THE PROCESSES AND PROBLEMS INVOLVED IN WINDING UP A DECEASED ESTATE IN SOUTH AFRICA

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ABSTRACT

This thesis discusses the processes involved in winding up a deceased estate and potential problems that can occur in carrying out these processes. The research adopts a legal interpretive approach, more specifically a doctrinal research methodology. This is low risk desktop research and is based on publicly available data.

In analysing the processes involved in winding up an estate, a will (or lack of a will) is identified as the starting point for the process. A will stipulates how the testator wishes to dispose of his or her property in the event of death, and must be executed in terms of the formalities provided in section 2 of the Wills Act. Section 13(1) of the Administration of Estates Act provides that the estate of the deceased is not wound up until letters of executorship have been granted by the Master. The Administration of Estates Act provides for formalities in the appointment and remuneration of an executor, who is responsible for the administration of the estate and distribution of the assets in the estate. Before the properties can be distributed to the beneficiaries, the executor must first call every person who has a claim against the estate to lodge a claim and pay the debts, including tax debts owed by the deceased. These tax liabilities are determined in terms of the Income Tax Act and Estate Duty Act. The three taxpayers involved in the winding-up process are the deceased taxpayer, the deceased estate, and the beneficiaries of the estate.

Several problems that may occur in winding up an estate are identified in the thesis. These include a testator who is incapable of executing a will, wills that do not comply with the formalities, forged wills, undue influence exerted on a testator, the death of testator caused by a beneficiary, disqualified beneficiaries, lost wills, the lack of a valid will, disputed and late claims against the estate, an executor failing to perform his or her duties, removing the executor of an estate, winding up the estate of a person who has died without a will, and insolvent estates. These problems, together with possible solutions, are discussed in detail.

Keywords: deceased estate, wills, testator/testatrix, executor, administration of an estate, income tax, estate duty.

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CHAPTER 1: INTRODUCTION

1.1 RESEARCH CONTEXT

A number of statutes are involved in the process of winding up a deceased estate: the Administration of Estates Act, No. 66 of 1965, as amended (Administration of Estates Act); the Intestate Succession Act, No. 81 of 1987, as amended (Intestate Succession Act); the Reform of Customary Law of Succession and Regulation of Related Matters Act, No. 11 of 2009 (Reform of Customary Law of Succession); the Wills Act, No. 7 of 1953 (Wills Act); the Income Tax Act, No. 58 of 1962, as amended (Income Tax Act) and the Estate Duty Act, No. 45 of 1955, as amended (Estate Duty Act).

Section 7(1) of the Administration of Estates Act states that the death of any person who dies in the Republic leaving any property or a will must be reported to the Master of the High Court (the Master) of the district the person has died in within 14 days after the death. The estate of a deceased cannot be liquidated or distributed unless a letter of executorship is granted to the person nominated by the deceased in a will registered in the office of the Master or appointed in terms of the provisions of the Administration of Estates Act (section 13(1), read with section 14(1)). The executor of the estate is responsible for the administration of the estate and, after being granted the letter of executorship, he or she takes control of the deceased's property (section 26(1) of the Administration of Estates Act). Williams (2020) states that the executor fulfils his or her obligation of administering the estate under the control and supervision of the Master. It was held in *Goosen v Bosch & the Master*, 1917 CPD (*Goosen v Bosch*), that the executor is obligated to administer the estate in terms of the will and the law. However, if an executor makes the wrong distribution, and this is proven to be true, the executor is liable to make good to the legitimate heir or claimant (section 50(1) of the Administration of Estates Act).

The customary law of succession applied in South Africa in the past, in terms of section 23 of the Black Administration Act, No. 38 of 1927 (Black Administration Act). In the customary law of succession, heirs of an estate were determined through the ma le line only (Kult, 2001). The law of succession was guided by the principle of male primogeniture. In terms of this principle, only the male relatives of the deceased were permitted to inherit from the estate, no

female could be an heir. This principle was found to be unconstitutional and invalid in *Bhe v The Magistrate, Khayelitsha; Shibi v Sithole; South African Human Rights Commission v President of the Republic of South Africa,* 2005 1 SA 580 (CC) (the *Bhe* case). The Reform of Customary Law of Succession and Regulation of Related Matters Act was introduced as an order in the *Bhe* case. The Act permits estates of indigenous people who left no valid will to be wound up according to the Intestate Succession Act. The Reform of Customary Law of Succession Act now provides the spouse(s) of the deceased and all of the deceased's children with an opportunity to inherit from the estate.

A valid will of a deceased person stating how he or she wishes to distribute his or her estate is interpreted in terms of the Wills Act. Where the deceased did not have a valid will and when there are properties owned by the deceased that are not included in the deceased's will, the estate is wound up in terms of the Intestate Succession Act. A will may also stipulate who the deceased nominates as an executor (section 14 of the Administration of Estates Act). In terms of section 8(1) of the Administration of Estates Act, any person who is in possession of a will of a deceased shall, as soon as he or she becomes aware of the death, deliver the will to the Master. This will be registered by the Master in the Register of Estates (section 8(4) of the Administration of Estates Act). Section 8(4) of the Administration of Estates Act states that the Master may refuse to accept a will if, for any reason, the will is invalid.

For a will to be valid it must be signed by the testator or testatrix (referred to as the "testator") in the presence of two witnesses, and the two witnesses must also sign the will in the presence of the testator; if the will has more than one page, the testator must sign each page and the witnesses must also sign each page in the presence of the testator (section 2(1)(a) of the Wills Act). Section 2(3) of the Wills Act states that a document can be accepted by the court as a will if it was drafted or executed by the person with the intention of making it his or her will, even if it does not meet the formalities stipulated in section 2(1) of the Act. Cases such as *Van Wetten & Others v Bosch & Others,* [2003] 4 All SA 442 (SCA), (*Wan Wetten v Bosch*) and *Raubenheimer v Raubenheimer & Others,* 2012 (5) SA 290 (SCA) (*Raubenheimer v Raubenheimer*), deal with what is to be considered when determining whether the deceased intended the document to be his or her will. The situations where a will can be challenged include the lack of requisite formalities, forgery of the will, the testator's mental capacity at the time the will was signed, and undue influence (Jacobs & Lambrechts, 2013). The authors state

that the onus in any of these situations lies with the person challenging the will. Only after the validity of the will has been determined by the Court can the Master accept the will (section 8(4) of the Administration of Estates Act).

The executor of the estate publishes a notice in the *Gazette* and local newspapers calling upon every person who has a claim against the estate to lodge the claim within a period of not less than 30 days but not more than three months after the notice has been published (section 29(1) of the Administration of Estates Act). This allows, *inter alia*, the South African Revenue Service (SARS) to claim against the estate for any taxes owed by the deceased.

The death of a resident of the Republic, or a non-resident who owns property in the Republic, will trigger tax consequences: income tax in terms of the Income Tax Act and estate duty in terms of the Estate Duty Act. The executor of the estate is responsible for paying tax on behalf of the deceased and the estate of the deceased and is therefore a representative taxpayer in terms of section 153(1) of the Tax Administration Act, No. 28 of 2011, as amended (Tax Administration Act)). The definition of a "person" for tax purposes includes a natural person and the estate of the deceased person (section 1 of the Income Tax Act). On the date of death, the deceased ceases to be a person for tax purposes and a new person, the estate of the deceased, is introduced into the tax system. In terms of section 9HA(1) of the Income Tax Act, the deceased is deemed to have disposed all his or her assets at market value at the date of death. This will trigger income tax and/or capital gains tax in terms of the Eighth Schedule to the Income Tax Act.

In terms of section 4A(1) of the Estate Duty Act, estate duty is charged on so much of the net value of the deceased estate as exceeds R3.5 million (or R3 500 000 plus the remaining balance of a predeceased spouse(s) of the deceased). An estate with a net value that is less than this is therefore not subject to Estate Duty. The net value of the estate is arrived at by deducting the qualifying expenses of the estate from the value of dutiable assets and "deemed" assets in the estate Paragraph 1 of the First Schedule to the Estate Duty Act states that a rate of 20% is levied on the dutiable amount of the estate where the dutiable amount of an estate does not exceed R30 million, while 30% is levied on an estate the dutiable amount of which exceeds R30 million. The beneficiaries of the estate will inherit the remaining balance of the deceased's estate, after the deduction of allowable deductions and estate duty. The executor must first pay

the creditors, including SARS, before distributing the estate among the heirs (section 35(12) of the Administration of Estates Act).

In the course of winding up an estate, several problems may be encountered, including problems relating to the will, the capacity of the testator to execute a will, or the capacity of beneficiaries to inherit under the will, the administration process, problems with the appointment of an executor, intestate succession, as well as the complexities of the income tax and estate duty calculations.

The research problem addressed is therefore to investigate the processes involved in winding up a deceased estate, and to identify potential problems that may arise in the process.

1.2 GOALS OF THE RESEARCH

The main goal of this research is to analyse the processes that are involved in winding up a deceased estate, and the potential problems that can occur during the process. The main goal is addressed by the following sub-goals:

- describing the process involved in executing a valid will, and the registration and acceptance of a valid will by the Master;
- describing the processes involved in winding up a deceased estate;
- discussing the income tax and estate duty consequences involved in winding up a deceased estate; and
- identifying problems that may arise in the administration of a deceased estate.

1.3 METHODS, PROCEDURES AND TECHNIQUES

This research is situated within the interpretivist paradigm. Interpretive researchers assume that access to reality is through social constructs such as language, shared meanings, and instruments (Stack, 2019). As the present research uses language, the shared “social meaning” of legislation enacted in a democratic process, and “instruments” in the form of documentary data, the interpretivist paradigm is appropriate (Bhattacherjee, 2012; Leedy & Ormrod, 2005). The research methodology adopted for the study is a legal interpretive approach, and more

specifically the doctrinal research methodology. McKerchar (2014) describes this approach as providing a systematic exposition of the rules governing legislation, analysing the relationship between these rules, explaining areas of difficulty such as the interpretation of these rules, and predicting future developments. Williams (1998) defines qualitative research as research that uses natural language arguments as opposed to numbers and figures. The present research is therefore qualitative in nature, based on relevant archival documentary data.

The documentary data include:

- Judicial decisions obtained from:
  LexisNexis, accessed by searching "My LexisNexis Library";
  Southern African Legal Information Institute, accessed by searching "SAFLII" ; and Juta Law, accessed by searching "Juta Law Online Publications".
- Relevant case law identified in the articles listed in **ADDENDUM A**; the cases were then accessed in the data bases referred to above, and studied in the original.
- Legislation, published articles, academic texts, and authoritative literature on the topic.

This study is conducted in the form of an extended natural language argument supported by logical reasoning. The credibility of the research and conclusions is promoted by:

- referring to legislation, case law and the writings of acknowledged experts in the field (Chowdhury, 2014);
- discussing opposing viewpoints and concluding, based on credible evidence; and
- the rigour of the arguments.

1.4 ETHICAL CONSIDERATIONS

All the documentary data for this research are publicly available and therefore no ethical considerations arise. No application for ethical clearance has therefore been submitted using the Rhodes University Ethical Application System (ERAS).

1.5 CHAPTER OVERVIEW

Chapter 2 provides a detailed discussion of the role of a will in the process of administering a deceased estate, and the formalities relating to a will, together with problems relating to wills. Chapter 3 describes the process involved in administering a deceased estate, starting with the inventory, appointment of an executor, the duties of the executor in winding up an estate, and the problems encountered in the process. Chapter 3 sets out the calculation of the income tax liabilities of the deceased person and the estate (where applicable), and the estate duty liabilities of the deceased estate, together with the associated complexities. Chapter 5 concludes the research by providing a detailed summary of the findings in chapters 2 to 4 in addressing the research goals, and discusses the problems identified in each chapter.

CHAPTER 2: WILLS

2.1 INTRODUCTION

This chapter addresses the first sub-goal of the research, which is to discuss the processes involved in executing a valid will, and the registration and acceptance of a will by the Master, and partly to address the fourth sub-goal of the research, which is to identify the problems that may arise as it relates to these processes. As wills are central to the process of administering an estate, they are discussed in detail in this chapter.

The chapter defines a will, explains the importance of executing a will, as well as the different types of wills that are considered valid in South Africa. The role that a will plays in the winding up an estate of a deceased is also discussed. Testators who are considered to be competent to execute a valid will, the freedom that the testator has to appoint an heir of the estate, and the restrictions imposed on this freedom are presented. For a will to be accepted by the Master it must considered valid in terms of section 2 and section 3*bis* of the Wills Act. The testator can revoke a will that no longer reflects the disposition wishes of the testator.

Problems that may arise when executing a will that are discussed include:

- wills executed by a testator who is considered to be mentally incapable of appreciating the nature and extent of the will-making process;
- forged wills and wills executed under undue influence;
- revoking a mutual or joint will;
- a testator's intention to revive a previously revoked will;
- lost wills; and
- wills executed by the testator that do not comply with the formalities in section 2(1) of the Wills Act.

2.2 WHAT IS A WILL?

Jones (2013) defines a will as a legal document that contains the last wishes of the person executing it (referred to as the testator), which determines the distribution of the testator's property in the event of death. Section 1 of the Wills Act defines a will to include a codicil. A codicil is "a supplement modifying a will or some provision of it" (Collins English Dictionary,

2003: 328). Faber (2021: 741) states that a will is "a legal declaration (expression) of a man's intentions (wishes) which he wills to be performed after his death." In a will, testators are able to ensure that their estate is divided according to their wishes, and they are also able to appoint an executor who will be responsible for the administration of the estate (Jones, 2013). Section 14(1)(a) of the Administration of Estates Act indicates that the Master grants a letter of executorship to a person nominated by the deceased in a will (the letter of executorship and the administration of the estate are discussed in Chapter 3). Roux (2013) states that the reason why testators execute their wills is to express their final wishes regarding what should be done with their earthly belongings after death. Ushakov and Gavrilov (2021) describe a will as a form of expression, the essence of which is to determine the fate of the testator's property in the event of death.

Faber (2021) indicates that for there to be a will there must be a document with the dispositive intention manifesting the disposal of property, the intention of the testator to make a will, and *animus testandi*, for the dispositive act to qualify as an act of the will. Faber (2022: 12) defines *animus testandi* as "the serious and deliberate intention on the testator's part that the expression of his or her will would result in the disposition upon his or her death, with the disposition being given legal effect through the post-mortem distribution of estate assets among beneficiaries."

There are documents that do not constitute a will even though they contain the act of disposition – contracts such as an ante-nuptial contract, a trust *inter vivos* (a trust created during the lifetime of the creator of the trust), or a *donatio mortis causa* (a donation that only takes effect on the death of the donor) – containing provisions in relation to the disposal of property to take effect upon the death of the testator (Faber, 2021). Faber (2021) further states that for the document to constitute a will the intention of the testator must be to execute a will (this is discussed further in part 4 of this chapter). Esterhuizen (2021) states that a will allows the testator's estate to be distributed to the heirs of his or her choice; however, without a will the estate will be distributed in terms of the Intestate Succession Act.

2.2.1 Types of will

According to section 2 of the Wills Act, for a will to be valid it must be a document. Certainty of a person's testamentary intentions could be obtained only by requiring writing (*Wood v Estate Fawcus,* 1935 C.P.D 350 (*Wood v Estate Fawcus*). It appears that audio and video wills are not accepted as valid wills in South Africa. Vaughn (1964) identifies three types of will:

- Sole will: This is the most common will, executed by one fully capable testator (capability of a testator is discussed in part 3 of this chapter) (Ushakov & Gavrilov, 2021).
- Joint will: Vaughn (1964) states that a joint will is single testamentary instrument that contains the will of two or more persons, executed jointly by the testators with the aim of disposing of property owned jointly, in common or severally by them. Despite its "joint" form, a joint will actually amounts to two separate wills, contained in one document in which the testator and testatrix each dispose their own portion of the estate (*Wessels v The Lord Chief Justice Bloemfontein and Others*, [2007] SCA 17 (RSA) (*Wessels v Lord Chief Justice*)). For this type of will to be valid it must be executed with the same formalities as those applicable to the will of a single person (formalities of a will are discussed in part 4 of this chapter) (Pace & Van der Westhuizen, 2022a). Pace and Van der Westhuizen (2022a) further stipulate that if there is a party who has not executed the will in compliance with the formalities, the joint will is accepted as a will of only the party or parties who executed it in compliance with the formalities.
- Mutual will: This type of will is executed pursuant to an agreement between two or more persons to dispose of their property in a particular manner, each in consideration of the other (Vaughn, 1964).

Vaughn (1964) explains that a single will can be both a joint and mutual will, if a will of two or more persons is contained in a single testamentary instrument, which is jointly executed by the testators, pursuant to an agreement to dispose of their respective estate to each other or a third party. Vaughn (1964) further indicates that two testators may make a joint and mutual will to dispose of property owned jointly or severally by them in a settled manner.

The issues that are commonly found when dealing with wills executed by two or more persons are:

- whether one party to the will can revoke his or her portion of the estate from the will (this is discussed in part 6 in this chapter); and
- whether the wills have resulted in the massing of properties (discussed below).

The disposition of the properties and the rights of beneficiaries after the death of the first-dying testator are dependent on whether there is massing of properties in the joint and mutual will. The issue is what should be considered when determining whether the will has resulted in the massing of properties of the testators and the difference in the rights granted in a massed will, as compared to a will that is not massed.

