

# Fraud and forgery of the testator's will or signature: the flight from formalities to no formalities

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“There is something about Wills which brings out the worst side of human nature. People who under ordinary circumstances are perfectly upright and amiable, go as curly as corkscrews and foam at the mouth, whenever they hear the words ‘I devise and bequeath’.”\*\*

## 1 Introduction

Falsification of wills by fraud or forgery is an offence all over the world.<sup>1</sup> It is, unfortunately, not an uncommon occurrence for a will to be tampered with, especially when large sums of money are involved.<sup>2</sup> Kahn indicated that “the number of relevant cases, civil and criminal, in our law reports, on falsification and forgery concerned with a will, apart from several bringing no success to the plaintiff or prosecution, of course is no reflection of the extent of the problem”.<sup>3</sup> Contesting a will on the grounds of fraud and/or forgery is not unique to South Africa. Recently a contribution in *The Wall Street Journal* stated that forged wills are no longer just a fiction.<sup>4</sup>

Testamentary fraud and forgery is a comprehensive phrase used to describe fraudulent acts regarding the drafting or execution of wills. Gilberson and Corbould distinguish between fraud and forgery as follows:<sup>5</sup>

“Fraud occurs when the deceased/testator has been tricked into signing the Will. Forgery differs from the other circumstances because in cases of forgery the deceased is generally not involved in the creation of the will at all. In will challenge cases that involve forgery, the will itself can be

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\*\* Sayers *Strong Poison* (1930).

<sup>1</sup> Osborn “Forged wills and codicils in certain States” 1937 *Journal of Criminal Law and Criminology* 118 ff; Dale “Forged wills are now not just fiction” *The Wall Street Journal* 15-10-2009 <http://online.wsj.com/news/articles> (24-01-2014) where it is stated: “Will forgery is ‘alleged frequently, and yes, it does happen’” Shakespeare “Homemade wills more likely to prompt fraud allegations” <http://www.access-legal.co.uk> (03-04-2014). Cases reported in the 19th and early 20th centuries include *Creswell v Jackson* (1860) 2 F&F 24 175 ER 94; *Tshona v Wauchope* (1908) 22 EDC 32; *Broderick's Will* (1874) 88 US 21 Wall 503 and *Robinson v Mandell* (1868) 20 F Cas 1027 (CCD Mass).

<sup>2</sup> Osborn (n 1) 120; Kahn *Bloody Hands Crime and Wills* (2003) 152 153; *The Law Wizard Blog* “Probate and greed: forged wills in the news again” 31-05-2011 <http://www.probatewizard.co.uk/> (23-01-2014); Shakespeare (n 1) and Croucher and Croucher “Forgeries and wills: a probate problem” 2010 *Australian Property Law Journal* 1-30.

<sup>3</sup> Kahn (n 2) 153. He refers to the position in South African law. Also see Kahn “The will that won't – Formalities gone bananas” in Van der Westhuizen (ed) *Festschrift – Paul van Warmelo* (1984) 128 133; Dumont and Mathers “Are wills too easy to fake?” 27-04-2007 *New Law Journal* <http://www.newlawjournal.co.uk/nlj/content/natural-cunningand> (23-04-2014) and Wood-Bodley “Revocation of a will by the presumed destruction of a copy” 2006 *SALJ* 3 ff.

<sup>4</sup> Dale (n 1).

<sup>5</sup> See “What is fraud and how do I prove it?” § 4 and “What is forgery and how do I prove it?” § 5 16-01-2014 [www.battleofwills.com.au/challenging-a-will.html](http://www.battleofwills.com.au/challenging-a-will.html) (16-04-2014).

forged, but so can the signature of the deceased. For example, the will might actually be valid, but the signature on it has been forged - which then invalidates the will".

Although testamentary fraud is not a new phenomenon,<sup>6</sup> it seems as if there has been an eruption of testamentary fraud cases over the last decade or two, especially where high profile people have been involved, either as the fraudster, falsifier or deceased.<sup>7</sup> Apart from the literally hundreds of reported cases in several jurisdictions on testamentary fraud,<sup>8</sup> one finds that when one searches the internet for "fraud or forgery of wills and testaments" hundreds of websites dealing with unreported cases of forgery or allegations of fraudulent wills can be traced.<sup>9</sup> Furthermore, it seems as if the rich, old-aged and sick people are specifically targeted.<sup>10</sup>

The question of why forgery of wills appears to be on the increase is not a novel one and has been discussed from time to time in scholarly articles.<sup>11</sup> Although fraud and forgery include actions, where the deceased is defrauded as to the content of the

<sup>6</sup> Shakespeare (n 1) refers *eg* to Dr Adams, who is believed to have killed 160 of his patients between 1946 and 1956. Of these, 132 left him money or items in their wills, all of which are believed to have been forged. Also see Kahn (n 2) 152 ff, who discussed most of the relevant South African and English law cases up to 2003; Dumont and Mathers (n 3) on the position in the UK and Bracegirdle "Informal wills" and "Probate fraud is on the rise" 12-02-2014 <http://poolealcock.co.uk/news/wills-probate/probate.html> (31-05-2014).

<sup>7</sup> To name only a few: *Rhoden v First Nat Bank of Nevada* 96 Nev 654 615 P2d 244 (Nev 1980); *Dummar v Lummis* 2007 WL 81808 (D Utah); *Marshall v Marshall* No 04-1544 (13-03-2009); *Chinachem Charitable Foundation Ltd v Chan Chun Chuen* HCAP 8/2007, HCMP 901/2009 and CACV 62/2010 and CACV 101/2010; *People v Anthony Marshall* 2013 NY Slip Op 02032; *Re Estate of Grabrovaz* 2007 NSWSC 550 BC 200705807; *Estate of Finlow*; *Boland v Morton* 2004 NSWSC 1173 BC 200409024; *Supple v Pender* 2007 WTLR 1461 All ER (D) 195 § 7; *Mawby v Howard* 2002 All ER (D) 14; *Fuller v Strum* 2002 2 All ER 87 1 WLD 1097 and *Vaccianna v Heroa* 2005 All ER (D) 200.

<sup>8</sup> *Dummar v Lummis* (n 7) for a dispute regarding the estate of the late billionaire Howard Hughes; *Robinson v Mandell* (n 1), where the estate was worth \$2 million (equivalent to approximately \$30.8 million in 2014); *Marshall v Marshall* (n 7) for an estate that involves \$88 million; *Chinachem Charitable Foundation Ltd v Chan Chun Chuen* (n 7), where the estate was worth \$13 billion and *People v Anthony Marshall* (n 7), where the estate was worth \$198 million. The *Chandigarh* case of 28-07-2013 (relating to a *Maharaja* of India) involves 200 billion rupees. *Cf* Bhadoria "Faridkot Maharaja Harinder Singh Brar's Daughters Inherit Rs20,000 cr" 30-07-2013 *India Times*.

<sup>9</sup> See n 1-5 above and n 10 below.

