandspruit. She had never owned a farm called Sandfontein.*

In your note, explain which legal concepts appear in the clause, indicate when dies cedit and dies venit take place for the parties, discuss any problems that you foresee and indicate which remedies are available to the beneficiaries. (15)

Answer

(1) First, the testatrix never owned a farm called Sandfontein and thus there is a mistake in the will. It will be necessary to apply to the High Court for rectification of the will. (1)

(2) The High Court has inherent jurisdiction to delete something from a will that was inserted by the drafter by mistake.(1)

(3) It may even add words to a will if this is necessary to give effect to the wish of the testator by way of rectification. In this case the name of the farm was incorrectly added by the drafter and has to be rectified. (1)

- (4) See *Rens v Esselen*. (1)
- (5) Furthermore, the testatrix may not place a prohibition of alienation on land for more than two fideicommissaries. (1)
- (6) The testator's capacity to prohibit the alienability of land by means of long-term provisions is limited because he may not place a restriction on alienation which lasts longer than the Act 94 of 1965 prescribes. (1)
- (7) This means that Kobus, Koos and Koos' eldest son will inherit and thereafter the fideicommissum will lapse (1).
- (8) The fact that Kobus has to transfer the farm to Koos establishes a *fideicommissum* (1)
- (9) which is subject to a resolutive time clause for Kobus (1)
- (10) and a suspensive time clause (1) for Koos.
- (11) A fideicommissum takes place when the testator leaves a benefit to the first beneficiary (the fiduciary). (1)
- (12) and stipulates that it must be transferred to the next beneficiary (the fideicommissary) (1).
- (13) It is a time clause because it is certain that Kobus will die. (1) [Note: It could also be considered as a condition, if one realises that there is an implicit condition that Koos has to survive Kobus in order to inherit.]
- (14) Kobus is subject to a terminative time clause as his rights are terminated when he dies (1)
- (15) and Koos is subject to a suspensive time clause as his rights are suspended until the death of his father. (1)
- (16) *Dies cedit* and *dies venit* take place for Kobus at the death of the testator (1)
- (17) and *dies cedit* and *dies venit* take place for Koos at Kobus' death (1)
- (18) and again for his eldest son at his (Koos') death. (1)

(Max 15)

3.7 Write a note on the provisions under Clause 3.4 of the will which provides:

"To my daughter Kathryn, my beach house in Ballito."

After the testatrix' death, it became apparent that the beach house in Ballito was sold at a liquidation auction 6 years prior to her death, two years after she had made the will. In your note, explain which legal concepts appear in the clause, indicate when dies cedit and dies venit take place for the parties, discuss any problems that you foresee and indicate which remedies are available to the beneficiaries. (5)

Answer

- (1) The bequest to Kathryn is a legacy. (1)
 - (2) A legacy may be revoked/cancelled by ademption, (1)
 - (3) but ademption only takes place if the testator voluntarily alienated the object of the legacy. (1)
 - (4) In this case, it was sold in liquidation – ie not voluntarily and therefore Kathryn will be entitled to either the house itself (if the executor succeeds in buying it back) (1)
 - (5) or the value of the house. (1)
 - (6) *Dies cedit* and *dies venit* take place for Kathryn at the death of the testatrix (Judy). (1)
(max 5)
- 3.8 *After the testatrix' death, Samantha refused to inherit the jewellery in the photos. Who will inherit the jewellery now?* (2)

Answer

- (1) Section 2C(1) of the Wills Act provides that where a descendant of the testator is entitled to inherit a benefit under a will together with a spouse and the descendant repudiates the benefit, then the spouse will inherit the benefit. (1)
- (2) The testator's husband will be entitled to inherit. (1)

(2)

[Note that section 2C(1) is only applicable when the person who repudiates is a descendant of the testator. Eg, if the sister of the testator repudiates a legacy, then the common law applies and the property will fall back into the residue of the estate to be inherited by the heir, which in this instance also happens to be the spouse.]

Total for question 3 [40]

4 Contrast the differences between a trust and a *fideicommissum* in table form. (10)

Answer

Trust

Fideicommissum

The control or ownership of the trust property is separated from the enjoyment of the property – a trustee only has an administrative interest in the property, unless he or she also happens to be a beneficiary.	The owner of the property is beneficially entitled to the fruits and use of property.
The trustee fill a quasi-public office.	The fideicommissarius does not fill an office.
The Court and Master supervise the proper execution of trusts.	The observance of the <i>fideicommissum</i> is left to fideicommissaries.
If a trust fails, the trustee is not beneficially entitled to the trust property.	If a <i>fideicommissum</i> fails, the fiduciary takes the property free of the burden.
A trust (over movable or immovable property) may continue for an indefinite period.	A <i>fideicommissum</i> over immovable property is limited to two successive <i>fideicommissarii</i> (in terms of the Immovable Property (Removal or Modification of Restrictions) Act).
A trust will not fail because there is no trustee.	A <i>fideicommissum</i> fails in the absence of a fiduciary.

1 mark each

(max 10)

Total for Section B: [70]

Total for paper: [100]

5 CONCLUSION

We wish you success in your studies this semester. Remember that all the tutorial letters are available in electronic format on *myUnisa*. Have a look at the webpage of this module on *myUnisa* and take part in the Discussion Forum.

PROF J JAMNECK

012 429-8506

PROF A ROOS

012 429-8422

MR PO MATSEMELA

012 429-8392

UNISA

/hs