2.*2.1.1 When is a will massed?*

It was indicated in *Theart v Scheibert and Others*, [2012] 4 All SA 278 (SCA) (*Theart v Scheibert*), that to determine whether the properties of the testators have been massed, the will must be interpreted to determine the intention of the testators. It was further stated that in the event of ambiguity in the will, the subordinate rule of interpretation is to presume against massing. The first rule in interpreting a joint or mutual will of testators is that it must, in the first instance, be read as separate wills (*Theart v Scheibert)*. In *Rampathy v Krumm NO and Others*, [1978] 1 All SA 184 (D) (*Rampathy v Krumm*), it was explained that essential features of massing are the joint disposition of testators, and a disposition taking effect on or after the death of the survivor. It was held in *Theart v Scheibert* that if the testators have intended the first-dying testator's estate to be consolidated with the survivor's property for the purpose of a joint disposition to a third party on the death of the survivor, then the will has resulted in properties being massed.

2.2.1.2 Rights granted in a mutual or joint will that is not massed

A mutual or joint will is not massed if the testators' intention is for the surviving testator and any third party only to inherit the first-dying testator's property (*Theart v Scheibert).* In the case of an estate that is not massed, the heirs of the estate of the first-dying testator only have rights to the estate of the first-dying testator and not the estate of the surviving testator (*Theart v Scheibert*).

2.2.1.3 Rights granted in a mutual or joint will that is massed

Section 37 of the Administration of Estates Act states that if a mutual or joint will has been massed, the disposal of the massed estate or any portion thereof after the death of the survivor or survivors, or the happening of any event after the death of first-dying, adiation by the survivor or survivors has the effect of conferring the massed estate upon the person in whose favour the disposition was made, in respect of any property forming part of the share of the survivor of the massed estate passed under the will. In *The Receiver of Revenue, Pretoria v CH Hancke and Others*, 1915 AD 64 (*The Receiver of Revenue v Hancke)*, it was held that a will that has been massed cannot grant real rights in the survivors' property to their heirs; however, once the survivor elects to accept the benefits of the will, he or she is under the obligation to recognise and give effect to the will. It was found in *Rampathy v Krumm* that after adiation by the survivor, he or she has precisely the same right in his or her share of the estate as he or she had in respect of the share of the deceased. Once the survivor accepts the benefits of the will it is therefore clear that the heirs become entitled to their shares, as stipulated in the will. The heirs will obtain vested rights to the property, therefore acquiring the right to claim the inheritance in the future (*Greenberg and Others v Estate, Greenberg*, [1955] 4 All SA 29 (A) (*Greenberg v Estate, Greenberg*).

It was held in *Upton v Upton*, 1879 Buch 289 (*Upton v Upton*), that any dispositions by the surviving testator of the joint estate or any part of it in any subsequent will that is not in accordance with the joint will of the deceased testator and surviving testator, are null and void and have no effect.

2.3 EXECUTING A WILL

For a testator to be competent to execute a will, the testator must be 16 years of age or older and, at the time of making the will, be mentally capable of appreciating the nature and effect of the act of executing a will (section 4 of the Wills Act). To allow testators the freedom to distribute their assets as they wish when they die, the common law assumes testamentary capacity until proven otherwise by the person alleging incapacity (Schoeman-Malan, 2015). This part of the chapter discusses the burden of proving the testator's mental capacity, together

with guidelines to determine a testator's mental capacity at the time the will was being executed.

2.3.1 Burden of proof

According to section 4 of the Wills Act, the burden of proving that the testator was mentally incapable of appreciating the nature and effect of the will lies with the person alleging this. The person alleging testamentary incapacity has to prove this on a balance of probabilities (*Tregea and Another Appellant v Godart and Another Respondent*, 1939 AD 16 (*Tregea v Godart*)). The person will have to prove that it is more likely than not that the testator lacked the required mental capacity to understand and appreciate the nature and effect of the will (Peled-Rez, 2008).

DuToit (2005) states that it is difficult to establish whether the testator possessed the necessary mental capacity to execute a will at the time the will was executed. The evidence provided by witnesses that were present during its execution carry greater weight than evidence presented by experts who have knowledge of the disease the testator was suffering from but were not present at the time of executing the will (Champine, 2005). Determining a testator's mental capacity is a question of fact and therefore determination of this is on a case-by-case basis; there is no recognised diagnostic test (Champine, 2005; Schoeman-Malan, 2015).

Champine (2005) indicates that a medical or psychological examination of a testator at the time of executing the will would be an effective precautionary tool to avoid the will being challenged on grounds of testamentary incapacity. Not all testators take this precaution as they are not required by law to do so, and therefore, the evidence that should be used to determine whether the testator was mentally incapacitated is the testator's autopsy (Chafetz, 2020). Chafetz (2020) describes an autopsy as a study of medical records to determine the nature and effect of the medical disease, and interviewing relatives and friends who knew the deceased.

2.3.2 Mental capacity of the testator

Schoeman-Malan (2015) indicates that mental incapacity in one domain does not automatically mean incapacity in another. The testator being found not to possess capacity to handle his or

her financial affairs and being placed under curatorship in respect of his or her assets does not automatically mean that the person is mentally incapacitated to execute a will (*Smith and Others v Strydom and Others*, 1953 (2) 799 (T) (*Smith v Strydom*)).

The test formulated in *Banks v Goodfellow*, 1870 L.R. 56B (*Banks v Goodfellow*), has been used in many cases as a guideline to determine the mental incapability of a testator (Schoeman-Malan, 2015). Schoeman-Malan (2015) explains that in *Banks v Goodfellow*, the testator is found to be mentally incapable to execute a will if at the time of executing a will it has been proved that the testator:

- did not understand the nature and effect of a will;
- did not know the nature and extent of his or her property;
- could not comprehend and appreciate the claim to which he or she ought to give effect; or
- was suffering from a mental disorder or insane delusion that would result in an undue disposition.

For a testator to be found to be mentally capable to appreciate the nature and effect of the act of executing a will, all of the requirements in *Banks v Goodfellow* must be met.

2.3.2.1 Understanding the nature and effect of a will

Schoeman-Malan (2015) explains that in order for a Court to establish whether the testator understood the nature and effect of a will, the court must first determine whether the testator understood the will-making process and also realise the effects of what is going to happen to his or her property on death. It was held in *Essop NNO and Others v Mustapha and Essop*, [1988] 2 All 217 (*Essop v Mustapha*), that the reduction of the testator's mental capacity below its normal standard, either because of disease or infirmity or other reasons, does not mean that the testator will not be capable of appreciating the effect of the will being executed. In this case it was stated that if the terms of the will were explained to the testator carefully and fairly in a manner that ensures that the testator understands the effect of what is being signed, the testator is to be found to be mentally capable in terms of the Wills Act.

2.3.2.2 Knowing the nature and extent of his or her property

The testator must, at the time of executing the will, have an understanding of what property is available for disposition in the event of death (Schoeman-Malan, 2015). For testators to be found to have knowledge of the nature and extent of the property they own, they must have a general knowledge of the property. Schoeman-Malan (2015) further states that the specific details of the properties are not required, as long as the testator remembers the properties owned and to whom they will be left on death. It was held in *Banks v Goodfellow* that if the testator, at the time of executing the will, had known his or her property and who were the object of his bounty, then he or she is competent to make the will.

2.3.2.3 Comprehending and appreciating the claim he or she ought to give effect to

The testator must have the knowledge of and realise the claims that the will ought to give effect to and who might benefit from the estate (Schoeman-Malan, 2015). The author further confirms that the testator has the freedom to be unfair, unwise, or harsh in respect of who is to be excluded from the bounty, as long as he or she is able to identify the person and the effects that this exclusion will have.

2.3.2.4 Suffering from medical disorder or insane delusion that would result in undue disposition

The mere fact that a testator is suffering from a mental disorder is not the decisive matter when determining the testamentary capacity of the deceased at the time of executing a will (*Vermeulen and Another v Vermeulen and Others*, [2012] NAHC 23 (*Vermeulen v Vermeulen)*). If the testator's mental disorder has resulted in the disposal of property in a way the testator would not have done if he or she had not suffered the disorder, then the testator must be found to have been mentally incapacitated to execute the will (Chaftez, 2020). In *Estate Rehne v Rehne,* 1930 OPD 80 (*Estate Rehne v Rehne),* the deceased suffered from a delusion which made him believe that his wife and child were attempting to poison him. The court found that this delusion affected the way in which the testator disposed of his properties. In *Banks v Goodfellow* it was found that an insane delusion affects the execution of a will where the testator has disinherited the family and appointed strangers as heirs of the estate without cause,

looked on his or her family as enemies, and accused them of seeking to poison him or her as a result of these delusions.

2.3.3 Wills executed under undue influence

The execution of a will must be a voluntary act that has been done by the testator freely without any coercion or undue influence (Hutton, 1932). South African courts are permitted to declare a contract or a will invalid and void if it has been found that the consent of one of the contracting parties was not free and was influenced unduly by another party (*Mauerberger v Mauerberger*, [1948] 4 All SA 444 (C) (*Mauerberger v Mauerberger*). According to Green (1943) undue influence can exist when one party occupies a position of dominance over another. Undue influence is an act where the dominant party is not acting in a manner that is consistent with the welfare of the submissive party and the transaction entered into is induced by unfair persuasion by the dominant party (Green, 1943). In the case of undue influence, the imposition by the dominant party must also be accompanied by an unethical advantage of a special relationship (Green, 1943). Undue influence is also the importunity or threats that the testator does not have the courage to resist, moral command asserted and yielded to for the sake of peace and quiet, if carried out to a degree in which the free play of the testator's judgement, discretion or wishes is overborne, even though no force is either used or threatened (Hutton, 1932).

Ratanee v Maharaj and Another, [1950] 1 All SA 98 (D) (*Ratanee v Maharaj*), identified that undue influence must fall within one of these three classes:

- undue influence presumed from the mere relationship of the parties;
- undue influence presumed from the nature of the transaction; and
- facts presented disclose that undue influence has brought about the contract.

2.3.3.1 Undue influence presumed from the mere relationship of the parties

Where there is a permanent fiduciary relationship between the parties, such as those of the guardian and minor, principle and agent, lawyer and client, doctor and patient, there is a duty to see that independent advice is given (*Ratanee v Maharaj*). If there is a confidential relationship that would cause one person to place confidence in the other person it would be

outrageous to permit the other person to take unethical advantage of the confidence (Green, 1943). *Ratanee v Maharaj* found that there are relationships where one party is morally incapable of resisting the will of the other and in such cases it may be that consent is apparent and not real.

2.3.3.2 Facts presented disclose that undue influence has brought about the contract

Ratanee v Maharaj indicated that where undue influence has brought about the contract, a person proven to be illiterate and ignorant has entered into a detrimental contract with a person whose characteristics are the reverse. This can be found in the case of a young person, though not a minor, parting with the inheritance left to him or her under strong, but questionable influence by an older person (*Mauerberger v Mauerberger*).

2.4 FREEDOM OF TESTATION AND LIMITATIONS

"The right to property includes the right to give enforceable direction as to the disposal on the death of the owner" (Du Toit, 2012:112). It was held in *Ex parte Estate Lowenthal,* 1939 W.I.D 78 (*Estate Lowenthal*), that the testator has the right to have his or her plans carried out as stipulated in the will. Freedom of testation is at the heart of testate succession in South Africa (*King NO and Others v De Jager and Others*, [2021] JOL 49722 (CC) (*King v De Jager*)). Du Toit (2000) explains that freedom of testation is recognised as one of the founding principles of the South African law of testate succession. South African law appears to take the principle of freedom of testation further than any other Western legal system (*Minster of Education and Another v Syfrets Trust Ltd NO and Another*, [2006] ZAWCHC 65 (*Minister of Education v Syfrets*)).

A testator has freedom of testation; however, complete freedom of testation could result in blatantly unfair situations and also create issues of racism and sexism (Roux, 2013). Du Toit (1999) indicates that Roman Law has imposed limitations on the freedom of testation as a measure to curb abuses of this freedom. *King v De Jager* (at page 12) found that the restrictions on the testator's freedom include:

- provisions in testamentary dispositions that are illegal or contrary to public policy;

- the right of children to claim against their parent's deceased estate for maintenance and education; and
- restrictions imposed by legislation.

In *Bank v Sussman & Another*, [1968] 1 All SA 290 (O) (*Bank v Sussman),* it was found that the fact that the deceased's estate has already been finalised when the claim against it is lodged is immaterial. It was further held that if it is found that the claimant is entitled to maintenance, the claim is to be made against the heirs of the estate.

2.4.1 Provisions of testamentary dispositions that are illegal or contrary to public policy

According to section 8(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution), "the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the state." The provisions of a will must not be in violation of anyone's Constitutional rights, which includes the right to human dignity, equality and freedom (*Minister of Education v Syfrets*). In *Minister of Education v Syfrets* it was found that public policy is the public interest and the general sense of the justice for the people. It was held in *King v De Jager* that public policy is considered in light of the good values of today; therefore, public policy in 1902 does not necessarily correspond in all respects with the public policy in 2023. Public policy must be determined with reference to the time the court is requested to enforce or implement a contract and not the time the contract was concluded (*Minister of Education v Syfrets*). It was held in *Minster of Education v Syfrets* that not all the clauses in the will become invalid, and only the clauses that are in violation of the Constitution and public policy will become invalid and therefore cannot be upheld.

2.4.2 Right of children to claim against their parent's deceased estate for maintenance and education

Section 18(2)(d) of the Children's Act, No. 38 of 2005, as amended, (Children's Act) stipulates that parents are responsible for contributing to the maintenance of their children. According to section 6(2)(a) of the Children's Act all proceedings, actions or decisions in a matter concerning a child must respect, protect, promote and fulfil the principles set out in this Act. It is submitted that the provisions of the will must also promote the principles of the Children's Act.

The question that arises is whether the parental responsibilities in section 18 of the Children's Act can still be imposed even when the parents die. It was held in *Glazer v Glazer, NO,* [1963] 4 All SA 422 (A) (*Glazer v Glazer*), that a child is entitled to maintenance out of the estate of the deceased parent. The responsibility imposed on parents to maintain a child is not terminated by the death of the parent, but it is transmitted to the estate. According to the section 15(2) of the Maintenance Act, No. 99 of 1998, as amended (Maintenance Act), the duty of a parent is to provide the support for his or her child that is reasonably required for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care, and education. The child of the deceased therefore has the right to claim from a parent's estate so much as is sufficient to provide proper care and upbringing. It was found in *Bank v Sussan* that if the surviving parent of the child is unable to maintain the standard of living the child has become accustomed to prior the death of the deceased parent, the child has the right to claim from the estate of the deceased parent. The Children's Act and the Maintenance Act make provision for children who are under the age of 18. *Hoffman v Herdan NO & Another,* [1982] 3 All SA 48 (*Hoffmann v Herdan*), found that, in respect of a claim for support by a major child, a child older than 18, the onus would be upon the claimant to show that the child needs support and the *quantum* of the support required; however, this is not the case with a minor child who ordinarily would need support from the parent.

2.4.3 Restrictions imposed by legislation

It is stated by Roux (2013) that where spouses are married in community of property, it is effectively impossible to exclude the surviving spouse from benefitting from the estate because the spouse already owns 50% of the joint estate. This is not the same in the case of spouses married out of community of property. Before the enactment of the Maintenance of Surviving Spouses Act, No. 27 of 1990, as amended (Maintenance of Surviving Spouses Act), the testator had the freedom to disinherit the surviving spouse. The provisions of the Maintenance of Surviving Spouse Act now impose certain restrictions on the freedom of a testator to disinherit a surviving spouse.

Section 1 of Maintenance of Surviving Spouses Act defines "survivor" as the surviving spouse in a marriage that is dissolved only by death. According to section 2(1) of this Act the survivor may claim against the estate of the deceased for provision sufficient for reasonable maintenance

until the survivor's death or remarriage. For the survivor to be able to claim against the estate of the deceased's spouse, he or she must not be able to provide for himself or herself from his or her own means or earnings (section 2(1) of the Maintenance of Surviving Spouse Act). Section 1 of the Act defines "own means" as any money, property or other financial benefit accruing to the survivor in terms of matrimonial property law, or the law of succession, or otherwise. It was held in *Feldman v Oshry NO and Another*, [2009] JOL 23442 (KZD) (*Feldman v Oshry*), that the good intentions of, and the voluntary contribution by the plaintiff's two sons to her maintenance subsequent to the death of the deceased, should not be included in the plaintiffs "own means". It was found that since there was no evidence produced to the court to show that the sons would remain financially able to live up to these good intentions they cannot constitute "own means". The purpose of the Maintenance of Surviving Spouses Act is to protect the survivor from being exposed to the risk and insecurity of being unable to be maintained for the duration of his or her life expectancy. It was stated in *Feldman v Oshry* that if the court were to accept the contribution by the plaintiff's sons as "own means" for the purpose of the Maintenance of Surviving Spouse Act and they are later unable to make such contributions, the survivor would be unable to maintain herself.

The surviving spouse is limited to claiming for provisions that are sufficient for reasonable maintenance needs, and if he or she is unable to provide for his or her own means (section 2(1) of Maintenance of Surviving Spouses Act). Section 3 of the Act sets out factors that should be considered when determining the reasonable maintenance needs, such as:

- the amount in the estate of the deceased spouse that is available for the distribution to heirs and legatees;
- existing and expected means, earning capacity, financial needs and obligations of the survivor, and the substance of the marriage; and
- the standard of living of the survivor during the subsistence of the marriage and his or her age at the death of the deceased spouse.

The testator therefore has the freedom to disinherit his or her spouse; however, the spouse has the right to claim reasonable maintenance from the estate of the deceased spouse.

2.5 VALIDITY OF A WILL

Any document being or purporting to be the will of a deceased must be registered in the Register of Estates (section 8(3) of the Administration of Estates Act). Section 8(4) of this Act further states that the Master may refuse to accept the registered will if for any reason the will appears to be invalid, until the validity has been determined by the court. Wills and amendments to the will that are executed in terms of the formalities stipulated in section 2(1) of the Wills Act may be accepted by the Master as a valid will, however only a court can order the Master to accept a will that does not meet these formalities, if it meets the requirements in section 2(3). Section 2(3) of the Act states that the court will order the Master to accept the document being or purporting to be a will if the court is satisfied that the document or the amendment was drafted or executed by the deceased and the document was intended to be the deceased's will.
Section 2(1) of the Act indicates that for a will to be valid it must be signed by the testator, or some other person in the presence and direction of the testator, and in the presence of at least two witnesses. The witnesses who were present when the testator or some other person directed by testator signed the will must also sign the will in the presence of the testator and each other.