<sup>10</sup> Kerridge "Wills made in suspicious circumstances: the problem of the vulnerable testator" 2000 *Cambridge Law Journal* 310 ff; Jones "Forgery: When is a will not a will?" 22-01-2014 <http://www.lester-aldridge.co.uk/news/news> (29-04-2014). Also see Sapa "Alzheimer's PA cleared of fraud" 14-05-2010 *Times Live*, where the personal assistant to a wealthy woman suffering from Alzheimer's disease was found not guilty of fraudulently transferring R4.5 million from her access-bond account into his own bank account. See also Shakespeare (n 1); Bracegirdle (n 6); Sonnekus "Freedom of testation and the ageing testator" in Reid *et al* (ed) *Exploring the Law of Succession – Studies National, Historical and Comparative* (2007) 78 98; Croucher and Croucher (n 2) 1 ff. For case law see n 7 and 8 above and *Levin v Levin* 2011 ZASCA 114 § 1, where the testatrix passed away at the age of 107; *Re Estate of Grabrovaz* (n 7), where a carer forged the will of a 90-year-old; *Marshall v Marshall* (n 7), where the deceased was aged 105 and *Estate of Finlow*; *Boland v Morton* (n 7) for forgery of a will of a 91-year-old. See also Sonnekus "Testeerbevoegdheid en testeervryheid as grondwetlik beskermde bates" 2012 *THRHR* 1 and 171-184 especially the critical discussion of the *Levin* case at 15-23.

<sup>11</sup> Croucher and Croucher (n 2) 1 ff; Kerridge (n 10) 310 ff; Kerridge "The case of the 'suspicious will'" 2003 *LQR* 39 ff; Jeffreys "Uncovering probate fraud" 10-2000 <http://www.trustees.org.uk> (06-03-2014); Ryznar and Devaux "Au revoir, will contests: Comparative lessons for preventing will contests" 2013 *Nevada Law Journal* 1 ff; Also see Jacobs and Lambrechts "Valid or not? General principles for challenging a will" 2013:10 *De Rebus* 30 ff and Sheikh "Will forgery does happen, estate litigation may be the answer" 19-04-2013 *Estate Litigation* [www.ahmedshaiikh.com/.../will-forgery-does-happen-estate-litigation](http://www.ahmedshaiikh.com/.../will-forgery-does-happen-estate-litigation) (21-04-2014).

will, this discussion will focus primarily on (i) forgery of a document (purported to be a will) and (ii) forgery of signatures on a will. The point of departure will be that a forgery of a will or signature becomes fraud through uttering when the forged document is presented for administration or probate. The extent of problems relating to the drafting and execution of wills and forgery will be examined and underscored with reference to different jurisdictions and relevant case law. Submissions will be made against the backdrop of the underhand will, and specifically the signing requirements for wills as a security measure for ensuring authenticity. The role of the "rescue provisions" introduced in certain jurisdictions is questioned and it is asked whether this excuse of formalities has contributed to the current dilemma and, furthermore, opens the door even wider for testamentary forgeries. In this context it will be investigated whether there is a parallel between the relaxations of strict formalities on the one hand and the increase of fraudulent acts regarding estates on the other hand.<sup>12</sup> In conclusion, the concern, whether it has become possible to forge a will effortlessly and if so, if testamentary fraud and forgery can be prevented, will be considered.<sup>13</sup>

Some scholars argue that everyone who wants to draft or execute a will should be able to do so without any impediment, and if there is a reservation as to the validity of a will, the will can be contested.<sup>14</sup> This point of view is questioned. The high costs involved in challenging a will may prevent litigation and result in a will that does not reflect the deceased's intentions being accepted.<sup>15</sup> Litigation should be the last resort to challenge a will and it cannot be an antidote or the answer to the problem of testamentary fraud.<sup>16</sup>

## 2 *Constituting a will*

### 2.1 Formality requirements

Formalities have always been seen as the foundation of an executed will, as they serve as precautionary and protective measures to ensure the authenticity of the document purporting to contain the wishes of the testator.<sup>17</sup> From the perspective of possible fraud or forgery the purpose and virtue of formalities are important, as they prevent fraud and secure solemnity.<sup>18</sup> Therefore, any will, regardless of whether it is

<sup>12</sup> Jones (n 10); Kahn (n 3) 135 137; Wood-Bodley (n 3) 11; Shakespeare (n 1); Croucher and Croucher (n 2) 2 and Dumont and Mathers (n 3).

<sup>13</sup> Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 49-50; Kahn (n 2) 152; Kahn (n 3) 133; Croucher and Croucher (n 2) 1 and Osborn (n 1) 122.

<sup>14</sup> n 11 above. Cf: "Wills" *Corpus Juris Secundum (CJS)* Updated 03-2014 § 219.

<sup>15</sup> Kahn (n 2) 174 ff; Sheikh (n 11); Dumont and Mathers (n 3); the *Levin* case (n 10); *Supple v Pender* (n 7); Yates "Attorneys rack up nearly \$4 million in administrative bills, leaving about \$3 million" 21-05-2013 *The Morning Call*; Shortell "Judge upholds Karoly will benefiting nieces, nephews – not siblings" 08-04-2013 *The Express-Times* and Hall "Northampton County judge upholds Karoly wills" 04-05-2013 *The Morning Call* <http://paelderestatedefiduciary.blogspot.com> (17-04-2014). The Karoly case took from 2008 to 2013 to resolve.

<sup>16</sup> Corbett *et al* (n 13) 49-50; Osborn (n 1) 124; Kahn (n 2) 153; Sheikh (n 11) and Jacobs and Lambrechts (n 11) 32.

<sup>17</sup> Corbett *et al* (n 13) 49; *CJS* (n 14) § 219; Reid, De Waal and Zimmermann "Testamentary formalities in historical and comparative perspective" in Reid *et al* (ed) *I Comparative Succession Law Testamentary Formalities* (2011) 432 455 and 468. Cf/Kerridge "Testamentary Formalities in England and Wales" in Reid *et al* (n 17) 305 ff 314 and Scalise "Testamentary formalities in the United States of America" in Reid *et al* (n 17) 357 362.

<sup>18</sup> Osborn (n 1) 118-122; Croucher and Croucher (n 2) 2; Reid "Testamentary formalities in Scotland" in Reid *et al* (n 17) 404 429 and Reid, De Waal and Zimmermann (n 17) 469.

an uncomplicated or most intricate one, requires some form of formalities.<sup>19</sup> As far as “form and formalities” for executing a will are concerned, there has been a firm dividing line between testamentary formalities regarding civil law jurisdictions on the one hand and common law and mixed jurisdictions on the other hand.<sup>20</sup> Common law jurisdictions were influenced by the English Wills Act of 1837, while civil law jurisdictions were influenced by the French Code Civil.<sup>21</sup> De Waal divides the striking variety of wills into four categories, namely (i) the holograph will (written and signed by the testator), (ii) the witnessed will (signed by the testator and a witness or witnesses), (iii) the notary or public will (executed with the help of a notary) and, (iv) the closed and international will.<sup>22</sup> This discussion will focus broadly on the first three varieties and more specifically on the underhand will, which also includes a so-called “homemade” will.

## 2.2 Underhand will – a signed document

The English Wills Act of 1837 makes provision for the written “statutory or underhand will”.<sup>23</sup> Reid, De Waal and Zimmermann summarise the current comparative position regarding the underhand will as follows:

“But the stronghold of the (written) witnessed will is now the common law world where it is typically the only will-type available. Its foundation is the English Wills Act of 1837, which tidied up, and streamlined, the law relating to testamentary formalities which had previously been overly complex and inconvenient. The 1837 Act is still in force today, its principal provision relating to formalities having been amended only twice (in 1852 and 1982) and then only in minor respects.”<sup>24</sup>

The underhand will is the preferred will in England, and influenced the position in most of the states in the America, Australia, New Zealand and South Africa.<sup>25</sup> The overriding principles for the constituting of an underhand will are that it must be written and signed.<sup>26</sup> There is no requirement that a will must be executed with the help or assistance of a professional lawyer. This type of will can be drafted and executed by the testator himself, but must be signed in the presence of witnesses. The rationale behind complying with the formalities of attestation is to safeguard the testator’s identity, estate and the devolving of his assets in accordance with his intention. Although there are minor deviations in the signing requirements in

<sup>19</sup> Sherwin “Clear and convincing evidence of testamentary intent: the search for a compromise between formality and adjudicative justice” 2002 *Cornell Law Faculty Publications* 453 ff.