Section 3*bis*(1)(a) of the Wills Act indicates that a will that complies with the internal laws of the state and territory in which:

- the will was executed;
- the testator was, at the time of execution of the will or at the time of death, domiciled or habitually resident; or
- testator was, at the time of execution of the will or at the time of death, a citizen, will be found to be a valid will even in South Africa.

It is stipulated in section 3*bis*(4) of the Wills Act that the provisions of section 3*bis* do not apply to a will that is executed by a South African citizen otherwise than in writing and by a person who has made a will before the commencement date of this section.

This section of the chapter discusses the provisions of sections 2(1) and 2(3) of the Wills Act.

2.5.1 Formalities according to section 2(1) of the Wills Act

In *Macdonald and Others v Master of High Court, OFS Provincial Division and Others,* [2002] JOL 10283 (O) (*Macdonald v Master*), it was held that the formalities in section 2(1) of the Wills Act were intended to secure the authenticity and eliminate false and forged wills. Compliance with these formalities is, however, no guarantee that the document is not a fraudulent one, but the object of the sub-section is to restrict forged documents from being accepted as the deceased's will (*Stoltz ID v The Master and Another*, 1994 (2) PH G2 (E) (*Stoltz v Master*)).

In an attempt to restrict fraud and forged documents from being accepted as the deceased's will, section 2(1) of the Wills Act requires that the document must be signed by the testator, or any other person directed by the testator, in the presences of at least two witnesses, and the witnesses who were present must also sign the will in the presence of the testator and each other. As found in *Logue and Another v The Master and Others*, [1995] 1 All SA 112 (N) (*Logue v Master*), the requirement that a will must be witnessed constitutes little guarantee that it was not a fraudulent one. It gives some guarantee, however, as the witnesses attest that they were present when the testator signed the document declaring it his or her will.

According to section 2(1)(v) of the Wills Act, a will may be signed by the making of a mark. According to the definition of "sign" in section 1 of the Act, this can only be done by the testator or by some other person in the presence and by direction of the testator; witnesses cannot sign by making a mark. For a will signed by making a mark or signed by another person on behalf of the testator in the presence and direction of testator to be valid, a Commissioner of Oaths must certify that he or she has satisfied himself or herself as to the identity of the testator and that the will so signed is the will of the testator (section 2(1)(a)(v) and section 2(b)(iv) of the Wills Act). According to the provisions of these sub-sections the Commissioner of Oaths must be present when the will was signed, and the certificate must be made as soon as possible after the will has been signed. As was found in *Mellvill and Another NNO v The Master and Others*, [1984] 2 All SA 250 (A) (*Mellvill v Master),* marks can easily be forged, therefore the certificate of oath aims to reduce forgery.

Forged wills

It was stipulated in *Stoltz v Master* that the formalities in the Wills Act aim to prevent forged wills from being accepted by the Master as the testator's will. A forged document is a document that has been made to misrepresent material facts with the intention to have another person rely upon it (Green, 1943). Green (1943) indicates that the person making the forged document must have made it with the full knowledge of the misrepresented information.

The onus to prove that the will has been forged lies with the person alleging it (*Kunz Appellant v Swart and Other Respondents*, 1924 AD 618 (*Kunz v Swart*)). In proving forgery, a person can use handwriting experts and the people who might have been present when the will was executed (*Karani v Karani NO & Others*, [2018] 1 All SA 156 (GJ) (*Karani v Karani*). A forged will cannot be accepted as the testator's will, therefore any disposition made in terms of the will should be returned to the rightful owner, either in terms of a valid will or intestate succession if the testator does not have a valid will (*Mauerberger v Mauerberger*).

2.5.2 Validating a will that is technically invalid

It was explained in *Back and Others NNO v Master of Supreme Court*, [1996] 2 All SA 161 (C) (*Back v Master*), that the introduction of section 2(3) of the Wills Act aims to eliminate the injustice and inequalities that frequently result from non-compliance with the formalities required of a valid will. It was further indicated in this case that the intention of the section is to validate a will that is technically invalid in order to give effect to the wishes of the testator. The failure to comply with the formalities in section 2(1) of the Act should not frustrate or defeat the genuine intention of the testator (*Logue v Master*). It was held in *Logue v Master* that the introduction of section 2(3) does not intend to convey that it is unnecessary to comply with any of the prescribed formalities in section 2(1) of the Wills Act. The object of section 2(3) of the Wills Act is to improve the situation where the formalities of section 2(1) have not been complied with, but the true intentions of the testator are self-evident (*Van der Merwe v The Master of High Court and Another*, [2010] JOL 26090 (SCA) (*Van der Merwe v Master*)).

According to section 2(3) of the Wills Act, the court must order the Master to accept the document or an amendment, for the purpose of the Administration of Estates Act, although the

document or amendment does not comply with all the formalities referred to in section 2(1) of the Wills Act. For the court to make such an order it must be satisfied that there is a document or an amendment of a document, the document must be drafted or executed by the deceased, and the deceased must have intended the document to be his or her will (section 2(3) of the Wills Act). For the document or amendment of the document to be accepted as the deceased's will, the document must satisfy two requirements: it must be drafted or executed by the deceased, and the deceased must have intended that document to be the deceased's will or an amendment of the will.

2.5.2.1 Document drafted or executed by the deceased

To determine whether the document has been drafted by the deceased the court may use the strict or the liberal interpretation of the word "draft" or "execute" (*Macdonald v Master*). It was held in *Webster v The Master and Others*, 1996 (1) SA 34 (D) (*Webster v Master)*, that for the document to be found to have been drafted by the deceased, in terms of the strict interpretation, the document is required to have been drafted by the deceased personally, in his or her handwriting. In *Logue v Master* it was stipulated that the Act did not intend to accept unsigned documents drafted by someone other than the testator for the purpose of section 2(3) of the Wills Act as that would leave the door open to potential fraud. It was further found that what the Act had in mind when introducing section 2(3) was that the intentions of the testator demonstrated in writing in his or her hand must not be frustrated because it does not comply with formalities stipulated in section 2(1).

In the liberal or flexible interpretation, the testator does not have to have drafted the will personally in his or her own handwriting for it to constitute being "drafted by the deceased" (*Black v Master)*. In *Ex parte Laxton*, [1998] 1 All SA 289 (N) (*Laxton*), it was stated that the liberal approach allows people who are illiterate or blind and other persons who, because of an affliction, are unable to write, to be able to benefit from the provisions of this section.

It was found in *Back v Master* that the strict interpretation is not only inconsistent with the purpose of section 2(3) of the Wills Act, which is to prevent the testator's last wishes from being nullified because of not complying with the formalities, but also does not take into consideration the realities of the technological world. In the liberal approach, the reality is that

computers and word processors have become the new pen and paper and testators may request someone else to draft their wills for them (*Back v Master*). In this case it was further found that if it has been proved that the testator gave a drafter full instructions regarding the will, it has been prepared according to those instructions, and the testator perused and approved every detail of the draft, the document must be found to have been drafted by the testator. In *Macdonald v Master* it was found that the deceased was the only person who could have typed the document purported to be his will because he was the only person who had access to the document, and the note indicating where the document could be found was in his handwriting. In this case there is no possibility of the document being tampered with.

2.5.2.2 The deceased has intended the document to be his or her will

For the court to order the Master to accept the document as the deceased's will, the court must first be satisfied that the deceased had intended the document to be his or her will (*Raubenheimer v Raubenheimer*). In *Ex parte Maurice*, 1995 (2) SA 713 (C) (*Ex parte Maurice*), it was held that a document that was intended to convey information about what the testator wishes to include or was already included in his or her will, is not regarded as being intended to be his or her will. In *Anderson NO and Others v Master of Supreme Court and Others*, [1996] 1 All SA 637 (C) (*Anderson v Master)*, it was found that for a document to be accepted as the testator's will, it must be one that expresses the testator's wishes for the distribution of his or her estate, not instructions on how the will must be drafted or advice given by the testator. The document must not be a preliminary sketch or notes of the discussion of a will still being drafted, the document must be the final draft of the deceased's will and testament (*Macdonald v Master)*. It was held in *Letsekga v The Master*, 1995 (4) SA 731 (*Letsekga v Master*), that the deceased must have intended that particular document to constitute his or her final instruction with regard to the disposition of his assets.

In *Van Wetten v Bosch* it was held that to determine whether the testator has intended the document to be his or her will, the words and language used in the will must be accepted, and only if there is ambiguity or uncertainty should the surrounding circumstances be considered. In *Van der Merwe v Master,* it was found that the document was titled testament, which indicated that the deceased intended that document to be the deceased's will. De Waal (2012) states that in interpreting the words and language, the clauses should not be modified, and the

meaning should not be strained. When there are implied terms, the terms must be so self-evident as to go without saying (De Waal, 2012).

2.6 REVOKING A WILL

Revocation of a will means that the properly executed instrument no longer represents the ultimate will of the testator (*Wessels v Lord Chief Justice*)). A testator may revoke a will with the intention of executing a new will or with the intention of dying intestate (*Wood v Estate Fawcus*). Section 8(4A) of the Administration of Estates Act states that when deciding on the acceptance of a will, the Master must consider the revocation of a will by a later will. Section 2A of the Wills Act indicates that the court must declare a will or part of a will revoked if the court is satisfied that the testator has intended to revoke a will and has:

- made a written indication on a will or has caused such indication to be made prior his or her death;
- performed any act with regard to a will or has caused such an act to be performed prior his or her death which is apparent from the face of the will; or
- drafted another document or has caused this document to be drafted prior his or her death.

In *Wood v Estate Fawcus* it was found that it is not absolutely necessary that the testator execute another will to revoke a previous will, revocation of a testament may be made either by destroying the will the testator wishes to be revoked, making a second testament, declaring the will revoked before a magistrate, making such declaration before a notary and witnesses, or an existing legal proof that the testator intends to revoke a will. A new will revokes a previous will not only because it is a will but because the document shows the clear intention of the testator to discontinue the existence of a prior will (*Wood v Estate Fawcus*).

2.6.1 Revoking a massed joint or mutual will

A joint and mutual will is revocable during the joint lives of the testators, so far as it relates to the disposition of the property that belongs to the testator revoking the will (Vaughn, 1964). The property belonging to the testator whose portion is not revoked will be disposed of according to the joint will on the decease of the testator (Ushakov & Gavrilov, 2021).

In the case of a will that has massed the testators' properties, when the survivor enjoys the benefits under the will after the decease of the first-dying testator, the survivor is deprived of the power of making a different disposition of the joint estate that is not according to the will (*Lucas v Hool*e). It was found in *Upton v Upton* that any disposition by the surviving testator of a joint estate, or any part of the joint estate, by any subsequent will after the surviving testator has benefited from it that is not according to the last will by the survivor and the predeceased co-testator, is null and void and has no effect. The surviving testator can execute a subsequent will; however, the disposition of the joint estate must be according to the terms of the joint or mutual will (*Receiver of Revenue v Hancke*).

2.6.2 Revoking by way of destruction

By destroying a will, the testator has performed an act with the intention of revoking the will, as indicated in section 2A of the Wills Act. In *Ex Parte Warren*, [1955] 4 All SA 352 (W) (*Ex Parte Warren*), it was held that the presumption in law is that, where a deceased is known to have executed and possessed a will that cannot be found on the decease of the testator, a rebuttable presumption that arises is that the deceased destroyed the will with the intention of revoking the dispositions made. This presumption cannot apply if the lost or destroyed will was in possession of a person other than the testator (*Ex Parte Warren*). The onus to rebut this presumption lies with the person alleging that the will was destroyed or lost accidentally (*Ex Parte Sade*, 1922 TPD (*Ex Parte Sade*)).

Rebutting a presumption of destruction

To rebut the presumption of destruction with the intent to revoke, each case must be determined on the strength of evidence laid before the court (*Ex Parte Sade*). In *Ex Parte Warren* it was stated that to rebut this presumption it must be shown on a balance of probability that the deceased did not destroy the will, or if he or she did, it was not done with the intention of rendering it inoperative.

In *Ex Parte Sade* it was found that there is no general rule as to the nature of the evidence required to rebut the presumption of destruction. Pace and Van der Westhuizen (2022b) explain

that there are several factors that need to be taken into consideration when determining whether the testator destroyed the will with the intention to revoke. These considerations include his relationship with his family, for instance the birth of further children; the happening of an event since testator made the will, making it probable that the testator wished to destroy or alter the will; and that the testator had made declarations in his lifetime not only regarding the intention not to revoke will, but of his desire to die testate (*Ex Parte Sade*).

For the presumption of destruction to be successfully rebutted, the contents of the will may be proved by secondary evidence such as a draft or a copy, or even oral testimony (*Ex Parte Sade*). Section 8(4B) of the Administration of Estates Act states that the Master can accept a duplicate of the original will; however, it must be proved that this duplicate is the duplicate of the testator's original will.

2.6.3 Reviving a previously revoked will

In *Re Estate Mark,* 1921 T.P.D 180 (*Estate Mark*), it was confirmed that there is nothing in our law that prevents a testator from reviving a will that has been revoked by the testator. There is no question of reviving a will unless the previous will, which the testator wishes to revive, has been revoked (*Wood v Estate Fawcus).* Certainty as to the testator's intention could be obtained only by requiring it in writing by the testator (*Wood v Estate Fawcus*). Revival must be in a new and validly executed testamentary instrument because it would be dangerous to permit revival of a will based on an oral statement (*Wynne v Estate Wynne*, (25 S.C. 951) (*Wynne v Estate Wynne*)). It was further explained in this case that the danger in accepting an oral statement is that there would often be uncertainty as to whether the people present at the time of revival remember the exact words of the testator and whether they are really the words of the testator.

It was found in *Wessels v Lord Chief Justice* that for a previously revoked will to be revived it must be done by executing a new will or codicil recording the testator's intention to revive a previously lapsed or revoked will that was itself duly executed when made. It is not necessary that the testator re-execute the previously revoked will to revive it, there should be proof in a testamentary instrument that the testator wishes to acknowledge a former will as his or her last

will (*Estate Mark*). It was further indicated in *Estate Mark* that the testamentary instrument must show the intention to revive a revoked will.

2.7 CONCLUSION

In addressing the first sub-goal of the research, this chapter has presented a detailed discussion of the formalities relating to the making of a valid will, and the problems associated with wills. A detailed discussion of the findings in the chapter is presented in chapter 5. In the administration of a deceased estate, the registration of a valid will is one of the steps involved. The will that is accepted and registered by the Master is used to determine who is to inherit the deceased's property.

The next chapter discusses the processes to be followed in the winding up of the estate. These processes involve the appointment of an executor, drawing up a liquidation and distribution account and the distribution of the estate. The challenges that are anticipated in carrying out these processes are also be dealt with.

CHAPTER 3: WINDING UP A DECEASED ESTATE

3.1 INTRODUCTION

Chapter 2 dealt with a will executed by the deceased in the context of winding up an estate. A will determines how the estate should be administered in the event of death. If the deceased has died without a valid will, the estate will be administered in terms of the Intestate Succession Act. This chapter discusses the second sub-goal, which is to describe the processes involved in winding up a deceased estate, and to deal partly with the fourth sub-goal – the problems that may arise in carrying out these processes.

The processes to be discussed in this chapter include:

- the inventory of the property owned by the deceased at the time of death;
- the appointment and duties of an executor;
- lodging a claim against the estate; and
- the liquidation of the estate and distributing the estate to beneficiaries.

When winding up an estate of the deceased there are certain problems that the executor, beneficiaries, and creditors may encounter. These problems are discussed in this chapter and include:

- the executor's failure to perform the duties imposed in terms of the Administration of Estates Act;
- the removal of an executor from office by the Master or the Court;
- disputed claims lodged against the estate;
- the claimant lodging a late claim against the estate;
- winding up an insolvent deceased estate; and
- a beneficiary who is unworthy of inheriting from the estate.

3.2 INVENTORY OF THE ESTATE

The surviving spouse, or the nearest relative or connection residing in the same district as the deceased who has died in the Republic, or is an ordinary resident in the Republic shall, within 14 days after death, make an inventory of all property known by that person to belong to the

deceased at the time of death (section 9(1)(a) of the Administration of Estates Act). The Master may, by written notice, require any person to make an inventory of the property of the deceased, within the period specified in the written notice (section 9(2)(a) of the Administration of Estates Act). Section 9(2)(a) provides that, in the case of the death of one spouse who was married in community of property, the inventory must also include the joint estate that belongs to the deceased and his or her spouse. The inventory must be made in the presence of any person having an interest in the estate as heir (section 9(1) of the Administration of Estates Act). According to section 9(3) of the Administration of Estates, the inventory must include:

- all immovable property registered in deceased's name or which the deceased had any interest in at the date of death; and
- all particulars known to the person concerning any of this property or interests.

Section 11(1)(b) of the Administration of Estates Act provides that any person having custody of the deceased's property, book, or document immediately after death of the deceased must retain possession or custody of the property, book, or document, other than a document being or purporting to be a will, until an executor of the estate has been appointed. This person must surrender the property, book, or document upon written demand by an interim curator, executor or person directed by the Master to liquidate and distribute the estate (section 11(1)(c) of the Administration of Estates Act).

3.3 EXECUTOR OF THE ESTATE

Section 7(1) of the Administration of Estates Act provides that the death of any person who dies in the Republic leaving assets or a will or a document that purports to be a will, must be reported to the Master. The purpose of section 7(1) of the Administration of Estates Act is mainly to appoint an executor to administer the estate and deal with the assets and liabilities the deceased (Williams, 2020). An executor is the principal role-player in the process of winding up a deceased estate (Williams, 2020). More than one executor can be appointed to administer the estate of the deceased. Section 1 of the Administration of Estates Act defines an executor as any person who is authorised to act under letters of executorship granted or signed and sealed by a Master, or under an endorsement made under section 15 of the Act. It was found in *Goosen v Bosch*, that the executor acts under the supervision of the Master, however, the Master is not the upper executor and will not perform the duties of an executor. An estate of a

deceased person will not be wound up until an executor has been appointed under letters of executorship granted by the Master (section 13(1) of the Administration of Estates Act). Vasile (2015) states that the powers of an executor are put into effect as of the date of acquiring letters of executorship.

3.3.1 Appointment of an executor

The Master will appoint and grant letters of executorship to any person:

- nominated by the deceased in a will that is registered and accepted in the office of the Master (section 14(1) of the Administration of Estates Act); or
- whom the Master may deem fit and proper to be the executor or executors of the estate of the deceased (section 18(1) of the Administration of Estates Act).

3.3.1.1 An executor testamentary

An executor testamentary is an executor nominated by the deceased in a will (Williams, 2020). The deceased appoints an executor testamentary to ensure that the executor represents the inheritors and ensures that the last wishes of the testator are given effect to (Vasile, 2015). Section 14(1) of the Administration of Estates Act provides that the Master must grant letters of executorship to any person who has been nominated by the deceased person by will to be an executor of the estate of the deceased.

It was found in *Brand, NO v Volkskas BPK and Another,* [1959] 2 All SA 70 (T) (*Brand v Volkskas)*, that an executor does not assume the responsibility of becoming an executor from being nominated by will, but from letters of executorship granted by the Master. Williams (2020) confirms that the mere nomination of a person in the will does not give the person any authority to act on behalf of the estate as an executor; the Master has to first authorise the nominated person by granting letters of executorship. Before the Master can grant letters of executorship, the person nominated in the will must first submit a written application to the Master accepting the nomination (section 14(1) of the Administration of Estates Act).

The will nominating an executor must have been registered and accepted in the office of the Master before the Master can grant letters of executorship (section 14(1) of the Administration

of Estates Act). Before any person can dispute an executor's right to administer an estate on grounds that the will is invalid, that person must first bring an action or institute proceedings to set aside the will (*Brand v Volkskas*).

3.3.1.2 An assumed executor

An executor testamentary may nominate an assumed executor who is not incapacitated from being an executor of an estate (section 15(1) of the Administration of Estates Act). The Master will not grant new letters of executorship to the assumed executor but will endorse the appointment of this executor on the letters of executorship granted to the executor testamentary (section 15(1) of the Administration of Estates Act). This subsection of the Act provides that, for the Master to endorse this nomination, the assumed executor must submit an application written by himself or herself and a deed of assumption duly signed by the assumed executor and executor testamentary.

By nominating an assumed executor, the executor testamentary will not be relieved of the responsibility of an executor, as it has been provided in section 52 of the Administration of Estates Act that an executor may not appoint someone to act as an executor instead of himself or herself. The assumed executor is placed in the same position as any other executor (*Goosen v Bosch*). The nomination of the assumed executor will not be affected by the subsequent death of the executor testamentary who nominated this executor (section 15(3) of the Administration of Estates Act).

3.3.1.3 An executor dative

Williams (2020) states that an executor dative is an executor appointed by the Master. The Master will not appoint any person who is by any law prohibited from liquidating and distributing the estate of any deceased person (section 13(2) of the Administration of Estates Act). According to section 18(1) of the Administration of Estates Act, the Master will appoint and grant letters of executorship to any person or persons the Master deem fit and proper to be an executor or executors of the estate if:

- the person nominated by the deceased refuses to be an executor;
- the person nominated by the deceased has died;

- the whereabouts of the person nominated by the deceased are unknown;
- the Master has called upon the person nominated by notice to take out letters of executorship, and the person fails to take them out within the specified period; or
- the executor ceased to be an executor for any reason.

The Master may, before granting letters of executorship in favour of any person not nominated by the will, other than a parent, spouse or child of the deceased, require the person to find security to the satisfaction of the Master of an amount determined to be proper by the Master for the proper performance of the executor's function (section 23(1) of the Administration of Estates Act).

The authority, rights and duties that are given to an executor dative are generally the same as those of an executor testamentary, except insofar as the will may give the executor testamentary certain powers (Williams, 2020).

3.3.2 Duties of an executor

The executor does not step into the shoes of deceased, the executor is simply required to administer and distribute the estate under the provisions of Administration of Estates Act and the will of the deceased (*Van den Bergh v Coetzee NO*, [2001] JOL 8365 (T) (*Van den Bergh v Coetzee*)). It was held in *Gross and Others v Pentz*, [1996] 4 All SA 63 (A) (*Gross v Pentz)*, that the executor of an estate acts on behalf of the estate in legal proceedings.

It was found in *Clarkson NO v Gelb and Others*, [1981] 1 All SA 93 (W) (*Clarkson v Gelb*), that the executor is vested with the administration of the estate of the deceased and the executor alone has the power to deal with the rights and obligations of the estate. The primary role of an executor is to obtain possession of the assets of the deceased, dispose of such assets as may be necessary to pay the debts and expenses, create and submit a liquidation and distribution account, and thereafter effect the distribution to the heirs and legatees of the estate (*Clarkson v Gelb*).

The executor is obligated to preserve the assets of the estate in order and transfer these assets to the heirs or inheritors in the state that they were in at the time of the death (Williams, 2020).

Section 47 of the Administration of Estates Act provides that an executor may sell assets of the estate if this is required to settle a liability of the estate, if the will instructs the executor to sell, or if the heirs request the sale. According to the judgment handed down in *L Ferera (Private) Ltd v Vos, NO & Others,* [1953 3 All SA 422 (A) (*Ferera v Vos*), an executor has the duty to carry on the business of the deceased in order to keep it a going concern and maintain goodwill.

3.3.4 Remuneration of an executor

An executor is entitled to receive remuneration out of the assets of the estate (section 51(1) of the Administration of Estates Act). Section 51(4) of the Act provides that the executor is not entitled to receive any remuneration until after the estate has been distributed, unless the payment has been approved in writing by the Master

The remuneration the executor is entitled to is either a fixed amount stipulated by the deceased in the will or, if no remuneration has been indicated in the will, an amount assessed according to a prescribed tariff (section 51(1) of the Administration of Estates Act). The prescribed tariff provided for in section 51(1)(b) is 3.5% of the gross value of the assets of the deceased and 6% of the income derived after the date of death (Basson, 2011).

The remuneration of an executor may be disallowed by the Master, either wholly or in part, if the executor failed to discharge his or her duties as an executor or has discharged them in an unsatisfactory manner (section 51(3)(b) of the Administration of Estates Act).

3.3.5 Action against an executor

If the executor acts legally the Court will be slow to interfere unless improper conduct has been established (*Ries v Ries,* 1912 CPD 390 (*Ries v Ries*)). According to section 36 of the Administration of Estates Act, if the executor has failed to perform the duties imposed under the Administration of Estates Act, the Master or any person having an interest in the liquidation and distribution of the estate may apply to the Court for an order directing the executor to perform these duties. Section 23(5) of the Administration of Estates Act provides that if any default is made by the executor in the proper performance of his or her functions, the Master may enforce the security and recover from the executor or sureties the loss to the estate.

It was held in *Clarkson v Gelb* that the contention that only an executor can institute an action against any wrongdoer is not well-founded as it ignores the rights of the heirs to institute an action against the executor to recover damages resulting from the executor's maladministration. Maladministration referred to in this case can be dishonesty or negligence, or simply non-performance of the duties cast upon the executor. An executor is a person who is in charge of the deceased person's affairs and is therefore in a fiduciary position (Vasile, 2015). If the executor fails to observe due care and diligence and exposes the beneficiaries, in any way, to business risk, the executor is liable to the beneficiaries for the consequent loss (*Clarkson v Gelb*).

3.3.6 Removal of an executor from office

There are a number of grounds for removing an executor from office (*Katirawu v Katirawu & Others*, [2008] JOL 21463 (ZH) (*Katirawu v Katirawu*)). Any person who ceases to be an executor must surrender letters of executorship granted to the Master (section 51(5) of the Administration of Estates Act). An executor may be removed from office by a Court or by the Master (section 54(1) of the Administration of Estates Act).

3.3.6.1 Executor removed by a Court

Katirawu v Katirawu found that any person who has an interest in the estate can approach the Court to remove an executor if the person can satisfy the Court that the continuance of the executor in the office is not in the best interests of the estate and the beneficiaries of the estate. Section 54(1)(a) of the Administration of Estates Act provides that an executor may be removed by the Court if:

- the executor has at any time been part of an agreement where he or she will, in the capacity of an executor, grant or endeavour to grant, obtain or endeavour to obtain any benefit for any heir, debtor or creditor of an estate that such person is not entitled to;
- the executor has by means of misrepresentation or any reward or offer to reward, directly or indirectly induced or has attempted to induce any person to vote for his or her recommendation to the Master as an executor of the estate;

- the executor has accepted or has expressed willingness to accept a benefit from any person in consideration of such person being engaged to perform work on behalf of the estate; or
- for any reason the Court is satisfied that it is undesirable that the person should act as executor of the estate.

3.3.6.2 Executor removed by the Master

Section 54(1)(b) of the Administration of Estates Act provides that the Master may remove an executor from office if:

- the executor has been nominated in a will that is declared void by the Court or has been revoked, either wholly, or as far as it relates to the nomination of the executor;
- the executor has failed to comply with the notice by the Master, under section 23(3) of the Administration of Estates Act, to provide security or additional security within the period specified, in respect of an executor whose estate or whose security's estate has been sequestrated, or who has committed an act of insolvency, or who is about to or has gone to reside outside the Republic;
- the executor is convicted in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged instrument or perjury, and is sentenced to imprisonment without the option of a fine or to a fine exceeding R2 000;
- at the time of appointment, the executor was incapacitated, or became incapacitated to act as an executor of the estate;
- the executor fails to perform satisfactorily any duty imposed upon the executor under the Act, or to comply with any lawful request by the Master; or
- the executor has applied in writing to the Master to be released from office.

3.4 CLAIMS AGAINST THE ESTATE

Section 29(1) of the Administration of Estates Act provides that as soon as may be after letters of executorship have been granted, the executor of the estate must cause a notice to be published, calling upon all persons having claims against the estate to lodge claims with the executor within a specified period, which should not be less than 30 days and not more than two months. This notice is to be published in the *Gazette* and in one or more newspapers

circulating in the district in which the deceased ordinarily resided at the time of death (section 29(1) of the Administration of Estates Act).

A person may claim from the estate for maintenance or for a debt owed by the deceased person. A claim for maintenance by a child or surviving spouse was discussed in detail in Chapter 2. *Van Zyl NO. v Getz NO.,* [2020] 3 All SA 730 (SCA) (*Van Zyl v Getz*), found that a claim for maintenance is passed on three factors:

- the claimant's inability to support himself or herself;
- the claimant's relationship with the person from whom support is being claimed; and
- the deceased estate's ability to provide support.

3.4.1 Disputed claims

There is no rule of law that requires that merely because a claim is made against the estate of the deceased, it must be proved with a special degree of cogency, as such a rule might work considerable injustice on honest claimants (*Wood v Estate Thompson & Another*, [1949] 1 All SA 449 (D) (*Wood v Estate Thompson*)). However, the executor has the right to dispute any claim against the estate by a notice in writing requiring the claimant to lodge an affidavit providing such details of the claim as the executor indicates in the notice (section 32(1)(a) of the Administration of Estates Act). Section 32(1)(b) of the Administration of Estates Act provides that the executor may, with the consent of the Master, require the claimant or any other person who may, in the opinion of the Master, be able to give material information in connection with the claim to appear before the Master or any magistrate to be examined under oath in connection with the claim. The onus to prove the validity of a claim does not lie with the deceased estate (*Fredman v Estate Yates*, 1923 WLD 9 (*Fredman v Estate Yates*)).

It was held in *Borcherds v Estate Naidoo*, [1955] 2 All SA 359 (*Borcherds v Estate Naidoo*), that in the case of a claim against the deceased, the one party to the alleged transaction is dead, therefore the Court must scrutinise with caution the evidence given by and led on behalf of the surviving party. When an attempt is made to charge a dead person in a matter in which if he or she were alive he or she might have answered the charge, the evidence ought to be looked at with great care (*Estate van der Walt v Crooks,* 1941 CPD 244 (*Estate van der Walt v Crooks*)). The Court should require more cogent proof than it would in a normal case; the balance of

probabilities that are required to discharge the onus should be heavier so that the allegations that a dead man cannot refute should be made with something approaching reasonable certainty (*Estate van der Walt v Crooks*).

3.4.2 Late claims

A claim can be considered to be late if the claimant has failed to lodge the claim against the deceased before the expiry of the period for notice to lodge a claim against the estate, as specified in section 29(1) of the Administration of Estates Act, or when the debt being claimed should have been settled during the lifetime of the deceased.

3.4.2.1 Claim lodged after the period specified

According to section 29(1) of the Administration of Estates Act, the executor must call upon all persons to lodge claims with executor within the period specified in the notice. Section 31 of the Administration of Estates Act provides that if a person lodges a claim after the expiry of the period specified, the person must prove to the Master that there is a reasonable excuse for the delay in the claim. If that person has failed to provide a reasonable excuse for the delay, he or she will be liable for any costs payable out of the estate in connection with the reframing of any account or as a result of the delay and will not be entitled to demand restitution from any other claimant of any money paid to such other claimant (section 31 of the Administration of Estates Act).

3.4.2.2 Claim of debt that should have been settled during the lifetime of the deceased

If the claim is one that should have been settled prior the death of the person the claim is against, the evidence in support of the claim must be scrutinised with the most meticulous care and the Court will at the outset approach it with suspicion (*Estate van der Walt v Crooks*). *Fredman v Estate Yates* found that for the claim to be accepted as valid the claimant must provide corroborating evidence. The evidence given by the claimant against the estate must be carefully scanned and regarded with certain amount of suspicion (*Fredman v Estate Yates*). The evidence provided must be supported with some satisfactory evidence as to why the debt, which was payable before death, was not paid when the debt was due (*Fredman v Estate Yates*).

These cases should be handled with great prudence otherwise it would open the door to fraud (*Estate van Der Walt v Crooks*).

3.4.3 Rejecting a claim

The executor of the deceased estate can reject a claim lodged against the estate. According to section 33(1) of the Administration of Estates Act, the executor must notify the claimant in writing by registered post and provide the claimant with the reasons for rejecting the claim. If the Court is satisfied that the information given by the claimant to the executor was insufficient or that the executor was justified in rejecting the claim, the Court may decline to grant the costs of the claimant even if it has been adjudged in favour of the claimant (section 33(2) of the Administration of Estates Act).

3.5 INSOLVENT DECEASED ESTATE

Section 34(1) of the Administration of Estates Act provides that the executor of the deceased estate must determine whether the estate is solvent after the period intended for claimants to claim against the estate (not less than 30 days or more than three months, as specified in section 29 of the Administration of Estates Act) or any time before the distribution of the estate provided for in section 35(12) of the Act. The insolvent estate must be administered in terms of section 34 of the Administration of Estates Act, or sections 26 to 31 of the Insolvency Act.

The estate can be surrendered for sequestration by the instruction of the majority in number and value of all creditors, in terms of section 34(1) of Administration of Estates Act, or the executor of the estate of the deceased may petition for the acceptance of the surrender of the estate for the benefit of creditors, as provided in section 3(1) of the Insolvency Act. Section 34(1) of the Administration of Estates Act was introduced after section 3 of the Insolvency Act, and the intention of the Legislature is that two courses should be open to an executor, to either act under the Administration of Estates Act with the consent of the Master and be protected, or act under the Insolvency Act (*Ex parte Willis*, 1923 TPD 187 (*Ex parte Willis*)). Section 34(13) of the Administration of Estates Act provides that the provisions of section 34 of the Administration of Estates Act do not prevent the sequestration in terms of the Insolvency Act.

3.5.1 An act of insolvency

Section 8 of the Insolvency Act provides that a debtor has committed an act of insolvency if:

- the debtor leaves the Republic, or being out of the Republic, remains absent from the Republic, or departs from his or her dwelling or otherwise absents himself or herself, with the intent by so doing to evade or delay the payment of debts;
- a Court has given judgment against the debtor and the debtor fails to satisfy the judgment or to indicate to the officer, whose duty is to execute the judgment, disposable property sufficient to satisfy the judgment;
- the debtor makes or attempts to make any disposition of any property which has or would have the effect of prejudicing the creditors or of preferring one creditor above another;
- the debtor makes or offers to make any arrangement with any of his or her creditors for the release of the whole or partial debts; or
- the debtor is unable to pay any debts.

If the deceased as the debtor has performed any of the acts referred to above and has not been rehabilitated, the deceased will be considered to have performed an act of insolvency. According to section 2 of the Insolvency Act, a debtor includes an estate of a person. If the estate is unable to pay the debts, it is considered to be insolvent (section 8(g) of the Insolvency Act).

3.5.2 Reporting to the creditors that the estate is insolvent

Section 34(1) of the Administration of Estates Act provides that the executor shall, by written notice, report to the creditors that the estate is insolvent, informing them that unless the majority in number and value of all creditors instruct the executor in writing to surrender the estate under the Insolvency Act, the executor will proceed to realise the assets in the estate according to the provisions in section 34(2). The purpose of section 34(1) of the Administration of Estates Act is to obtain an instruction from the creditors so that the estate can be administered to the best advantage of the creditors (Burdette, 2001). The executor must give the creditors a period of not less than 14 days for the instruction to surrender the estate (section 34(1) of the Administration of Estates Act).