<sup>20</sup> Corbett *et al* (n 13) 49 and 51; Reid, De Waal and Zimmermann (n 17) 432 and 469 and De Waal “A comparative overview” in Reid *et al* (n 10) 1 ff.

<sup>21</sup> Kerridge (n 17) 314; De Waal “Testamentary formalities in South Africa” in Reid *et al* (n 17) 381 ff and Reid (n 18) 404 ff for mixed jurisdictions.

<sup>22</sup> (n 20) 3. Also see Ryznar and Devaux (n 11) 2 and Reid, De Waal and Zimmermann (n 17) 434 and 441. The international will was accepted in only a few jurisdictions, and is an alternative to the other categories. See Reid, De Waal and Zimmermann (n 17) 451 and Reid (n 18) 429.

<sup>23</sup> and so does the Wills Act 7 of 1953. Cf Du Toit *et al* “Section 2(3) of the Wills Act 7 of 1953: a retrospective and critical appraisal of some unresolved issues” 2014 *Acta Juridica* 80 ff.

<sup>24</sup> (n 17) 446. Cf Du Toit *et al* (n 23) 82; Kerridge (n 10) 310-311 and De Waal (n 21) 384-385.

<sup>25</sup> De Waal (n 20) 2; Du Toit “Succession law in South Africa: a historical perspective” in Reid *et al* (n 10) 67, 69 and 74. Also see Peart “Testamentary formalities in Australian and New Zealand law” in Reid *et al* (n 17) 330 ff; Scalise (n 17) 362 and Kerridge (n 17) 325. Canada is not discussed in this contribution.

<sup>26</sup> The document becomes a valid will once it is executed. See n 25 above and Ryznar and Devaux (n 11) 17; *CJS* (n 14) § 220; Reid (n 18) 429 explains that the Wills Act 1837 was not adopted in Scotland. Also see Reid, De Waal and Zimmermann (n 17) 457 and Reid (n 18) 429 for the form required in Scotland.

the different jurisdictions, the general principles remain the same.<sup>27</sup> If the testator executes a will without the support of a skilled person, the will is referred to as a homemade will. On the side of the testator, his signature ensures the authenticity of the content of the document as well as his approval of it, while on the side of the witnesses the requirement for signatures is to provide a main safeguard against the perpetration of fraud, uncertainty and speculation.<sup>28</sup> Ryznar and Devaux state: “The goal of such formalities, however, is to ensure that the will is authentic in order to give full effect to the testator’s intent. If a will fails to meet even one of the statutory formalities, it is subject to a will contest.”<sup>29</sup>

### 2.3 Notary will

The notary will, contrary to the underhand will, is widely recognised in Europe. Predominantly, notary wills survive in civilian codifications like France, Belgium and Italy. The will is always a deed and therefore secure, as a signed document intended to serve as evidence.<sup>30</sup>

Reid, De Waal and Zimmermann comment on the notary will:

“The ‘open’ notarial will scores high on everything other than complexity, cost, and secrecy. For *safe and reliable will-making, it is without serious rivals*. To some, however, the complexity, and consequent cost, will seem a serious drawback. The ‘closed’ version, indeed, is so convoluted as to have few users, and, in Austria at least, even the open will is often abandoned by notaries in favour of the much simpler will with witnesses. Yet, complex as the open will may be, the supervision by notaries ensures that it is rarely invalid for reasons of form. In that important sense if not others, the facilitative virtue is amply demonstrated.”<sup>31</sup>

Fraud and forgery hardly ever materialise in these jurisdictions. The most valuable characteristic of the notary will is the probative value of the notary’s signature, which in itself decreases the chances of will contests. The notary’s main duty is to authenticate the will document, which becomes “an instrument with a high evidential value or probative force derived from its form and authority by whom it is prepared”.<sup>32</sup>

<sup>27</sup> See Osborn (n 1) 120; Scalise (n 17) 306 325; Ryznar and Devaux (n 11) 2 for an overview of the USA; Croucher and Croucher (n 2) 1 refers to signature as the foundation of the will; Reid, De Waal and Zimmermann (n 17) 447 ff for a summary of all jurisdictions. De Waal (n 20) 1 indicates that the applicable *prescripts on signing* differ slightly from jurisdiction to jurisdiction (my emphasis). Dumont and Mathers (n 3) state: “The only *safeguard* in this country is that two witnesses must see the testator sign. Often that is no safeguard at all” (my emphasis).

<sup>28</sup> Du Toit (n 25) 74; Kerridge (n 10) 311; Sonnekus “Ondertekening van ‘n testament” 1984 *TSAR* 294 ff and n 25 above.

<sup>29</sup> (n 11) 2. Also see Kahn *Supplement to the Law of Succession in South Africa* (1994) 30-39; De Waal and Schoeman-Malan *Law of Succession* (2008) 53 ff; Corbett *et al* (n 13) 51 and De Waal (n 21) 388.

<sup>30</sup> Reid, De Waal and Zimmermann (n 17) 454 and 449-450 for the notary will; Scalise (n 17) 362; Kolkman “Testamentary formalities in The Netherlands” in Reid *et al* (n 17) 142 147 and Pintens “Testamentary formalities in France and Belgium” in Reid *et al* (n 17) 51 62 refers to some of the disadvantages.

<sup>31</sup> (n 17) 469 (my emphasis). The words notary and notarial wills are used as alternatives. Most scholars refer to notary wills. *CJS* (n 14) § 319 ff.

<sup>32</sup> Wood-Bodley (n 3) 11-12; Ryznar and Devaux (n 11) 7; Osborn (n 1) 121; Kolkman (n 30) 161 and Pintens (n 30) 60 and 64.

## 2.4 Holograph will

In addition to notary wills, many civilian and some common law systems also offer a less formal alternative named the holograph will. The holograph will is written in the testator's own handwriting and signed by the testator himself. Holograph wills are therefore trouble-free when it comes to their execution. It may also be difficult to prove fraud, as the will needs no other formalities and the creator of the will is no longer with us.<sup>33</sup> In civil systems testators typically have a choice between the staid formalities of the notary will or the informal made-at-home holograph will. Contrary to the signed underhand will and notary will, the aforesaid protective and cautionary virtues are largely absent when executing a holograph will, as no witnesses are required. The authenticity lies in the handwriting of the deceased. When comparing the holograph will with the underhand will, the holograph will is a "document" that complies with only the two specific requirements of writing and signing by the testator. Lang states:

"The handwriting and signature partially fulfil a protective function, but holograph wills do not fulfil the protective function of preventing fraud or undue influence. Furthermore holograph wills do not adequately fulfil the cautionary, ritual or channelling functions of will formalities, which are serious deficiencies."<sup>34</sup>

Although the abovementioned wills differ in the way they are executed, they do, however, have something in common. Behind the profound differences between the formalities and requirements for the different types of wills, there is a broad measure of agreement as to the purpose of testamentary formalities, and that is to secure the authenticity of the document.