If the executor has not been directed to surrender the estate after the expiry of the period specified in the notice, the executor will sell the assets in the estate (section 34(2) of the Administration of Estates Act). The proceeds will be paid to the creditors of the estate, and the remaining proceeds will be distributed to the heirs of the estate in terms of the will or provisions of the Intestate Succession Act (section 34(11) of the Administration of the Estates Act).

3.5.3 Sequestration of the estate

The executor is authorised to bring an application for voluntary surrender to the High Court (section 3(1) of the Insolvency Act). Section 9(1) of the Insolvency Act provides that a creditor who has a claim against the estate may petition the Court for sequestration of the estate. According to section 6(1) of the Insolvency Act, for the Court to approve sequestration of the estate, it must be satisfied that the formalities have been complied with, the estate is in fact insolvent, there are sufficient free residue assets to pay the costs of sequestration, and that the sequestration will be to the benefit the creditors.

Standard Bank van SA Bpk v van Zyl, 1999(2) SA 221 (O) (*Standard Bank v van Zyl*) found that if the creditor seeking compulsory sequestration, as provided for in section 9(1) of the Insolvency Act, is not a majority in number and value of the creditors of the estate, the creditor must be able to prove to Court that the reason for sequestration will be to the advantage of the general body of creditors. To decide this an analytical investigation and evaluation of all relevant facts and circumstances is required to decide which process is advantageous for the creditors (*Standard Bank v van Zyl*). To decide whether the sequestration process is the most advantageous for the creditors the following would be relevant to consider (*Standard Bank v van Zyl)*:

- the size of the estate;
- the complexity and possible complications inherent in the administration of the estate and the extent to which the respective Acts offer the best method of dealing with these problems;
- the competence and independence of the executor;
- the cost of the various methods; and
- the wishes of the majority of creditors and the size of applicant’s claim.

A provisional trustee is appointed by the Master as soon as the estate has been sequestrated (section 18(1) of the Insolvency Act). The effect of this appointment is that the rights and duties of the executor are regarded as being suspended (*The Master v Omar NO,* 1958 (2) SA 547 (T) (*The Master v Omar*)). If, after paying all the creditors out of the insolvent estate, a surplus remains, the trustee will pay the balance over to the deceased estate; this amount will be distributed in the same way the estate would have been distributed if it had not been insolvent (Burdette, 2001).

3.6 LIQUIDATION AND DISTRIBUTION

Section 35(1) of the Administration of Estates Act provides that the executor of the estate must submit to the Master an account in the prescribed form of the liquidation and distribution of the estate, within six months after letters of executorship have been granted, or such further period as the Master may in any case allow. The liquidation and distribution account will lie open at the Master's office and the executor of the estate will give notice to anyone interested in the estate in the *Gazette* and in one or more newspapers circulating within the district in which the deceased was ordinarily resident, that the account will be open for inspection (section 35(4) read with section 35(5)(a) of the Administration of Estates Act). The account will lie open in the office of the Master for a period of no less than 21 days for inspection by any person interested in the estate (section 35(4) of the Administration of Estates Act). According to section 35(7) of the Act, any person interested in the estate can lodge an objection with the Master. If the objection has been accepted, either by the Master or the Court, the liquidation and distribution account should be amended by the executor (section 35(9) read with section 35(11) of the Administration of Estates Act).

3.6.1 Distribution in terms of a will or the Intestate Succession Act

Liquidation and distribution of an estate means that the estate must be put in order to pay debts owed by the estate, and thereafter placing it in a position where the assets can be separated into parts and divided amongst the beneficiaries of the estate (*Cilliers v Kuhn*, 1975 (3) SA 881 (NCD) (*Cilliers v Kuhn*)). Williams (2020) explains liquidating an estate as realising so much of the assets as is necessary to settle debts of the deceased, taxes, and the costs of administering

the estate. When the executor has settled the debts of the deceased and costs of administering the estate, the remaining property is distributed to the beneficiaries of the estate (Williams, 2020).

If no objection has been lodged, or an objection has been lodged and the liquidation and distribution account has been amended, or an objection that has been lodged has been withdrawn, the executor will pay the creditors and distribute the estate amongst the heirs (section 35(12) of Administration of Estates Act). The estate is distributed in terms of the deceased's valid will or if the person dies wholly or partly intestate, in terms of the Intestate Succession Act. The validity of a will is discussed in chapter 2.

If the deceased does not have a valid will or the distribution of any property is not stipulated in the will, the distribution of the property takes place in terms of the provisions of the Intestate Succession Act. Section 1 of the Intestate Succession Act provides that if the deceased is survived by:

- a spouse and no descendant, the surviving spouse inherits the intestate estate;
- a descendant and no spouse, the descendant inherits the intestate estate;
- a spouse and descendant, the spouse inherits a child's share of the intestate estate or so much of the estate as does not exceed R250 000, whichever is greater, and the descendant inherits the residue of the intestate estate;
- both parents and no spouse or descendant, the parents inherit the intestate estate; or
- no spouse, descendant, parent or descendant of the spouse, the intestate estate is inherited by a blood relation or blood relations of the deceased who are related to the deceased in the nearest degree.

Problems may be encountered in winding up a deceased estate where certain properties need to be sold to pay the debts of the estate, or where an asset needs to be realised in order to provide the heirs with their inheritance, and this may take a number of years. *Berea West Estates (Pty) Ltd v SIR*, 1976 (2) SA 614 AD, 38 SATC 43 (*Berea West v SIR)*, provides an example of the problem where a farm was bequeathed to multiple heirs. The property was held by a deceased estate and a trust, and as there were various problems, the estate could not be wound up. The executors of the estate were granted approval to establish a township on the land and a company was formed to develop and sell the property, with the beneficiaries of the estate and the trust as

shareholders. Over a further period of 20 years the company developed parts of the land, sold the plots, using the funds to develop further plots for sale, and distributed the profits to the heirs. It took 22 years to wind up the deceased estate.

The beneficiary of an estate has the choice to either accept or reject the inheritance (*Durandt NO v Pienaar NO & Others*, [2000] JOL 7306 (C) (*Durandt v Pienaar*). *Durandt v Pienaar* determined that if the beneficiary chooses to reject the inheritance, then the right is assumed in law never to have been vested, and the property will be distributed in terms of the Intestate Succession Act.

An executor of an estate becomes personally liable to make good to any beneficiary or claimant for any loss sustained as a result of incorrect distribution and can thereafter recover from the person the amount that has been paid, or property delivered, in the course of the incorrect distribution (section 50 of the Administration of Estates Act).

According to section 39(1) of the Administration of Estates Act, the executor of the deceased estate will cause immovable property to be registered in the name of the beneficiary. Section 35(12) of Administration of Estates Act provides that, after paying the creditors and distribution of the estate, the executor will lodge with the Master the receipts and acquittances of the creditors and beneficiaries and produce to the Master the deeds of registration relating to the distribution.

3.6.2 Unworthy beneficiary

An unworthy beneficiary is a beneficiary who cannot inherit from the estate of the deceased. In the course of determining whether a beneficiary is unworthy to inherit the property of the deceased, the Court has to refer to the principle that no one can profit by what is punishable (*Casey NO v The Master & Others*, [1992] 3 All SA 827 (N) (*Casey v The Master*)); (*Katirawu v Katirawu*). It is a general principle that an offender in law is not entitled or allowed to derive any benefit from his or her own criminal conduct, and therefore a person cannot inherit from an estate if the inheritance is a result of criminal conduct by the person (*Danielz NO v De Wet & Another*, [2008] JOL 22151 (C) (*Danielz v De Wet*)). A false description given by the beneficiary to the deceased, before death, does not prevent the beneficiary from inheriting from

the estate of the deceased, unless the false description enters into the motive of the bequest, and the false description is imputable to the beneficiary (*L. Taylor v A.E. Pim*, (1903) 24 NLR 484 (*Taylor v Pim*)). Such criminal conduct includes:

- forgery of the deceased's will;
- killing the deceased; or
- undue influence imposed on the deceased when executing a will.

Anyone who has killed or helped to kill a person should not inherit from the property of that person (*Casey v The Master*). This principle also applies to a person who has negligently caused the death of another (*Casey v The Master*). Although the beneficiary of the estate might not have intended that the deceased should die, the criminal activity that resulted in the death of the deceased should disqualify the beneficiary from benefiting from the estate (*Danielz v De Wet*).

3.6.3 The Guardian's Fund

An executor of the estate will, no later than two months after the distribution of the estate, pay the Master a deposit into the Guardian's Fund on behalf of the persons entitled to all moneys that the executor has, for any reason, been unable to distribute according to the distribution and liquidation account (section 35(13) of the Administration of Estates Act). According to section 86(1)(c) of the Administration of Estates Act, the moneys deposited in the Guardian's Fund are accepted by the Master in trust for any known and unknown persons. Williams (2020) indicates that the executor deposits an inheritance of a beneficiary into the guardian's fund if:

- the beneficiary is a minor;
- the beneficiary is mentally incapacitated to manage his or her finances; or
- the whereabouts of the beneficiary are unknown.

The Master will pay money to any person who has become entitled to receive any money, upon application by the person (section 89 of Administration of Estates Act). Section 90(1) of the Administration of Estates Act provides that the Master may pay money in the Guardian's Fund to the natural guardian of the minor on behalf of the minor or other person for the purpose of maintenance, education, or other benefit of the minor or other person or any dependents of the person. In *Ex Parte the Master,* 1927 TPD 117 (*Ex Parte the Master*), it was held that "other

benefit" does not contemplate investments, therefore, the Master has no power to withdraw money from the fund for the purpose of investment. The Court has the power, on petition, to allow the capital of the minor to be invested otherwise than in Guardian's Fund, subject to the Master's approval (*Estate Hofmeyr*, 1906 23 SC 772, (*Estate Hofmeyr*)). The Master will need to be satisfied with the security of the investment before authorising the reinvestment (*Estate Hofmeyr*).

3.7 CONCLUSION

In addressing the second sub-goal of the research, this chapter discussed in detail the processes and problems involved in the liquidation and distribution of the estate of the deceased, commencing with the inventory, the appointment of an executor, and the processes to be followed by the executor in winding up the deceased estate and distributing the assets of the deceased person to the beneficiaries who are entitled to inherit the assets. The detailed discussion of the findings in the chapter are presented in chapter 5.

Before the executor can distribute the estate to the beneficiaries, debts owed by the estate should be paid to the creditors of the estate. These debts include tax liabilities. The following chapter discusses the taxes levied on the deceased and the estate of the deceased.

CHAPTER 4: TAX CONSEQUENCES OF WINDING UP A DECEASED ESTATE

4.1 INTRODUCTION

The previous chapter dealt with the winding up of a deceased estate. Williams (2020) explains that before the executor can distribute the estate to beneficiaries, he or she must first pay all debts owed by the deceased. According to section 29(1) of the Administration of Estates Act, the executor must cause a notice to be published calling upon all persons having claims against the estate to lodge a claim with the executor. This notice also calls upon SARS to claim against the estate for any tax liabilities owed by the deceased or the deceased estate. This chapter addresses the third sub-goal, which is to discuss income tax and estate duty consequences involved in winding up a deceased estate[1].

In the event of death, the South African tax system levies two types of taxes: normal tax in terms of the Income Tax Act, and estate duty in terms of the Estate Duty Act[i]. In the case of death three taxpayers are involved (Stiglingh, Koekemoer, van Heerden, Wilcocks & van der Zwan, 2023):

- the deceased taxpayer;
- the deceased estate; and
- the beneficiaries of the estate.

The executor or administrator (referred to as "the executor") of the deceased estate is the representative taxpayer in respect of income received by or accrued to or in favour of the deceased taxpayer for the period commencing from the first day of March in the year of death until the date of death, as well as income received by or accrued to or in favour of the deceased estate (the definition of "representative taxpayer" in section 1(e) of Income Tax Act). According to section 153 of the Tax Administration Act, the executor, as a representative taxpayer, is responsible for the tax liability of the deceased person and the deceased estate, as an agent. The executor of the estate may not have the ability to perform these tax calculations, and the assistance of qualified persons would have to be sought. Expert assistance would also be

[1] A discussion of all the potential income tax and estate duty consequences for the deceased person, the estate and the beneficiaries will not be presented, as the goal of the research is to discuss the processes and problems involved in administering a deceased estate.

required for the valuation of certain categories of property, for the purposes of calculating the income tax liability of the deceased.

4.2 INCOME TAX CONSEQUENCES

As part of his or her duties, the executor is required to submit the tax return of the deceased for the tax period ending on the date of death and pay the tax liability owing to the Receiver of Revenue.

In terms of section 5 of the Income Tax Act, normal tax is levied on the taxable income received by or accrued to or in favour of any person during the year of assessment. A "person" includes a deceased estate (section 1 of the Income Tax Act). Section 66(13)(a)(i) of the Income Tax Act provides that where a person dies, a return for normal tax will be made for the period commencing on the first day of that period and ending on the date of death. The year of assessment of a deceased taxpayer, therefore, does not necessarily end on the last day of February as provided in the definition of "year of assessment" in section 1 of the Income Tax Act, but ends on the date of death. Section 6(1) of the Income Tax Act provides that the normal tax payable by a natural person is reduced by the rebates stipulated in subsection (2). (A deceased estate is not considered to be a natural person for the purposes of the section 6 rebates (section 25(5)(a) of the Income Tax Act)). The rebates are based on the age the natural person would have been on the last day of the year of assessment. If the period of assessment is less than a year, the rebates will be apportioned (section 6(4) of the Income Tax Act). Section 6(2) of the Income Tax Act provides that:

- the primary rebate of R16 425 (2023 year of assessment) is deductible from the tax liability if the person would have been younger than 65 years old;
- in addition, the secondary rebate of R9 000 is deductible if the person would have been 65 years or older; and
- in addition, the tertiary rebate of R2 997 is deductible if the person would have been 75 years or older.

Assets owned by the deceased person are physically transferred to the beneficiaries in terms of a will or the rules of the intestate succession, or sold to a third party. According to section 9HA(1) of the Income Tax Act, these assets are first treated as having been disposed of by the

deceased to the deceased estate (Stiglingh *et al*., 2023). The assets of the deceased person are thereafter transferred from the deceased estate to the beneficiaries or to a third party.

4.2.1 The deceased taxpayer

Paragraph 19(1)(a)(ii) of the Fourth Schedule to the Income Tax Act stipulates that, in the year of assessment in which the person dies, no estimate of the deceased person's taxable income for provisional tax purposes is required to be made in respect of the period ending on the date of death.

4.2.1.1 Deemed disposal of assets

The deceased person is treated as having disposed of his or her assets at the date of death for an amount equal to the market value of those assets on that date (section 9HA of the Income Tax Act). The effect of the deemed disposal upon death is to impose normal tax and capital gains tax on the growth in the value of the assets acquired by the deceased during his or her lifetime (Ostler, 2012). Thorpe (2015) states that in the event of death, the deceased person will no longer be able to realise assets in the future and therefore the unrealised gains on those assets should not be lost as a result of death. Hence the introduction of deemed disposals in terms of section 9HA.

According to section 9HA(1) of the Income Tax Act, a deceased person's assets are deemed to be disposed of for an amount equal to the market value of these assets at the date of death. This provision does not apply in respect of:

- assets disposed of for the benefit of the deceased's surviving spouse, if that surviving spouse is resident in the Republic;
- a long-term insurance policy of the deceased, if any capital gain or loss that would have been determined in respect of a disposal that resulted in proceeds of that policy being received by or accruing to the deceased would have been disregarded in terms of paragraph 55 of the Eighth Schedule to the Income Tax Act; or
- an interest of the deceased in a pension, pension preservation, provident, provident preservation, or retirement annuity fund in the Republic (or in a fund or instrument situated outside the Republic, which provides benefits similar to a pension, pension

preservation, provident, provident preservation, or retirement annuity fund) if any capital gain or loss that would have been determined in respect of a disposal of that interest that resulted in a lump sum benefit being received by or accruing to the deceased would have been disregarded in terms of paragraph 54 of the Eighth Schedule.

The revenue gain or loss on the deemed disposal of trading stock held by a deceased sole trader, determined by deducting from the market value of the trading stock the original cost of the trading stock, or the value of the trading stock taken into account at the beginning of the year of assessment in terms of section 22(2) of the Income Tax Act, is taken into account in determining the taxable income of the deceased. Wear-and-tear or depreciation allowances on assets used in the business for the tax period ending on the death of the deceased, and recoupments of these allowances in respect of depreciable assets (determined in terms of section 8(4)(a)), or the "scrapping allowance" (in terms of section 11(o)), are also taken into account in the determination of the taxable income of the deceased. Income from the business of the sole trader, less allowable deductions, and any other taxable income of the deceased (for example dividends, interest or the rental of property), less exemptions and allowable deductions, are also taken into account.

Taxable capital gains of the deceased person, as determined in terms of the Eighth Schedule to the Income Tax Act, are included in the deceased's taxable income (section 26A of the Income Tax Act). These gains or losses are determined by deducting from the market value of the assets deemed to be disposed of (reduced by allowances on depreciable assets) the base cost of the assets (after deducting the taxable recoupments). The amount to R300 000 is deducted from the resulting capital gain (paragraph 5 of the Eighth Schedule), and the amount remaining is included at 40% in the taxable income of the deceased person (paragraph 10 of the Eighth Schedule).

In respect of the resulting taxable income, the tax payable by the deceased for the period of assessment is calculated, and the personal rebates (section 6), reduced proportionally in respect of the tax period, the medical rebates (sections 6A and 6B), foreign tax rebates (sections 6*quat* and 6*quin*), together with any provisional tax payment in respect of the first tax period, are deducted in arriving at the final tax liability of the deceased.

4.2.1.2 Assets transferred to the resident spouse

Section 9HA(2)(b) of the Income Tax Act provides that assets that have been disposed of for the benefit of a surviving spouse who is resident in the Republic must be treated as having been disposed of for an amount received or accrued that is equal to the base cost of those assets in respect of assets that are not trading stock or livestock (section 9HA(2) of the Income Tax Act). In respect of assets that have been transferred to a surviving spouse who is a resident, section 25(4) of the Income Tax Act applies, which provides that, for the purposes of determining any:

- deductions or allowances the surviving spouse is entitled to or to be recovered or recouped by or included in the income of that spouse; or
- a capital gain or loss in respect of the disposal of the assets in question by that spouse, the surviving spouse must be treated as one and the same person as the deceased in respect of the date of acquisition, valuation of the asset, expenditure incurred in respect of that asset, the manner in which asset had been used, and any allowance or deduction in respect of the asset.

This will result in the revenue or capital gain being postponed until the surviving spouse subsequently disposes of the asset or at the spouse's death (Thorpe, 2015). This only applies to a resident spouse and does not apply to a non-resident spouse; if this provision were to apply to a non-resident, the rollover would be transferred from a taxable person to a non-resident (Stiglingh *et al.*, 2023). As non-residents are only subject to capital gains tax on immovable property situated in the Republic, including certain ownership rights in respect of immovable property, normal tax, and capital gains tax on the deemed disposal of other assets would otherwise have been lost to the *fiscus*.

4.2.2 The deceased estate

According to the definition of a "person" in the section 1 of the Income Tax Act, the estate of the deceased person is a separate person for the purposes of normal tax and is treated as a natural person for normal tax purposes; however, the estate does not qualify for section 6, 6A and 6B rebates (section 25(5) of the Income Tax Act). The definition of a "provisional taxpayer", in paragraph 1 of the Fourth Schedule to the Income Tax Act excludes an estate, and therefore the estate of a deceased person is not subject to provisional tax.

Section 25(1) of the Income Tax Act provides that income received by or accrued to or in favour of an executor of a deceased person in his or her capacity as an executor, where the amount would have been income in the hands of the deceased person had it been received by or accrued to or in favour of the deceased person, must be treated as income of the estate of the deceased person. Therefore, where the executor disposes of trading stock, or continues to carry on the business of the deceased, earns income, uses fixed assets in producing the income, and incurs expenses, the normal tax consequences apply.

Section 25(2) of the Income Tax Act provides that the deceased estate of a person is deemed to have acquired assets from the deceased person at a cost equal to the market value of those assets at the date of death, and this cost must be treated as an amount of expenditure actually incurred for the purpose of determining the base cost of that asset (paragraph 40(1A) of the Eighth Schedule to the Income Tax Act).

In terms of paragraph 35(1) of the Eighth Schedule to the Income Tax Act, proceeds from the disposal of an asset are equal to the amount received by or accrued to, or treated to have been received by or accrued to or in favour of a person in respect of disposal. Where assets that have been disposed of by the executor of the estate to a third party, the proceeds of the disposal will be the amount received by the estate.

Paragraph 40(2)(a) of the Eighth Schedule to the Income Tax Act provides that the deceased estate must be treated as having disposed of an asset to a beneficiary for an amount equal to the base cost of the asset in the deceased estate. This amount is the market value of the asset at the date of the deceased person's death (section 9HA(1) of the Income Tax Act). There will therefore be no capital gain or capital loss in respect of the asset.

In terms of section 25(5) of the Income Tax Act, a deceased person's estate must be treated as if it were a natural person, other than for the purpose of section 6, section 6A and section 6B of the Income Tax Act. The deceased estate is subject to the R40 000 capital gains tax annual exclusion (paragraph 5 of the Eighth Schedule to the Income Tax Act) because the estate is recognised as natural person, but is not subject to the R300 000 exclusion (paragraph 10 if the Eighth Schedule) because the deceased estate is a person separate from the deceased, in terms

of the definition of "person" in terms of section 1 of the Income Tax Act. The capital gain of a deceased estate is also included in the taxable income of the estate at the rate of 40% (paragraph 5 of the Eighth Schedule to the Income Tax Act).

4.2.3 The beneficiaries of the estate

Taxation is levied on the deceased estate; however, section 25(6) of the Income Tax Act makes provision for the situation where the beneficiary may be liable to pay the tax. This sub-section provides that where a taxable capital gain that is realised by the deceased person on assets disposed of in terms of section 9HA of the Income Tax Act exceeds 50% of the net value of the estate of the deceased person and the executor of the estate is required to dispose of any asset of the estate for purposes of paying the capital gains tax, any beneficiary of the estate who would have been entitled to the asset had there been no liability for tax, may elect that the executor of the deceased estate distributes the asset to that beneficiary if the amount of tax that exceeds 50% of that net value is to be paid by that beneficiary within a period of three years after the estate is distributed.

4.3 ESTATE DUTY CONSEQUENCES

Estate duty is levied on the estate of every natural person who dies on or after the first day of April 1955 (section 2(1) of the Estate Duty Act[2]) at the rate of 20% of the dutiable amount of the estate, if the amount does not exceed R30 000 000, and 25% of the dutiable amount of the estate if the amount exceeds R30 000 000 (paragraph 1(a) of the First Schedule) Thus the South African tax system provides for the taxation of the wealth transfer on death (Muller, 2010). Estate Duty is therefore levied as a transferor-based tax on the deceased's estate and not on the inheritance acquired by the heir (Basson, 2015).

An estate consists of all property owned by the deceased and property deemed to be the deceased person's property at the date of death (section 3(1)). The value of the deceased estate is determined in terms of section 5.

[2] Sections referred to in the Estate Duty section of this chapter all refer to the Estate Duty Act, 45 of 1955, as amended, unless a reference to another Act is specifically provided.

4.3.1 Property

Section 3(2) defines “property” as any right in or to property, movable or immovable, corporeal or incorporeal. The property and the rights to this property must be transferable to constitute property for the purpose of estate duty (Muller, 2010). Van Wijk (1977) points out that rights to property that cease upon the death of the holder of the rights are also included as property. Although these rights are not transferable to another person, in the true sense of the word, the cessation of these rights might result in the creation or expansion of someone else’s right *ex lege* (Muller, 2010).

According to section 3(2)(c) to (h) of the Estate Duty Act, in the case of a deceased who was not ordinarily resident in the Republic at the date of death, the definition of property does not include:

- any right in movable and immovable property physically situated outside the Republic;
- debts not recoverable or rights of action not enforceable in the courts of the Republic, and any right to any income produced by or any proceeds derived from the debt;
- any goodwill, license, patent, design, trademark, copyright or other similar right not registered or enforceable in the Republic, and any right to income produced by or proceeds derived from the right; and
- any stock or share held by the deceased in any body corporate that is not a company, and stock or shares in a company, provided that any transfer whereby any change of ownership in such stock or share is not required to be registered in the Republic, and any income produced by or proceeds derived from the stock or share.

In the case of a person, whether ordinarily resident in the Republic or not ordinarily resident, the benefit that is due and payable by or in consequence of membership or past membership of any pension fund, pension preservation fund, provident fund, provident pension fund or retirement annuity fund as defined in the Income Tax Act on or as a result of the death of the deceased, is not included as the deceased’s property (section 3(2)(i)).

4.3.1.1 Fiduciary, usufructuary or other like interest in property

Included in the estate of the deceased, as the deceased's property, is a fiduciary, usufructuary, or other like interest in property, and this includes the right to an annuity charged upon property (section 3(2)(a)). Fiduciary and usufructuary interests refer to interests in which one person, referred to as a fiduciary, enjoys temporary right to property subject to the condition that on the death of the fiduciary, the right to property will be transferred to another person, referred to as fideicommissary (Ostler, 2012). The fiduciary is only entitled to the fruits of the property during his or her life and therefore does not have the right to dispose this property (Bruwer, 2016).

4.3.1.2 Right to an annuity not charged upon property

Any right to an annuity not charged upon property that was enjoyed by the deceased immediately prior to his or her death is included as the deceased person's property for estate duty purposes if the right accrues to another person on the death of the deceased (section 3(2)(b)). If the right to the annuity does not accrue to any other person upon the death of the deceased, no wealth has been transferred, and therefore there is no estate duty on the right.

4.3.2 Deemed Property

Deemed property is property that did not exist or did not belong to the deceased at the time of death (Ostler, 2012). Bruwer (2016) explains that deemed property comes into existence after the death of the deceased. Although these properties did not exist at the time of the deceased's death, they form part of the deceased person's estate in terms of section 3(3).

4.3.2.1 Domestic policy of insurance on the life of the deceased

The amount that is due and recoverable under any domestic life insurance policy upon the life of the deceased is included as deemed property (section 3(3)(a)). For a policy to be considered a domestic policy it must be a life policy issued anywhere upon an application made or presented to a representative of an insurer at any place in the Republic (section 1). Any proceeds on the life insurance policy of the deceased that are payable directly to the estate of the deceased form part of the deceased's property because the estate has the right to these proceeds, while

proceeds payable to a nominated beneficiary are considered to be deemed property (section 3(2)).

In terms of section 3(3)(a)(i), (iA) and (ii), the provisions of sub-section 3(3)(a) do not apply if:

- the amount due is recovered by the surviving spouse of the deceased under a duly registered ante-nuptial or post-nuptial contract, or is paid to the deceased's child;
- the Commissioner for SARS is satisfied that the policy was taken out by a person who at the date of the deceased's death was a partner of the deceased or held any shares or like interest in the company of the deceased; or
- the policy was not effected by the deceased, no premium on the policy was paid or borne by the deceased, and no amount under the policy was paid to the deceased's estate or will be paid for the benefit of any relative of the deceased.

4.3.2.2 Property exempt from donations tax

Section 3(3)(b) includes as deemed properties of the deceased estate properties that were donated by the deceased and that were exempt from donations tax in terms of section 56(1)(c) or (d) of the Income Tax Act. This type of donation only takes effect when the donor dies (Stiglingh *et al*, 2023). Thorpe (2015) explains that either the ownership of the property does not pass until the death of donor, or if the property has been delivered and ownership passes, the property must be returned if the beneficiary predeceases the donor.

4.3.2.3 Claim against the surviving spouse

If the deceased is married out of community of property under the accrual system, upon the death of one spouse, the growth in both spouses' estates since their marriage must be calculated, and the spouse with smaller accrual has a claim against the spouse with higher accrual (section 3(1) of Matrimonial Property Act, No. 88 of 1984 (Matrimonial Act)). The death of one of the parties results in the dissolution of the estates and therefore the claim arises (Ostler, 2012).

4.3.2.4 Property which the deceased was competent to dispose of

Property that a person was competent to dispose of for own benefit or for the benefit of the estate immediately prior to the death of the person, is included as deemed property for the purpose of determining the dutiable amount of the deceased estate (section 3(3)(d)). This property is deemed to include any profits of the property. A deceased person is found to have been competent to dispose of property if that person had the power to appropriate or dispose of the property as the person saw fit, or if under any deed of donation, settlement, trust, or other disposition, the person had the power to revoke or vary the provisions relating to the property (section 3(5)(b)).

4.4 VALUATION OF PROPERTY

The value of any property or deemed property is determined in terms of the provisions in section 5. The value of property, other than unlisted shares or property referred to in section 5(1)(g), disposed of to a third party in a *bona fide* purchase and sale in the course of liquidation of the estate, will be the price realised by the sale (section 5(1)(a)). In the case of property that has not been disposed in the course of liquidation, the value is the fair market value of the property at the date of the deceased person's death (section 5(1)(g)). The value of unlisted shares in any company is the value of the shares in the hands of the deceased at the date of death (section 5(1)*bis*). This value is included when valuing the deceased estate even if the executor sold these shares at a different price (Stiglingh *et al.*, 2023).

4.4.1 Fiduciary, usufructuary or other like interest in property

When determining the value of a fiduciary, usufructuary, or other similar interest, the first step is to determine the annual value of this interest, which is 12% of the fair market value of the full ownership of the property (section 5(1)(b) read with section 5(2)). In the case of fiduciary, usufructuary or similar interests in books, pictures, statuary or other objects of art, the annual value is deemed to be the average net receipts, if any, derived by the person entitled to the right during the three-year period immediately preceding the date of death (section 5(2)). Stiglingh *et al.* (2023) indicate that if no income is derived as a result of this interest in the period of three years before the date of death, the annual value will be nil.

In determining the value to be included as property of the deceased, if the interest has been transferred to another person for a period less than the expected life of the person, the annual value will be capitalised over the fixed period; if the interest is transferred to a person for the rest of his or her life, the value is capitalised over his or her life expectancy (section 5(1)(b)). Where the interest has been transferred to the holder of the *bare dominium* right, and the holder has paid a consideration for the *bare dominium* right, the value will be reduced by the amount of consideration paid, together with compound interest at 6% of the consideration, from the date of payment to the date of the deceased's death (section 5(1)(b)). For this provision to apply, the holder of *bare dominium* right must become the full owner of the property after the death of the deceased.

If the deceased is the recipient of an annuity charged upon property, the value is dependent on whether the right to the annuity will accrue to another person upon death (Stiglingh *et al.*, 2023). Section 5(1)(c)(i) makes provision for the value of the right to an annuity charged upon property. If the annuity accrues to any other person upon death, the value is determined by capitalising at 12% the annuity over the life expectancy of the person to whom the annuity accrues (section 5(1)(c)(i)). If the annuity does not accrue to another person, the value is determined by capitalising at 12% the annuity over the life expectancy of the owner of the property upon which the annuity is charged (section 5(1)(c)(ii). If the right is held for a lesser period, the value will be capitalised over that lesser period.

4.4.2 Right to an annuity not charged upon property

The value to be included in the property of the deceased in respect of an annuity not charged upon property, is the value of the annuity capitalised at 12% over the life expectancy of the person to whom the annuity will accrue. If the annuity will be paid to the person for a period less than the life of that person, the value will be capitalised over such lesser period (section 5(1)(d)).

4.4.3 Domestic policy of insurance on the life of the deceased

The value to be included in the estate of the deceased is determined by deducting from the amount due and recoverable under the policy, the aggregate amount of premiums paid by any

person who is entitled to the amount, with interest at 6% on the premiums from the date of payment to the date of death (section 3(3)(a)).

4.4.4 Property exempt from donations tax

The value of the property exempted from donations tax in terms of section 56(1)(c) or (d) of the Income Tax Act is the market value of the property as at the date on which the donation takes effect (section 62(1)(d) of the Income Tax Act). These are *donatio mortis causa* (donations made in contemplation of death) and donations in terms of which the beneficiary will not receive the benefit until the date of death of the donor.

4.4.5 Claim against surviving spouse

Section 3(3)(cA) of the stipulates that the amount of the claim against a community of property spouse is included in the deceased estate of the spouse with a smaller accrual under the accrual system. This amount is half of the difference between both spouses' estates (Stiglingh *et al.*, 2023).

4.4.6 Property which the deceased was competent to dispose of

Section 5(1)(f)*ter* of the states that, in respect of property that the deceased was competent to dispose of that consists only of profit, the value to be included is 12% of the annual value of the profit over the life expectancy of the deceased person immediately prior to the death of the deceased. In any other case, the value of this property, for the purpose of determining the dutiable amount, will be the difference between the fair market value of the property, and the expense or liability which the deceased would have had to bear or assume if the deceased had exercised the power of disposition (section 5(1)(f)*ter*).

4.5 DEDUCTIONS

To determine the net value of the estate of the deceased estate, the amounts referred to in section 4 of the Estate Duty Act must be deducted from the estate's gross value.

Funeral, tombstone, and death-bed expenses

So much as the Commissioner for SARS considers to be fair and reasonable of the amount of expenditure incurred for the deceased person's funeral, tombstone and deathbed expenses is deductible (section 4(a)).

Debts due by the deceased person

Debts due by the deceased to a person who is ordinarily resident in the Republic and is settled out of property that has been included in the estate of the deceased is deductible (section 4(b)). The South African income tax liability arising in the year of death of the deceased is also claimed as a deduction under this section (Michaelides, 2011). Tax payable by the deceased on lump sums accruing upon death from the deceased's retirement funds will not qualify for deduction because these lump sums are excluded from the deceased's property in terms of section 3(2)(i) (Stiglingh *et al.*, 2023).

Debts that are due by the deceased to a person ordinarily resident outside the Republic are deductible, if the debt has been discharged from property included in the estate of the deceased (section 4(f)). The amount deductible is so much of the total foreign debt that exceeds the value of any of the deceased's assets situated outside the Republic that are not included in the deceased estate.

Sections 4(b) and 4(f) provide that a debt that constitutes a claim by a person to property that has been donated by the deceased person, which was exempt from donations tax in terms of section 56(1)(c) or (d) of the Income Tax Act, is not deductible for the purpose of determining the net value of the estate.

Cost of administration and liquidation

The cost incurred in the administration and liquidation of the estate is deductible (section 4(c)). This includes the executor's fees, the Master's fees and the cost of valuations incurred in the process of administration and liquidation of the estate (Muller, 2010). Section 4(c) states that expenditure incurred in the management and control of any income that accrued to the estate

after the date of death is not deductible. Stiglingh *et al*. (2023) explain that these expenditures are not deductible because the income earned by the estate after the date of death is not included in the estate.

Cost of carrying out the requirements of the Estate Duty Act

Expenditure incurred by the estate for the purpose of carrying out the requirements of the Master or the Commissioner in pursuance of the provisions of the Act, is deductible (section 4(d)).