## 3 *From strict formalities to no formalities (informal wills)*

### 3.1 Strict formalities – the will that won't

For centuries, compliance with formalities in the execution of wills was seen as non-negotiable. If a will didn't comply with "all" the prescribed formalities for the execution of a will, it was invalid and not accepted for administration or probate purposes. All jurisdictions where the underhand will was adopted, *ie* South Africa, Australia, New Zealand and most states in America, favoured a strict approach in their interpretation of the required formalities. In pursuing this literal interpretation, and by insisting on meticulous compliance with statutory provisions, a deviation

<sup>33</sup> *CJS* (n 14) §§ 321 and 331; Lang "Formality v intention – wills in an Australian supermarket" 1985 *Melbourne University Law Review* 82 97 and 98; Pintens (n 30) 70; Kolkman (n 30) 163; Ryznar and Devaux (n 11) 6; Sherwin (n 19) 456; Corbett *et al* (n 13) 88; Kahn (n 3) 130,133-137; Reid, De Waal and Zimmermann (n 17) 462 and 469; Kerridge (n 17) 321 and 325 and Du Toit *et al* (n 23) 83. The words holograph and holographic wills are also used as alternatives.

<sup>34</sup> (n 33) 97 states: "As the sole option, holograph wills might be unsatisfactory, but as an alternative to notary wills there is much to be said in their favour". For disputed holograph wills see the *Dummar* case (n 7); and *In the Matter of the Estate of Michael Fleischer, Deceased* 2012 NJ Super (App Div 2012).



from any one of the formalities resulted in a will being invalid.<sup>35</sup> The consequence of this harsh interpretation of formalities led to frustration, as wills were set aside, and the intention of the testator was sometimes undermined because of non-compliance with formalities. Cases in which the intention of the testator was clear but some formalities were not complied with gave rise to legal reform.<sup>36</sup> To resolve the problem with documents that did not comply with prescribed formalities, one of the two solutions outlined below was adopted.

### 3.2 The flight from strict formalities for signing

The judiciary's stern interpretation of formalities brought tension between formalism on the one hand and the primary goal of succession law, *ie* to give effect to the testator's last wishes, on the other hand. At first there was a tendency by courts to simplify the will-making process, and some jurisdictions also adopted legislation to relax the formalities.<sup>37</sup> Scalise summarises the position in America as follows:

“A great degree of liberalising has occurred in the formal requirements for an effective will and testament. The trend is decisively towards the enforcement of wills that do not comply with the standard form requirements, if the testator's intent can be safely ascertained and no fraudulent activity is suspected.”<sup>38</sup>

The direction legal reform took, was primarily to ease up the “sign and signing” requirements of the testator and witnesses.<sup>39</sup> Sherwin refers to the decrease in strict formalities as “the erosion of the requirements of testamentary formalities” that is well underway.<sup>40</sup> As a result of easing up the formalities it became easier to draft

<sup>35</sup> The phrase “The will that won't” was used by Kahn (n 3) 128 in his discussion of the strict formalities. See *CJS* (n 14) § 219; Scalise “New developments in US succession law” 2006 *The American Journal of Comparative Law* 103 110; Scalise (n 17) 374; Peart (n 25) 331 and 334; Kerridge (n 10) 311; Kerridge (n 17) 312-313 and 334; Sherwin (n 19) 456 and Reid, De Waal and Zimmermann (n 17) 462. Case law includes: *In the Matter of the Probate of the Alleged Will and Codicil of Macool, Deceased* 416 NJ Super 298 (App Div 2010), where the deceased after discussing her notes and intentions with the attorney left his office with the intention of having lunch nearby. She passed away one hour after leaving the office, without having reviewed the terms of the draft will. The will was invalid, as she didn't sign it. Also see *Kidwell v The Master* 1983 1 SA 509 (E); *Biakanja v Irving* 49 Cal 2d 647 (1958); *Re Groffman* 1969 1 WLR 733; *Re Colling* 1972 1 WLR 1440; *Estate of Iverson* 150 SW 3d 824 (Tex App 2004); *Succession of Eddy* 664 So 2d 853 (La Ct App 1995); *In re Estate Waterloo* 226 Ariz 492 250 P3d 558 (Ct App Div 1 2011) and *In re Hendricks* 28 So 3d 1256 (La 2010).

<sup>36</sup> Kahn (n 3) 130; Du Toit *et al* (n 23) 84; Sherwin (n 19) 453; Peart (n 25) 340; Reid, De Waal and Zimmermann (n 17) 437, 454 and 462 call it “the flight from formalities”. Also see Lang (n 33) 105 and Kako *Informal Wills under Section 8 of the Succession Act 2006* (2013) 59-77.

<sup>37</sup> Du Toit *et al* (n 23) 83-84; Kahn (n 3) 138; Corbett *et al* (n 13) 93 ff; Scalise (n 17) 374; Scalise (n 35) 110-111; Sherwin (n 19) 455-458 and Reid, De Waal and Zimmermann (n 17) 463 and 464 for a summary of judicial and legislative interventions.

<sup>38</sup> (n 35) 110 and fn 38 for a discussion of the legislation in the different states in America. For older case law see Corbett *et al* (n 13) 51-57 and 54 n 37; Kahn (n 3) 130-132 and Du Toit *et al* (n 23) 81 n 4.

<sup>39</sup> Lang (n 33) 90 ff; Kerridge (n 17) 322 and 327 for the adoption of minor changes to s 9 of the Wills Act 1837; De Waal and Schoeman-Malan (n 29) 58-64 for amendments to s 2(1)(a) of the Wills Act 7 of 1953. In the USA there was a national trend away from strict formalities since the adoption of § 2-503 of the Uniform Probate Code: See Scalise (n 17) 374 and Sherwin (n 19) 457. For Australia and New Zealand see Kako (n 36) 63 ff.

<sup>40</sup> (n 19) 457 and 458. Also see Scalise (n 35) 111-112. Scotland abolished the holograph will, and reduced the required number of witnesses to only one. See Reid (n 18) 419.

and execute a will, but at the same time it also became easier to commit fraud and forgery of a will or signatures to a will.<sup>41</sup>

### 3.3 Rescue provision as alternative

Despite judicial and legislative intervention to ease up the formalities, and although it became relatively straightforward to draft and execute a will, non-compliance with the simplified formalities sometimes still led to the invalidity of the will even where there was no suspicion of fraud.<sup>42</sup> Every so often it happened that, although the intention of the testator was clear, the will, due to the slightest non-compliance with a formality, failed.<sup>43</sup> To minimise the risk of invalidity, some jurisdictions where the underhand will was the will of choice had determined that additional provisions were required to save the will in justified circumstances. The main objective with this so-called “rescue provision” or condonation power was to authorise the dispensing with formalities in situations where all formalities were not adhered to, but it was clear that the deceased intended for the document to be his last will and testament.<sup>44</sup> The statutory requirements differ slightly from jurisdiction to jurisdiction, but in principle the court or similar statutory body is empowered to dispense with *some or all* of the essential formalities and declare a written document valid.<sup>45</sup> Some jurisdictions initially required “substantial compliance” with formalities before dispensing could take place, but others only required a written document. Lang explains how the standard of proof moved away from “substantial compliance” to “clear and convincing evidence” to find a middle way between the criminal and civil standard of proof. He concluded that the standard of proof remains the civil onus, which is proof on a balance of possibilities.<sup>46</sup>

Initially, the judiciary interpreted the provisions with great caution and emphasised that to condone the relevant “document” it must fall within the provisions of the applicable section. The intention of the deceased was naturally the overriding factor,

<sup>41</sup> See Croucher “Succession Law Reform in NSW - 2011 update” 17-09-2011 *Australian Law Reform Commission (ALRC)* and Kako (n 36) 59.