Foreign Property

Section 4(e) of the Estate Duty Act provides for the deduction of foreign property that has been included when determining what constitutes the deceased estate in terms of section 3. Property included in the estate of the deceased is deductible if it relates to any right in or to property situated outside South Africa acquired by the deceased:

- before the deceased became ordinarily resident for the first time in South Africa;
- after the deceased has become ordinarily resident in the Republic for the first time, by donation, if at the date of donation, the donor was a not ordinarily resident in the Republic, or an inheritance from a person who, at the date of the person's death, was not ordinarily resident in the Republic; or
- out of profits or proceeds of any of the property referred to above.

Limited interest created by the predeceased spouse

A limited interest includes fiduciary, usufructuary or other similar interests that are held by the deceased. These interests are included as property of the deceased (section 3(2)(a)). In terms of section 4(m), a limited interest is deductible if:

- this interest was created by the predeceased spouse;
- the property in respect of which the deceased enjoys the interest or right was part of the estate of the predeceased spouse; and
- no deduction was granted in respect of this interest or right in the determination of the net value of the estate of the predeceased spouse under the provisions of section 4(q).

Bequests to certain charitable bodies

The value of property included in the estate of the deceased is deductible in terms of section 4(h) if it accrues to:

- any public benefit organisation that is exempt from tax in terms of section 10(1)(cN) of the Income Tax Act;
- any institution, board or body that is exempt from tax and that has the sole or primary objective of carrying on any public activity in terms of section 10(1)(cA)(i) of the Income Tax Act; or
- the State or a municipality.

Improvements made by the beneficiary

The value of improvements made to the inherited property by the beneficiary of that property is deductible (section 4(i)). If the value of fiduciary, usufruct or like interests in property has been enhanced through improvements made by the person to whom the benefit accrues, in the event of the cessation of such interest upon the death of the owner of the property, there is a deduction in terms of section 4(j). The amount that has been applied for the purpose of the improvements made on a property that has been included in the estate of the deceased will be deductible if:

- the amount was at the expense of the person to whom such property accrues on the death of the deceased; and
- the improvements were made during the lifetime of the deceased with the consent of the deceased.

Accrual claims

The amount of claim against the estate by the surviving spouse of the deceased, acquired under section 3 of the Matrimonial Property Act, is deductible when determining the net value of the deceased estate (section 4(lA)).

Books, pictures, statuary, and other works of art

Section 4(o) provides for the deductibility of an amount included in the estate of the deceased that relates to:

- the value of books, pictures, statuary, or other objects of art; or
- the value of any shares in a body of corporate as is attributable to the body's ownership of books, pictures, statuary, or other objects of art, if the books, pictures, statuary, or other works of art have been lent under notarial deed to the national, provincial, or local government of the Republic for a period of at least 30 years and the deceased has died during that period.

Deemed property considered in the valuation of shares

Deemed property of the deceased, included in the estate in terms of section 3(3), that has been considered in the valuation of a company shares or a member's interest in a close corporation in terms of section 5(1)(f)*bis*, is deductible in terms of section 4(p). For the amount to be deductible it must:

- have qualified as deemed property of the deceased upon death;
- the amount has not been deducted under any provisions of section 4; and
- the value of that deemed property has been considered when determining the value of the company's shares or member's interest.

Amount accruing to the surviving spouse

Property that has been included in the estate of the deceased that accrues to the surviving spouse is deductible (section 4(q)). This deduction applies only to an amount that has not already been deducted in terms of any of the provisions in section 4.

Section 4(q)(i) provides that the deduction is reduced by so much of the amount that the surviving spouse is required by the will to dispose of to another person or trust. No deduction is allowed in respect of any property that accrues to a trust established by the deceased for the benefit of the surviving spouse, if the trustee appointed has the power to allocate such property or income to another person, other than the spouse (section 4(q)(ii)).

4.6 THE ABATEMENT

To determine dutiable amount of the estate, an abatement of R3 500 000 is deductible from the net value of the estate (section 4A(1)). With effect from 1 January 2010, the abatement that has not been used by the first dying spouse is rolled over to the estate of the surviving spouse (Ostler, 2012). In terms of section 4A(2), if the deceased has survived one or more spouses, the amount to be deducted when determining the dutiable amount will be R3 500 000 multiplied by two, and this amount is reduced by the amount deducted from the net value of any one of the predeceased spouses. Muller (2010) explains that the Estate Duty Act does not specify which predeceased spouse's abatement to use for the purpose of section 4A(2)(b).

Where the deceased, at the time of death, is one of the spouses of a predeceased person, the deceased's abatement of R3 500 000 is increased by deducting the abatement previously used by the predeceased spouse from R3 500 000, then dividing this amount by the number of spouses the predeceased spouse had at the time of death, and the resulting amount is the abatement to be deducted by the deceased.

Section 4A(6) makes provision for when the deceased and the spouse die simultaneously. The person whose estate has the smaller net value is deemed to have died immediately before the other spouse.

For the provisions in section 4A(2) and 4A(3) to apply, the executor of the surviving spouse's estate must submit a copy of the estate duty return of the predeceased spouse or other relevant material that Commissioner regards as reasonable (section 4A(5)).

4.7 CONCLUSION

In addressing the third sub-goal of the research, this chapter has explained that in the event of death, two types of taxes are levied: normal tax, in terms of the Income Tax Act; and estate duty in terms of Estate Duty Act, and the three taxpayers involved are the deceased, the beneficiaries of the estate and the estate. The calculation of these tax liabilities has been discussed, together

with the associated complexities in carrying out these calculations. A detailed discussion of the findings in the chapter is presented in chapter 5.

The following chapter concludes the thesis by presenting the findings in relation to the goals of the research, including the problems encountered in the process of winding up an estate.

CHAPTER 5: CONCLUSION

5.1 INTRODUCTION

The goal of the research was to analyse the processes and problems involved in winding up an estate of a deceased person. To achieve this, the subgoals of the research were as follows:

- describing the processes involved in executing a valid will, and the registration and acceptance of a valid will by the Master;
- describing the processes involved in winding up the estate of the deceased;
- discussing the tax consequences involved in winding up the estate; and
- identifying the problems that may arise in the administration of the deceased estate.

5.2 EXECUTING A VALID WILL

Chapter 2 addresses the first sub-goal of the research, providing a detailed discussion of all aspects of a will, or the lack of a will. The chapter defines a will and a codicil to the will and explains that a will provides for the disposition of the testator's property to beneficiaries, and the appointment of an executor. Sole, joint and mutual wills are explained, as well as the massing of properties.

The chapter deals with the competence to execute a will, and wills executed under undue influence. Freedom of testation is identified as one of the founding principles of testate succession. There are, however, limits to this freedom, including illegal dispositions and dispositions that are contrary to public policy, the rights of children to claim for maintenance and education, and the need to provide for fair maintenance of the surviving spouse.

To be valid, a will must be registered by the Master in the Register of Estates. Valid wills must be signed in the presence of two witnesses, who must sign the will. A will can be signed by way of a mark in the presence of a Commissioner of Oaths. Signing a will is no guarantee that a will is not forged. The onus is on the person claiming that the will is forged.

An order of court is required to validate a will that is technically invalid, if the true intentions of the testator are evident. The terms “drafted” or “executed” must be interpreted liberally or flexibly to establish that the deceased has intended the document to be his or her will.

A will is revoked when the testator intends to execute a new will or to die intestate. A will can be revoked by executing a new will, destroying the existing will, declaring it revoked before a magistrate or before a notary and witnesses, or by providing existing legal proof that it is revoked. A revoked will can be revived by executing a new and valid testamentary document, or by means of a codicil to the revoked will.

Once a valid will has been registered by the Master in the Register of Estates, the winding up of the estate can proceed.

5.3 THE PROCESS INVOLVED IN WINDING UP A DECEASED ESTATE

The second sub-goal of the research is dealt with in chapter 3 – the processes involved in winding up the estate of the deceased.

The surviving spouse, nearest relative, or connection residing in the same district as the deceased who has died in the Republic, or an ordinary resident in the Republic, within 14 days after death makes an inventory of all property known by that person to belong to the deceased at the time of death. The Master may, by written notice, require any person to make an inventory of the deceased within the period specified in the notice. In the case of the death of one spouse who was married in community of property, the inventory must also include the joint estate that belongs to the deceased and the spouse. The inventory must be made in the presence of any person having an interest in the estate as an heir.

Any person who has custody of the deceased’s property, book, or document (other than a document being or purporting to be a will) immediately after death of the deceased must retain it until an executor of the estate has been appointed. This person must surrender the property, book, or document upon written demand by an interim curator, executor or person directed by the Master to liquidate and distribute the estate. The inventory must include all immovable

property registered in deceased's name or which the deceased had any interest in at the date of death, and all particulars known to the person concerning any this property or interest.

The death of any person who dies in the Republic leaving assets or a will or a document that purports to be a will, must be reported to the Master of the Supreme Court for the purpose of appointing an executor, or more than one executor, to administer the estate and deal with the assets and liabilities of the deceased. An executor is any person nominated by the deceased in a registered will, or any person the Master deems fit and proper to be the executor of the estate of the deceased, and who is authorised to act under letters of executorship granted or signed and sealed by the Master, or under an endorsement. The executor acts under the supervision of the Master, but the Master is not the upper executor and will not perform the duties of an executor. An estate of a deceased person will not be wound up until an executor has been appointed under letters of executorship granted by the Master, and the powers of an executor are put into effect as of the date of acquiring letters of executorship.

The primary role of an executor is to obtain possession of the assets of the deceased, dispose of such assets as may be necessary to pay the debts of the deceased and expenses associated with winding up the estate, create and submit a liquidation and distribution account, and effect the distribution to the heirs and legatees of the estate. Before any person can dispute an executor's right to administer an estate on the grounds that the will is invalid, that person must first bring an action or institute proceedings to set aside the will.

An executor testamentary may nominate an assumed executor who is not incapacitated from being an executor of an estate and the Master will endorse the appointment of this executor on the letters of executorship granted to the executor testamentary. By nominating an assumed executor, the executor testamentary will not be relieved of the responsibility of an executor, and the nomination of the assumed executor will not be affected by the death of the executor testamentary who nominated this executor.

An executor dative is an executor appointed by the Master and the Master will not appoint any person who is by any law prohibited from liquidating and distributing the estate of any deceased person. The Master will appoint and grant letters of executorship to any person or persons the Master deem fit and proper to be an executor or executors of the estate if:

- the person nominated by the deceased refuses to be an executor;
- the person nominated by the deceased has died;
- the whereabouts of the person nominated by the deceased are unknown;
- the Master has called upon the person nominated by notice to take out letters of executorship and the person fails to take them out within a specified period; or
- the executor ceased to be an executor for any reason.

The authority, rights and duties that are given to an executor dative are generally the same as those of an executor testamentary, except insofar as the will may give the executor testamentary certain powers.

The Master may, before granting letters of executorship in favour of any person not nominated by the will, other than a parent, spouse or child of the deceased, require the person to find security to the satisfaction of the Master of an amount determined to be proper by the Master for the proper performance of the executor's function.

The executor does not step into the shoes of deceased, the executor is simply required to administer and distribute the estate under the provisions of Administration of Estates Act and the will of the deceased. The executor of an estate acts on behalf of the estate in legal proceedings, and the executor alone has the power to deal with the rights and obligations of the estate.

The executor is obligated to preserve the assets of the estate and transfer these assets to the heirs or inheritors in the state that they were in at the time of the death. An executor may sell assets of the estate if this is required to settle a liability of the estate, if the will instructs the executor to sell, or if the heirs request the sale. An executor has the duty to carry on the business of the deceased in order to keep it a going concern and maintain goodwill.

An executor is not entitled to receive remuneration out of the assets of the estate, until after the estate has been distributed, unless the payment has been approved in writing by the Master. The remuneration the executor is entitled to is either a fixed amount stipulated by the deceased in the will or, if no remuneration has been indicated in the will, an amount assessed according to a prescribed tariff, which is 3.5% of the gross value of the assets of the deceased and 6% of the

income derived after the date of death. The remuneration of an executor may be disallowed by the Master, either wholly or in part, if the executor failed to discharge his or her duties as an executor or has discharged them in an unsatisfactory manner.

If the executor acts legally the Court will be slow to interfere unless improper conduct has been established. If the executor has failed to perform the duties imposed under the Administration of Estates Act, the Master or any person having an interest in the liquidation and distribution of the estate may apply to the Court for an order directing the executor to perform these duties. If there is any default by the executor in the proper performance of his or her functions, the Master may enforce the security and recover from the executor or sureties the loss to the estate.

The heirs may institute an action against the executor to recover damages resulting from maladministration, which can be the result of dishonesty or negligence, or simply non-performance of his or her duties. The executor is in charge of the deceased person's affairs and is in a fiduciary position. If the executor fails to observe due care and diligence and exposes the beneficiaries, in any way, to business risk, the executor is liable to the beneficiaries for the consequent loss.

There are a number of grounds for removing an executor from office. Any person who ceases to be an executor must surrender the letters of executorship granted to the Master. An executor may be removed from office by a Court or by the Master. Any person who has an interest in the estate can approach the Court to remove an executor if the person can satisfy the Court that the continuance of the executor in the office is not in the best interest of the estate and the beneficiaries of the estate. An executor may be removed by the Court:

- if the executor has at any time been part of an agreement where he or she will, in the capacity of an executor, grant or endeavour to grant, obtain or endeavour to obtain any benefit for any heir, debtor or creditor of an estate that such person is not entitled to;
- the executor has by means of misrepresentation or any reward or offer to reward, directly or indirectly induced or has attempted to induce any person to vote for his or her recommendation to the Master as an executor of the estate;
- has accepted or has expressed willingness to accept a benefit from any person in consideration of such person being engaged to perform work on behalf of the estate; or

- for any reason the Court is satisfied that it is undesirable that the person should act as executor of the estate.

The Master may remove an executor from office if:

- the executor has been nominated by a will that is declared to be void by the Court or has been revoked, either wholly, or as far as it relates to the nomination of the executor;
- the executor has failed to comply with the notice by the Master for security or additional security within the period specified;
- an executor whose estate or whose security's estate has been sequestrated, or who has committed an act of insolvency;
- an executor who is about to or has gone to reside outside the Republic;
- where the executor is convicted in the Republic or elsewhere, of theft, fraud, forgery, uttering a forged instrument or perjury, and is sentenced to imprisonment without the option of a fine or to a fine exceeding R2 000;
- if, at the time of appointment, the executor was incapacitated, or became incapacitated to act as an executor of the estate;
- if the executor fails to perform satisfactorily any duty imposed upon the executor under the Act, or to comply with any lawful request by the Master; or
- the executor has applied in writing to the Master to be released from office.

Within 30 days and not more than two months after letters of executorship have been granted, the executor of the estate must publish a notice in the *Gazette* calling upon all persons having claims against the estate to lodge these claims with the executor. These claims include debts owed by the deceased and claims for maintenance of a surviving spouse and children of the deceased. Claims lodged against the estate for the maintenance of a child or surviving spouse are considered based on the claimant's inability to support himself or herself, the claimant's relationship with the deceased, and the deceased estate's ability to provide support.

The executor has the right to dispute any claim against the estate in a notice in writing requiring the claimant to lodge an affidavit providing such details of the claim as the executor indicates in the notice, and the executor may, with the consent of the Master, require the claimant or any other person who may be able to give material information in connection with the claim to

appear before the Master or any magistrate to be examined under oath in connection with the claim.

A person who lodges a claim after the expiry of the period specified must prove to the Master that there is a reasonable excuse for the delay in the claim. If that person has failed to provide a reasonable excuse for the delay, he or she will be liable for any costs payable out of the estate in connection with the reframing of any account or as a result of the delay, and will not be entitled to demand restitution from any other claimant of any money paid to the other claimant. The executor of the deceased estate can reject a claim lodged against the estate, and must notify the claimant in writing by registered post and provide the claimant with the reasons for rejecting the claim.

The executor of the deceased estate must determine whether the estate is solvent after the period intended for claimants to claim against the estate, or any time before the distribution of the estate. The insolvent estate must be administered in terms of Administration of Estates Act or the Insolvency Act. The estate can be surrendered for sequestration by the instruction of the majority in number and value of all creditors, or the executor of the estate of the deceased may petition for the acceptance of the surrender of the estate for the benefit of creditors – thus two courses are open to an executor. The executor reports to the creditors in a written notice that the estate is insolvent, informing them that, unless the majority in number and value of all creditors instruct the executor in writing to surrender the estate under the Insolvency Act, the executor will proceed to realise the assets in the estate. The executor must give the creditors a period of not less than 14 days for the instruction to surrender the estate. If the executor has not been directed to surrender the estate after the expiry of the period specified in the notice, the executor will sell the assets in the estate, the proceeds will be paid to the creditors of the estate, and the remaining proceeds will be distributed to the heirs of the estate in terms of the will or provisions of the Intestate Succession Act.

The executor of the estate must submit to the Master an account in the prescribed form of the liquidation and distribution of the estate within six months after letters of executorship have been granted, or such further period as the Master may in any case allow. The liquidation and distribution account will lie open at the Master's office and the executor of the estate will give notice to anyone interested in the estate, published in the *Gazette* and in one or more newspapers circulating within the district in which the deceased was ordinarily resident, that

the account will be open for inspection. The account will lie open in the office of the Master for a period of no less than 21 days for inspection by any person interested in the estate. Any person interested in the estate can lodge an objection with the Master. If the objection has been accepted, either by the Master or the Court, the liquidation and distribution account should be amended by the executor.

In liquidating an estate so much of the assets must be realised as is necessary to settle debts of the deceased, taxes, and the costs of administering the estate. When the executor has settled the debts of the deceased and costs of administering the estate, the remaining property is distributed to the beneficiaries of the estate, in terms of the deceased's valid will or if the person dies wholly or partly intestate, in terms of the Intestate Succession Act. The Intestate Succession Act provides that if the deceased is survived by:

- a spouse and no descendant, the surviving spouse inherits the intestate estate;
- a descendant and no spouse, the descendant inherits the intestate estate;
- a spouse and descendant, the spouse inherits the child's share of the intestate estate or so much of the estate as does not exceed R250 000, whichever is greater, and the descendant inherits the residue of the intestate estate;
- both parents and no spouse or descendant, the parents inherit the intestate estate; or
- no spouse, descendant, parent or descendant of the spouse, the intestate estate is inherited by a blood relation or blood relations of the deceased who are related to the deceased in the nearest degree.