<sup>42</sup> Kahn (n 3) 132; De Waal and Schoeman-Malan (n 29) 57; Du Toit *et al* (n 23) 82 ff and Croucher and Croucher (n 2) 8 ff for a discussion of case law.

<sup>43</sup> Du Toit *et al* (n 23) 93; Sherwin (n 19) 458; Peart (n 25) 355 and Reid, De Waal and Zimmermann (n 17) 465.

<sup>44</sup> In South Africa it is referred to as “condonation power”. Langbein “Substantial compliance with the Wills Act” 1975 *Harvard Law Review* 489 498 is regarded as the architect of the dispensing power. Also see Corbett *et al* (n 13) 58; Du Toit *et al* (n 23) 87 ff; De Waal (n 21) 396 refers to it as “radical innovation”; Peart (n 25) 340-341 for adoption of the provisions in Australia (1970) and 345 for New Zealand (2007); Reid, De Waal and Zimmermann (n 17) 432 465 n 319 for the English-speaking jurisdictions that adopted similar provisions. The possibility was also considered in Scotland and England, but not accepted. See Kerridge (n 17) 327 and Reid (n 18) 430 and n 40 above. For America see Scalise (n 35) 110 and La Ratta and Osorio “No signature required: NJ leads the way with writings intended as wills” 2013 *New Jersey Law Journal* 1-3.

<sup>45</sup> South Africa needs a court order for condonation, but some jurisdictions allow the registrar to make a decision. Different criteria were used in the different jurisdictions. See Reid, De Waal and Zimmermann (n 17) 466; *Bekker v Naude* 2003 5 SA 173 (SCA); *De Reszke v Maras* 2003 6 SA 676 (C); *Bell v Crewes* 2011 NSWSC 1159; *Hatsatouris v Hatsatouris* 2001 NSWCA 408; *MacDonald v MacDonald* 2012 NSWSC 1376; *In re Estate of Albertha Blackwell* 2011 NJ Super (Chan Ct 2011); *Re Deer* 2006 QSC 278. In *The Estate of Schwartzkopff* (2006) 94 SASR 465 Gray J dismissed an application for probate of an unexecuted will prepared by solicitors and in *Re Voegelé* 2007 QSC 404, Douglas J did not admit to probate a document which was unsigned and which the deceased had not otherwise adopted.

<sup>46</sup> (n 33) 103 and 112. Also see Langbein (n 44) 430; Sherwin (n 19) 459 who refers to it as an onerous standard; Du Toit *et al* (n 23) 98-99 and Kako (n 36) 63 on the standard of proof.



but only if there was a written document.<sup>47</sup> Recently the tendency changed, and it seems that if there is a document in any form of writing, in which the intention of the deceased is clear, non-compliance with some or all formalities will be excused.<sup>48</sup> The focus on the intention of the testator became of paramount importance and the formalities for executing a will actually started to play an insignificant role.<sup>49</sup> The easing up of the formalities has recently moved to the point where documents are condoned in situations where there is only an unsigned document.<sup>50</sup> Even electronic versions and holograph wills that do not comply with the formalities were condoned.<sup>51</sup>

The rescue provisions were not accepted well by all in the legal fraternity.<sup>52</sup> Not even those who were advocates of the dispensing power could have foreseen it that eventually it would have become so easy as to type a document and present it as the will of the deceased.<sup>53</sup>

#### 4 Allegations of fraud or forgery in a criminal context

##### 4.1 General principles

Although accusations of testamentary fraud usually lead to a civil dispute regarding the validity of a will, they can also result in criminal action if the forger or fraudster can be identified. Either the criminal charges, or civil proceedings,

<sup>47</sup> Du Toit *et al* (n 23) 82. Also see De Waal (n 21) 388; Peart (n 25) 349 and 350; Scalise (n 17) 374; Kerridge (n 17) 327; Sherwin (n 19) 460; Reid, De Waal and Zimmermann (n 17) 456; Croucher and Croucher (n 2) 20-30 for the current position in Australia and La Ratta and Osorio (n 44) 2.

<sup>48</sup> *Van Wetten v Bosch* 2004 1 SA 348 (SCA); *Smith v Parsons* 2009 3 SA 519 (D); *In the Matter of the Estate of Leigh Cameron Randall*, 2011 NJ Super (Ch Div. 2011) a document that was not executed in compliance with the will statute. The court was convinced that the handwritten notations on the margin of page 1 of a letter should be given testamentary effect. See Du Toit *et al* (n 23) 98-105; Sherwin (n 19) 458; Ryznar and Devaux (n 11) 23; Reid, De Waal and Zimmermann (n 17) 470 and Peart (n 25) 339-349.

<sup>49</sup> See discussion below § 5.3.3 n 142-147.

<sup>50</sup> Du Toit *et al* (n 23) 90 state: "testamentary condonation tells an interesting, and sometimes disconcerting tale of the struggles associated with judicial attempts to give effect to statutory law reform". Cf Croucher and Croucher (n 2) 2 argue that signing remains crucial, as it is in situations where there is no signing that one will find forgery. For cases where only writing and no signature was required see *MacDonald v The Master* 2002 5 SA 64 (O); *Abrahams v Francis* 2010 ZAWCHC 542; *Van der Merwe v The Master* 2010 6 SA 544 (SCA) § 11 and 12; *National Australia Trustees Ltd v Fazey* 2011 NSWSC 559; *NSW Trustee and Guardian v Halsey*; *Estate of Von Skala* 2012 NSWSC 872 at § 15: "To restate the last requirement, the question is whether the deceased intended the document to be his or her testamentary act, that is, to have present operation as a will."

<sup>51</sup> n 50 above and *In the Matter of the Estate of Ehrlich, Deceased* 2012 WL 2470122 where the court continued to relax the formalities required for admission of a will to probate, holding that the unexecuted copy of deceased's will which had purportedly been executed by him and sent to his attorney-executor for safe-keeping sufficiently represented his final testamentary intent. For a holograph will see the *Michael Fleischer* case (n 34) where the daughter of deceased alleged that she received a handwritten birthday card from the deceased which she contended should be admitted as a holographic will. The matter was ultimately dismissed.

<sup>52</sup> See Bracegirdle (n 6); Kako (n 36) 64-77. Informal wills refer to wills which do not satisfy the formal requirements of a will. Cf Ellison "Informal wills and suicide notes" 06-2009 [http://www.tved.net.au/PublicPapers/\(23-05-2014\)](http://www.tved.net.au/PublicPapers/(23-05-2014)) for a thorough discussion of the development of the dispensing power in the different states of Australia. See Kahn (n 3) 138 n 41; Dumont and Mathers (n 3); Corbould "Unsigned wills – when intention is everything" 17-09-2012 [http://www.turnbullhill.com.au/articles\(18-05-2014\)](http://www.turnbullhill.com.au/articles(18-05-2014)); Schlesinger and Katz "Look what passes as a valid will across the Hudson river" 10-10-2012 *New York Law Journal* and La Ratta and Osorio (n 44) 2.

<sup>53</sup> Sherwin (n 19) 460 refers to it as an open-ended exception to compliance with formalities. Also see De Waal and Schoeman-Malan (n 29) 68; and Reid, De Waal and Zimmermann (n 17) 454.

can materialise first. Often these two actions are entangled.<sup>54</sup> In most jurisdictions fraud and forgery is not only a common law crime but also a statutory violation.<sup>55</sup> Proving fraud or forgery depends on a number of factors and can be quite difficult to prove.<sup>56</sup> To establish whether forgery is proved beyond reasonable doubt raises a factual question, the determination of which depends on the court's assessment of the credibility of witnesses.<sup>57</sup> Teitelbaum comments that often the only person who can tell whether or not there is a forgery is the deceased. As a result, estate theft is often undetected:

“As stated above, the only direct victim is usually dead by the time the theft is discovered. A case for estate theft is often made out entirely by circumstantial evidence. . . . theft is almost never prosecuted. The legal burden of “beyond a reasonable doubt” for a criminal conviction is nearly impossible to prove in estate theft cases. Prosecutors often have no choice but to rely on the civil justice system to remedy the theft. Without the threat of prosecution, thieves have little deterrent.”<sup>58</sup>

When fraud and forgery result in criminal action the state will prosecute the alleged offender.<sup>59</sup> To be convicted of the crime it must be proven that the accused is in fact the person who was the fraudster or forger, and it must be established beyond reasonable doubt that a crime has been committed by the person who is charged.<sup>60</sup> The crime of forgery is not sustainable unless the forgery is done with the intent to deceive or attempt to commit fraud or theft.<sup>61</sup> If a signature is found to be a forgery the will is invalid.<sup>62</sup> Archbold refers to the intent to commit fraud and forgery as

<sup>54</sup> Shaikh (n 11); *Eastern District of Pennsylvania v Karoly jr* Crim no 08 25-09-2008; *S v Maqubela* 2014 1 SACR 378 (WCC); *In the Matter of the Estate of Muigai* Nairobi HCSC No 523 of 1996, where the allegedly forged will was submitted to the CID at the request of the objectors following a criminal complaint. Also see Dumont and Mathers (n 3) for *Supple v Pender* (n 7).

<sup>55</sup> Osborn (n 1) 119 refers to forgery as an ancient crime. Also see Burchell and Milton *Principles of Criminal Law* (2005) 846; *Criminal Trial Courts Bench Book* NSW Government Book-Update 43 04-2014 jirs.judcom.nsw.gov.au 779-780 § 5-350 and § 5-360; s 102 of the Administration of Estates Act 66 of 1965; *S v Van Zyl* 1985 3 SA 25 (A) 28 where the difference between the common law crime of forgery and the statutory provision in s 102 was discussed. *Cf S v Maqubela* (n 54) for common law fraud and forgery of a will; *Eastern District of Pennsylvania v Karoly jr* (n 54) where Karoly was charged with a violation of s 18 USC § 371.

<sup>56</sup> Soady “Prosecutors allege will forgeries led to fraud against estates” 30-08-2013 <http://www.sandiegoestateplanninglawyerblog.com> (14-02-2014); Kovaleski “Son of Astor is said to face criminal case” 27-11-2007 *The New York Times*; Eligon “Brooke Astor’s son guilty in scheme to defraud her” 08-10-2009 *The New York Times*; Burchell and Milton (n 55) 846; Kahn (n 3) 130 discusses older cases that involves crime *eg R v Foreman* 1952 1 SA 423 (SR) and *R v Basson* 1965 1 SA 697 (C). Also see *R v R Spillman, Spillman & Russill* 2001 1 Cr App R (S) 139 and *People v Anthony Marshall* (n 7).

<sup>57</sup> *The State v Patsel* 240 Ind (1960) 163 NE 2d 602; *R v Knight* 2001 NSWCCA 114; *R v Burns and Collins* (2001) 123 A Crim R 226 and *R v Doney* (2001) 126 A Crim R 271.

<sup>58</sup> “How to help spot a fraudulent will (and other forms of estate theft)” undated <http://www.dcandmdprobatelawyer.com/fraud.htm> (03-05-2014). He refers to the case of *People v Anthony Marshall* (n 7). Also see Burchell and Milton (n 55); Kerridge (n 10) 318 for “‘What is fraud’ in the context of a will.”

<sup>59</sup> *Criminal Trial Courts Bench Book NSW* (n 55) § 5-360; Jones (n 10); Burchell and Milton (n 55) 847; Eligon (n 56) and Sherwin (n 19) 461.

<sup>60</sup> *S v Van Zyl* (n 55) 29C-D; *S v Maqubela* (n 54); *Rex v Dlamini* 2013 SZHC 220; *United States of America v Morley II* No 981894 (1999); *People v Anthony Marshall* (n 7); *People of the State of Michigan v Kozyra* no 172275 (1996) and the *Spillman* case (n 56).

<sup>61</sup> Jones (n 10) refers to the case of Shipman, who forged a patient’s will, the case of an ex-policeman who was recently jailed for eight months after being convicted of forging his late father’s will and the case against Karen Phillips (n 69) below.

<sup>62</sup> See the *Van Zyl* case (n 55) 29D-F, where the court ruled that the state proved beyond reasonable doubt that the signature of the testator was false, and that the accused was responsible for the forgery.

“an offence of double specific intent, requiring both an intention that the instrument should be used to induce someone else to accept it as genuine, and an intention that by reason of accepting it as genuine that the other person will do some act to his own or another’s prejudice”.<sup>63</sup>

## 4.2 Prevalence of criminal forgery

Despite harsh sentences for the perpetrators, criminal courts appear to be swamped with cases of will forgery. Reported cases, newspaper reports and online websites are reporting incidents of testamentary fraud and forgery almost on a weekly basis.<sup>64</sup> This increasing tendency is found in all jurisdictions.<sup>65</sup> The following broad overview indicates the regular occurrence of criminal prosecution in this regard.

An American case that fascinated the world was the death of Howard Hughes in 1976. Although no criminal charges were brought against “the beneficiary” Dummar or his wife, someone must have forged the will. Dummar originally claimed that he knew nothing about the will that came to light and in which he would have inherited from the billionaire. After authorities discovered Dummar’s fingerprint on the envelope, he said that a well-dressed man had left the will in a sealed envelope at his service station. An enclosed note instructed him to deliver the will to the headquarters of the Church of Jesus Christ of Latter-day Saints. Investigation revealed that Dummar’s wife Bonnie had worked for a magazine called *Millionaire*, which was distributed to wealthy Americans, and that her job had allowed her access to Hughes’s memos and signature. Bonnie denied forging the will. The document, which became known as the “Mormon Will”, was ruled a forgery by a Nevada jury in 1978. Dummar received no portion of Hughes’s estate, but no criminal charges were filed against him or his wife.<sup>66</sup> The case of *People v Anthony Marshall* also deserves special mention. The signature of the well-known activist, philanthropist, journalist and author Brooke Astor was forged by her son and his attorney. When she passed away at the age of 105, two forged amendments to her will were found. Her son Marshall, aged 86, was convicted of forgery and sentenced to jail.<sup>67</sup> Another case that made headlines in America was the Ohio case of Mr Fewlas’s will, which was forged by a tenant. The tenant forged the will with the help of her boyfriend and

<sup>63</sup> *Summary of the Law Relative to Pleading and Evidence in Criminal Cases* (1822) 22-28.