The beneficiary of an estate has the choice to either accept or reject the inheritance, and if the beneficiary chooses to reject the inheritance, then the right is assumed in law never to have been vested, and the property will be distributed in terms of the Intestate Succession Act.

The executor of the deceased registers immovable property in the name of the beneficiary. After paying the creditors and distributing the estate, the executor lodges with the Master the receipts and acquittances of the creditors and beneficiaries and produces to the Master the deeds of registration relating to the distribution.

The executor of an estate becomes personally liable to make good to any beneficiary or claimant of any loss sustained as a result of incorrect distribution and can thereafter recover from the

person the amount that has been paid, or property delivered, in the course of the incorrect distribution.

An unworthy beneficiary is a beneficiary who cannot inherit from the estate of the deceased. It is a general principle that an offender in law is not entitled or allowed to derive any benefit from his or her own criminal conduct, and therefore a person cannot inherit from an estate if the inheritance is a result of criminal conduct by the person. Criminal conduct includes forgery of the deceased's will, killing the deceased, or undue influence imposed on the deceased when executing a will. Anyone who has killed or helped to kill a person should not inherit from the property of that person, and this principle also applies to a person who has negligently caused the death of another. Although the beneficiary of the estate might not have intended that the deceased should die, the criminal activity that resulted in the death of the deceased should disqualify the beneficiary from benefiting from the estate. A false description given by the beneficiary to the deceased, before death, does not prevent the beneficiary from inheriting from the estate of the deceased, unless the false description enters into the motive of the bequest, and the false description is imputable to the beneficiary.

An executor of the estate will, no later than two months after the distribution of the estate, pay the Master a deposit into the Guardian's Fund on behalf of the persons entitled to it all moneys that the executor has, for any reason, been unable to distribute according to the distribution and liquidation account. The moneys deposited in the Guardian's Fund are accepted by the Master in trust for any known and unknown persons. The executor deposits an inheritance of the beneficiary into the guardian's fund if the beneficiary is a minor, the beneficiary is mentally incapacitated to manage his or her finances, or the whereabouts of the beneficiary are unknown.

The Master will pay money to any person who has become entitled to receive any money, upon application by the person, and may pay money in the Guardian's Fund to the natural guardian of the minor on behalf of the minor or other person for the purpose of maintenance, education, or other benefit of the minor or other person or any dependents of the person. "Other benefit" does not apply to investments, therefore the Master has no power to withdraw money from the fund for the purpose of investment. The Court, however, has the power, on petition, to allow the capital of the minor to be invested otherwise than in Guardian's Fund, subject to the Master's approval. The Master will need to be satisfied with the security of the investment before authorising the reinvestment.

One of the duties of the executor of an estate is to calculate the income tax owing by the deceased up to the date of death, the income tax owing by the deceased estate, and the estate duty owing by the deceased estate, and pay these amounts over to the Receiver of Revenue. This is discussed in the following section.

5.4 TAX CONSEQUENCES INVOLVED IN WINDING UP A DECEASED ESTATE

In addressing the third sub-goal of the research, chapter 4 deals with the tax consequences that are involved in winding up the estate of a deceased person. Two types of taxes are imposed in the event of death: normal tax in terms of the Income Tax Act, and estate duty in terms of the Estate Duty Act, and there are three taxpayers involved: the deceased taxpayer, the deceased estate, and the beneficiaries of the estate.

5.4.1 Income Tax

The tax period of a person who has died ends on the date of death, which is usually not the last day of February. The normal tax payable by a natural person is reduced by the personal rebates, which are based on the age the natural person would have been on the last day of the year of assessment. If the period of assessment is less than a year, the rebates are apportioned in relation to the period of assessment of the deceased compared to the year of assessment.

Assets of the deceased person are treated as having been disposed of to the deceased estate at the date of death for an amount equal to the market value of these assets at the date of death, other than:

- assets disposed of for the benefit of the deceased's surviving spouse, if that surviving spouse is a resident in the Republic;
- a long-term insurance policy of the deceased, if any capital gain or loss that would have been determined in respect of the disposal that resulted in proceeds of the policy being disregarded in terms of paragraph 55 of the Eighth Schedule to the Income Tax Act;
- an interest of the deceased in pension, pension preservation, provident, provident preservation, or retirement annuity funds in the Republic if any capital gain or loss that would have been determined in respect of disposal of the interest that resulted in a lump

sum benefit would have been disregarded in terms of paragraph 54 of the Eighth Schedule; or

- an interest of the deceased in a fund or instrument situated outside the Republic that provides benefits similar to a pension, pension preservation, provident, provident preservation, or retirement annuity fund, if any capital gain or loss that would have been determined in respect of disposal of the interest that resulted in a lump sum benefit would have been disregarded in terms of paragraph 54 of the Eighth Schedule.

Assets that have been disposed of for the benefit of a surviving spouse who is resident in the Republic must be treated as having been disposed of for an amount received by or accrued that is equal to the base cost of those assets in respect of assets that are not trading stock. This will result in the revenue or capital gain being postponed until the surviving spouse subsequently disposes of the assets or at the spouse's death.

Income received by or accrued to or in favour of an executor of the deceased estate in his or her capacity as an executor, where the amount would have been income in the hands of the deceased person had it been received by or accrued to or in favour of such a person, must be treated as income of the estate of the deceased person.

The deceased estate is deemed to have acquired the assets from the deceased person at a cost equal to the market value at the date of death, and where an asset is disposed of to a beneficiary of the deceased estate, it is deemed to have been disposed of for an amount equal to the base cost of these assets, which is the market value at the date of death. In respect of assets that have been disposed of to a third party, the proceeds of the disposal will be the amount received by the estate for the asset.

The normal tax liability of the deceased is calculated as follows: amounts received or accruing to the deceased are included in "gross income", less exemptions, other amounts deemed to be income are added, allowable expenses are deducted, taxable capital gains are added, and the normal tax is calculated in terms of the tax tables applying to an individual. From the normal tax, any employees' tax deducted from the remuneration of the deceased, any other prepayments of tax, including the first provisional tax payment, and applicable rebates are deducted in arriving at the tax liability of the deceased.

5.4.2 Estate Duty

Estate duty is levied on the dutiable amount of the estate of every natural person who has died on or after the first day of April 1955 at the rate of 20% of the amount, if it does not exceed R30 000 000, and 25% of the amount if it exceeds R30 000 000. When determining the dutiable amount of the estate, an abatement of R3 500 000 is deductible from the net value of the estate. If the deceased has survived one or more spouses, the amount to be deducted when determining dutiable amount will be R3 500 000, together with the unutilised portion of R3 500 000 of the predeceased spouse(s). A similar calculation applies when the deceased is one of the spouses of a deceased spouse.

The estate of a deceased person consists of all property owned and deemed to be owned by the deceased person. “Property” includes any right in or to property, movable or immovable, corporeal or incorporeal, and includes a fiduciary, usufructuary or like interest in property, and a right to an annuity not charged upon property. Deemed property is property that did not exist or did not belong to the deceased at the time of death, but forms part of the deceased person’s estate, and includes a domestic policy of insurance on the life of the deceased, property exempt from donations tax, a claim against surviving spouse, and property the deceased was competent to dispose of.

In determining the net value of the estate of the deceased, certain amounts are deducted from the gross value of the estate, including funeral, tombstone, and death-bed expenses, debts due by the deceased person, the cost of administration and liquidation, the cost of carrying out the requirements of the Estate Duty Act, the value of certain foreign properties, a limited interest created by predeceased spouse, bequests to certain charitable bodies, improvements made to property by a beneficiary, accrual claims against the estate by a surviving spouse, books, pictures, statuary, and other works of art donated to State institutions for a specified period, deemed property already considered in the valuation of shares, and the amount accruing to a surviving spouse. The estate duty will be included in the liquidation and distribution account the deceased.

5.5 PROBLEMS ENCOUNTERED IN THE PROCESS OF WINDING UP A DECEASED ESTATE

The final sub-goal of the research involved the identification of problems encountered in administering a deceased estate. The following problems are discussed below:

- The deceased was mentally incapacitated when he or she was signing the will (*Taylor v Pim*; *Banks v Goodfellow*): The burden to prove mental incapacity of the testator lies with the person alleging this (section 4 of the Wills Act). This must be proved on a balance of probabilities (*Tregea v Godart*). A test was formulated in *Banks v Goodfellow* that provides a guideline to determine the mental capability of a testator. *Banks v Goodfellow* stipulates that a testator is found to be mentally incapable to execute a will if at the time of executing a will it has been proven that the testator either:
    - did not understand the nature and effect of will;
    - did not know the nature and extent of his or her property;
    - could not comprehend and appreciate the claim to which he or she ought to give effect; or
    - was suffering from a mental disorder or insane delusion that would result in undue disposition.

- A will does not comply with the formalities stipulated in section 2(1) of the Wills Act and should now be considered in terms of section 2(3) of the Act (*Webster v the Master*; *Logue v Master*): Section 2(1) of the Act indicates that for a will to be valid it must be signed by the testator, or some other person in the presence and direction of the testator, and in the presence of at least two witnesses who were present when the testator or some other person directed by testator signed the will, and these witnesses must also sign the will in the presence of the testator and each other. Only a court can order the Master to accept a will that does not meet these formalities if it meets the requirements in section 2(3). Section 2(3) of the Act states that the court will order the Master to accept the document being or purporting to be a will if the court is satisfied that the document or the amendment was drafted or executed by the deceased and the document was intended to be the deceased's will.

- Wills are forged, and wills are executed under undue influence (*Mauerberger v Mauerberger;* Green (1943)). In *Mauerberger v Mauerberger* it was held that a forged

will cannot be accepted as the testator's will. *Kunz v Swart* found that the onus to prove that the will has been forged lies with the person alleging forgery.

- A will is invalid: A court will declare a will as invalid and void if it has been found that the consent of the testator was not free and was influenced unduly by another party (*Mauerberger v Mauerberger*). Undue influence can exist when one party occupies a position of dominance over another, where the dominant party is not acting in a manner that is consistent with the welfare of the submissive party, and the transaction entered into is induced by unfair persuasion by the dominant party (Green, 1943).
- Revoking a mutual or joint will (*Lucas v Hoole*, (1879) 9 Buch 132 (*Lucas v Hoole*)): Vaughn (1964) states that a joint or mutual will is revocable during the joint lives of the testators, so far as it relates to the disposition of the property belonging to the testator revoking the will. In the case of a will that has massing of testators' property, if the surviving testator enjoys the benefits of the first-dying testator, the survivor is deprived of the right to revoke the joint will, or of executing a will that provides for the disposition of the massed property that is not in terms of the joint will (*Lucas v Hoole*).
- A previously revoked will is revived (*Estate Mark; Wynne v Estate Wynne*): A testator may revive a will that was previously revoked (*Estate Mark*). *Wynne v Estate Wynne* found that the revival of a will must be in a new and validly executed testamentary instrument because it would be dangerous to permit the revival of a will based on oral statement. It is not necessary that the testator re-execute the previously revoked will to revive it, a testamentary instrument should state that the testator wishes to acknowledge a former will as his or her last will (*Estate Mark*).
- A will is lost (*Ex Parte Warren; Ex Parte Sade*): The presumption in law where a will cannot be found on the decease of the testator is that the deceased has destroyed the will with the intention of revoking the will (*Ex Parte Warren*). *Ex Parte Warren* found that this presumption cannot apply if the lost will was in the possession of a person other than the testator. The onus to rebut this presumption lies with the person alleging that the will was destroyed or lost accidentally (*Ex Parte Sade*).
- How is the estate is wound up if the deceased did not leave a valid will, or properties of the deceased are not included in the will? If the deceased does not have a valid will or the distribution of any property is not specified in the will, the distribution of the property takes place in terms of the provisions of the Intestate Succession Act.

- Claims lodged against the estate are disputed (section 32(1) of the Administration of Estates Act): The executor has the right to dispute the claim in terms of section 32(1) of the Administration of Estates Act. The executor of the estate may, by notice in writing require the claimant to lodge an affidavit providing such details of the claim as the executor indicates in the notice, and require the claimant or any person who may be able to provide material information in connection with the claim, to appear before the Master or any magistrate to be examined under oath in connection with the claim (section 32(1) of the Administration of Estates Act).
- A claim against the estate is lodged after the period specified in section 29 of the Administration of Estates Act (section 31 of the Administration of Estates Act): According to section 31 of the Administration of Estates Act, if the person lodges a claim after the expiry of the period specified in the notice in section 29 of the Act, the claimant must prove to the Master that there is a reasonable excuse for the delay; if a claimant is unable to provide such reasonable excuse he or she will not be entitled to demand restitution from any other claimant.
- A withdrawal from the guardian's fund is made for the purpose of investment (*Ex Parte Master: Estate Hofmeyr*): The Master does not have the power to withdraw money from the guardian's fund for the purpose of investment without an order of Court (*Estate Hofmeyr; Ex Parte the Master*). *Estate Hofmeyr* found that the Court has the power, on petition, to allow the capital of the minor to be invested otherwise than in guardian's fund, subject to the Master's approval.
- An executor of the estate is removed (section 54 of the Administration of Estates Act; *Katirawu v Katirawu*): The executor may be removed from office by the Master or the Court in terms of the provisions stipulated in section 54(1) of the Administration of Estates Act. An executor who has been removed from office must return the letters of executorship granted by the Master (section 51(5) of the Administration of Estates Act).
- A beneficiary of the estate rejects his or her share of the estate (*Durandt v Pienaar*): *Durandt v Pienaar* held that if the beneficiary chooses to reject the inheritance, then the right is assumed to have never been vested, and if the will does not make provision for such rejection, the property will be distributed in terms of the Intestate Succession Act and exclude the beneficiary from the beneficiaries who can inherit from the estate.

- A beneficiary is disqualified from benefiting from an estate (Barns & Thompson, 2014; *Kunz v Swart*; *Casey v Master*): Certain beneficiaries cannot inherit from the estate, even if the beneficiary is entitled to benefit in terms of a valid will or the Intestate Succession Act. It was held in *Danielz v De Wet* that it is a general principle that an offender in law is not entitled to benefit from his or her own criminal conduct and is therefore disqualified from benefiting from the estate. Such criminal conduct includes:
    - forgery of the deceased's will;
    - killing the deceased; or
    - undue influence is imposed on the deceased when executing a will.
- The executor fails to perform duties imposed in terms of Administration of Estates Act (*Clarkson v Gelb*): Section 36 of the Administration of Estates Act provides that if the executor has failed to perform his or her duties, the Master or any person having an interest in the liquidation and distribution of the estate may apply to the Court for an order directing the executor to perform these duties. The heirs of an estate have the right to institute a claim against the executor to recover damages resulting from the executor's maladministration (*Clarkson v Gelb*). If an executor makes a wrong distribution, and this is proven to be true, the executor is liable to make good to the legitimate heir or claimant (section 50(1) of the Administration of Estates Act).
- An insolvent estate is wound up (Insolvency Act): The executor of an estate may determine the solvency of the estate after the period intended for claimants to claim against the estate, or at any time before the distribution of the estate (section 34(1) of the Administration of Estates Act). An insolvent estate is administered in terms of section 34 of the Administration of Estates Act, or sections 26 to 31 of the Insolvency Act. According to section 34(1) of the Administration of Estates Act the estate is surrendered by instruction of the majority in number and value of all creditors, while section 3(1) of the Insolvency Act stipulates that executor of the estate may petition the Court for the acceptance of the surrender of the estate for the benefit of creditors.
- There is a long delay in winding up an estate (*Berea West v SIR*): Another problem that arises is where certain properties need to be sold to pay the debts of the estate, or where an asset needs to be realised in order to provide heirs with their inheritance, and this may take a number of years. *Berea West v SIR*, provides an illustration of the problem created by the bequest of a farm to multiple heirs. The property was held by a deceased estate and a

trust, the administration of the deceased estate had continued for 22 years (as there were various problems), and the estate could not be wound up. The executors of the estate were granted approval to establish a township on the land and a company was formed to develop and sell the property, with the beneficiaries of the estate and the trust as shareholders. Over a further period of 20 years the company developed parts of the land, sold the plots, using the funds to develop further plots for sale, and distributed the profits to the heirs.

- The executor of the estate may not have to ability to perform tax calculations, and the assistance of qualified persons would have to be sought. Expert assistance would also be required for the valuation of certain categories of property, for the purposes of calculating the income tax liability of the deceased.

5.6 CONCLUSION

The process of winding up a deceased estate is a complex exercise and does not start when the person dies, it starts when the person executes a will. In a will the testator decides on how he or she wishes the estate to be administered and who is to inherit from the estate. When the testator dies the estate is administered in terms of the will. In the absence of a will, or where assets have been omitted from the will, the Intestate Succession Act applies.

An estate of a deceased is not wound up until letters of administration have been granted by the Master to an executor of the estate (section 13(1) of the Administration of Estates Act). The executor is responsible for calling upon claimants to claim against the estate, paying the debts owed by the estate, lodging claims on behalf of the estate, and distributing the assets of the estate to beneficiaries of the estate in terms of the will of the deceased.

The executor, possibly assisted by experts, is required to calculate and pay the income tax owing by the deceased at date of death, the estate, and the estate duty owing by the estate of the deceased.

All of these processes involve the problems that are identified and discussed in the thesis.

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ADDENDUM A: SOURCES OF CASE LAW

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