<sup>64</sup> See Dale (n 1) reporter for *The Wall Street Journal-Eastern Edition* New York. *The Law Wizard Blog* (n 2), where several recent incidents of fraud in England are discussed eg a woman who used a £9.99 kit bought from WH Smith to change her dying mother’s will in her favour was jailed for seven months and, the case where a cleaner who faked her landlord’s will to make herself the sole beneficiary of his estate was sentenced to 12 months in jail.

<sup>65</sup> Jones (10); Bracegirdle (n 6); Kako (36) 66-70 and Kerridge (n 17) 321.

<sup>66</sup> See Henley “Melvin still swears by encounter with Howard” 12-04-2004 *The Associated Press* 379-381; the *Rhoden* case (n 7) for the civil cases and Breinholt “Remembering the Howard Hughes ‘Mormon will’” 31-10-2009 *Mormon Matters*. Not only Dummar but also “wives” started emerging from his past. Moore, an actress, claimed to have married Hughes twice, but provided no documentation to support her assertions. In addition to supposed wives, an extraordinary number of supposed children decided to acknowledge their deceased father. The liquidation of the estate wasn’t completely finalised until 2010, 34 years after his death.

<sup>67</sup> (n 7). Also see Kovaleski (n 56); Eligon (n 56) and Barron “Brooke Astor’s son is sentenced to prison” 21-12-2009 *The New York Times* <http://www.justia.com/criminal/docs/calcrim/1900/1900.html>

his father.<sup>68</sup> Only after the estate was declared closed did the father of the boyfriend tell the internal revenue service that the will was in fact a forgery. The will was apparently drawn up by the tenant and her boyfriend a week after the deceased had died. The father admitted that he personally forged the dead man's signature. The internal revenue service later conducted its own forensic examination of the will and concurred that the signature had been forged.

Recent criminal cases in England and Wales include *Regina v Anthony Simon Chalk*,<sup>69</sup> where Chalk was charged with forgery, and convicted on two offences of conspiracy to defraud, fraud and theft. In *Director of Public Prosecutions v Hayes and O'Leary*, which deals with allegations that brothers were involved in forging a will and forging the signature of the deceased after he had passed away.<sup>70</sup> In *R v Hursthouse* a forged will was put forward under which the forger received the entire estate (as opposed to half the estate as stipulated in the true will).<sup>71</sup> The truth came to light whilst the solicitors were still dealing with the administration. In another recent case, the dispute over a purported will of Chris John took a bizarre turn. His partner, Ms C, was prosecuted for forgery of his will and convicted. His wife Helen, who had admitted that she herself had added a forged codicil to the will, received only a police caution. The will was later found to be genuine. Ms C had her criminal conviction overturned.<sup>72</sup>

Thandi Maqubela was charged with murder and forgery of her late husband's will. The late acting judge left an estate worth R20 million. It was alleged that she forged her husband's signature on his will and then fraudulently presented the forged will at the master of the high court.<sup>73</sup> Murphy J found the will to be forged,

<sup>68</sup> Reiter "Feds claim executrix drew up fake will to steal fortune" 28-02-2013 *The Blade*; Herman "Widow of film tycoon in court for forgery" 16-02-2006 *IOL news* reporting on the estate of film tycoon Bruce Anderson-Terry, which was worth between R10 and 20 million and Soady (n 56), who also refers to the Ohio-case of Fewlas and to an analogous case where the police arrested a woman on charges that she forged the last will and testament of her deceased neighbour. Also see *Skelton v The State of Texas* No 04-08-00720-CR 2010, where an attorney was investigated for forgery related to a will filed in the probate court purported to be the last will and testament of her client.

<sup>69</sup> 2013 EWCA Crim 2084 No 201303956/A5. Also see *Regina v Karen Phillips* No 201200534/A3 §§ 2 and 4, where Phillips used members of her family to witness a will that was presented as a genuine will. Also see *Hunts Post 24* "Godmanchester woman forged partner's will" 29-06-2011.

<sup>70</sup> 2014 IECCA 5. Also see *The Law Wizard Blog* (n 2) and Shiles "Ex-attorney for county linked with forged wills (NC)" 02-05-2014 <http://robsonian.com/news/home> (25-05-2014), where the judge ruled that two wills naming a former attorney as executor were forgeries.

<sup>71</sup> 2013 EWCA Crim 517.

<sup>72</sup> Neither the criminal case nor the civil case could be traced. Soady (n 56); *The Law Wizard Blog* (n 2); Salkeld "How tycoon's mistress and wife 'both forged wills to grab his £5m fortune'" 05-05-2011 *Daily Mail* and Cramer "When is a forged will not a forged will?" 09-04-2013 <http://www.cohencramer.co.uk/opinionhub> (17-05-2014).

<sup>73</sup> the *Maqubela* case (n 54); Samodien "Judge's signature 'probably a forgery'" 11-09-2012 *IOL news*. In the *Dlamini* case (n 60) from neighbouring Swaziland, evidence emerged that the accused submitted an alleged forged will to the master's office, on the strength of which the master issued letters of administration.

as it was unlikely that the deceased would have left almost of his entire estate to his wife, while disinheriting some of his children.<sup>74</sup>

The forgery of wills, however, transcends the borders of the jurisdictions discussed above. In India the Bombay high court ruled that a will that one of the deceased's sons produced and in which his Canada-based brother and a sister were disinherited, was forged and fabricated.<sup>75</sup> Making headlines all over the world was the case where Tony Chan was convicted of forgery of Nina Wang's will. Chan was convicted of two criminal fraud charges in a jury trial for forging the will and using a false document. He was sentenced to 12 years in prison.<sup>76</sup>

## 5 *Forgery of wills in a civil context*

### 5.1 Contested will

Against the background of the easing of formalities and the adoption of the dispensing power the question arises if these developments have had a negative impact in the facilitating of will fraud and forgery. When a document executed and *ex facie* compliant with the prescribed formalities is presented for probate or administration as a will, it is more often than not accepted, whereafter the administration continues. Testamentary fraud is typically alleged after the death of the "testator" during the winding-up of the deceased estate. If the validity of the will or a signature to the will is questioned, the will becomes contested and the winding-up process will be suspended until there is clarity regarding the authenticity of the will or signatures.<sup>77</sup> It seems that one more often comes across fraud and forgery of wills in jurisdictions where the underhand will and the holographic wills are in force.

Forging a will or presenting a forged will can be defined as "an intentional deception made for *personal gain* or *to damage* another individual".<sup>78</sup> Fraud is not

<sup>74</sup> The almost forgotten criminal case is where Ben du Toit was charged and convicted of the murder of his wife and falsification of her last will and testament. According to newspaper reports he visited the bank with a woman who pretended to be his wife. The woman signed a will on behalf of Du Toit's wife. The criminal case couldn't be traced. Newspapers were used to reconstruct the facts. See Van der Westhuizen "Testament van miljoenêr-boer. Wie't geteken? Getuies erken vermoorde nie" 31-07-1997 *Beeld* 1; Kahn (n 2) 39-47. More recently the facts of the same case featured again in *Pricewaterhousecoopers Incorporated v Du Toit in re Du Toit v Pricewaterhousecoopers Incorporated* 2011 ZAGPPHC 47.

<sup>75</sup> *H v Ig* (20-12-2013) TS-41/06. It was 27 years after the woman's death and the court found the man guilty of forging his mother's will to disinherit his siblings – 25-12-2013 *Times of India*.

<sup>76</sup> (n 7). Unfortunately the criminal case could not be traced. See Chiu "Jailed fung shui master Peter Chan to appeal conviction" 11-07-2013 *South China Morning Post*. Also see *State of Washington v Glaser-Gibson 351 11-1-II* (App Div 11), where Barnett had passed away a document purporting to be the will was filed. The twin brother of the deceased received a faxed copy of the purported will a few days after it was filed and immediately knew that the signature was not that of his brother. The police investigated the forging of the will and established that the sister of the deceased had forged the document with the help of a notary.

<sup>77</sup> Olivier "Disputing a will: fraud" 07-06-2013 <http://www.wrightshassall.co.uk/articles> (29-01-2014). Also see Dumont and Mathers (n 3); *The Law Wizard Blog* (n 2); Croucher and Croucher (n 2) 1 ff. For case law see *Kunz v Swart* 1924 AD 618 638; the *Supple* case (n 7) § 7; the *Mawby* case (n 7) &14; the *Fuller* case (n 7); the *Rhoden* case (n 7); the *Dummar* case (n 7); *Froud v Lewitt* 2009 ZAGPPHC 272; *Karanja v Karanja* 2002 2 KLR 22; the *Levin* case (n 10); *Diehl v Master of High Court* 2008 4 All SA 430 (T) and *Haribans v Haribans* 2011 ZAKZPHC 46 § 7.

<sup>78</sup> Olivier (n 77) – my emphasis. Cf *Gilberson and Corbould* (n 5). Also referred to as "probate fraud". Probate is the process by which a decedent's estate is distributed to his heirs and beneficiaries. Each state sets its own laws on estate administration. Cf *Jeffreys* (n 11); *Dumont and Mathers* (n 3); *The Law Wizard Blog* (n 2); *Croucher and Croucher* (n 2) 1; Kahn (n 3) 138 and *Corbett et al* (n 13) 93.

the only reason a will is contested, and it is often combined with claims of undue influence and duress. Although circumstances in which the testator is deceived as to the nature, effect or content of a document can result in the will being contested on grounds of fraud and forgery,<sup>79</sup> the focal point in this discussion is on forgery and uttering of a will, or forging signatures on a will, which constitutes fraud when the document is presented as a will.<sup>80</sup> Unfortunately, contested wills have nowadays become the rule rather than the exception, to the point where several lawyers promote themselves by advertising that they are specialists in “will contests”.<sup>81</sup>

## 5.2 Litigation

Disputing a will can result in lengthy civil litigation.<sup>82</sup> Fraud and forgery normally transpire only after the deceased has passed away and differs from other grounds for contesting a will.<sup>83</sup> The deceased is usually not involved in the creation of the will, and the forger wants to enrich himself to the detriment of other potential beneficiaries.<sup>84</sup> The person challenging the will bears the onus to prove that the will or signatures are not authentic and that the will is therefore invalid.<sup>85</sup> The document in question need not be a will or other legal document for it to be considered a forgery.<sup>86</sup> Many levels of forgery can occur, from amending a valid will to attempting to create an entirely new document.<sup>87</sup> An act will furthermore be considered “signature forgery” regardless of whether or not the entire signed document was created

<sup>79</sup> The *locus classicus* on fraud and the onus of proof in South African law is *Kunz v Swart* (n 77) 638. For a discussion of older cases see Kahn (n 2) 157; Jacobs and Lambrechts (n 11) 31. Also see Victoria Law Reform “Succession laws final report - Fraud and forgery” 15-10-2013 <http://www.lawreform.vic.gov.au> (26-04-2014) § 296.

<sup>80</sup> cases in n 7 above; *Pillay v Nagan* 2001 1 SA 410 (D); the *Levin* case (n 10); the *Diehl* case (n 77) § 56 and 449 § 57; the *Haribans* case (n 77) § 7; *Hawes v Burgess* 2013 EWCA Civ 74; *Lewis v Lewis* 2014 EWCA Civ 412; *Ali Haider v Syed* 2013 EWHC 4079 (Ch); the *Grabrovaz* case (n 7) § 34 and *Appeal of Karl Matter and Kim Karoly Luciano in the Estate of Angstadt, deceased and Estate of Karoly, deceased* JA31035/13 No 1356 EDA 2013.

<sup>81</sup> “Challenging a will?”- [kblaw.co.uk](http://kblaw.co.uk) (26-04-2014); Hassall “[www.wrightshassall.co.uk](http://www.wrightshassall.co.uk) theprobate.net/contesting-wills-mainmenu-26 (26-04-2014); “[www.battleofwills.com.au/html](http://www.battleofwills.com.au/html) (26-04-2014); “[www.slatertutler.com.au](http://www.slatertutler.com.au) and “[www.ericbutler.com.au/contesting-a-will/wa](http://www.ericbutler.com.au/contesting-a-will/wa) (26-04-2014).

<sup>82</sup> Jeffreys (n 11); Jacobs and Lambrechts (n 11) 31; Kerridge (n 10) 312 and 318; *CJS* (n 14) § 354 and Schoeman-Malan “Miscellaneous problems relating to the existence and validity of a will at the death of the testator” 2013 *De Jure* 413 ff and 684 ff.

<sup>83</sup> Auld “The evidential burden: on the validity of will disputes in England and Wales” 07-2013 *Step Journal*; Jacobs and Lambrechts (n 11) 32; Dumont and Mathers (n 3); Jeffreys (n 11); Schoeman-Malan (n 82) 427 and Kerridge (n 11) 39.

<sup>84</sup> Teitelbaum (n 58); Croucher and Croucher (n 2) 2-3; Kako (n 36) 73 and Corbett *et al* (n 13) 91 n 22.

<sup>85</sup> Auld (n 83); Kerridge (n 10) 301 ff and De Waal “The law of succession” 2008 *Annual Survey* 1084-1113. Also see the *Levin* case (n 10) §§ 5 and 6; *Yokwana v Yokwana* 2013 ZAWCHC § 3; *Froud v Lewitt* (n 77); *Karanja v Karanja* (n 77) and *Re Estate of Grabrovaz* (n 7) § 13.

<sup>86</sup> In *Froud v Lewitt* (n 77) although the applicant did not name the person who might have simulated the deceased’s signature she categorically stated that her sister’s signature was forged. Her evidence was corroborated by a handwriting expert, who said that the forger simulated the deceased’s signature. Also see Kerridge (n 10) 301 ff.

<sup>87</sup> See *Diehl v Master of High Court* (n 77) 448; the *Pillay* case (n 80); the *Grabrovaz* case (n 7) and the *Haribans* case (n 77).



fraudulently.<sup>88</sup> Testamentary fraud also includes circumstances where individuals have impersonated the “testator” in order to execute a will.<sup>89</sup>

Challenging a will on the basis of forgery is particularly hard to do.<sup>90</sup> The court must be convinced that on a balance of probabilities the will is invalid on account of the signatures having been forged.<sup>91</sup> Mere suspicion of fraud or forgery is not enough to set aside a will.<sup>92</sup> The emphasis is on fraudulent acts in the execution of a will, as summarised by Ryznar and Devaux:

“Fraud in the execution, meanwhile, occurs when someone intentionally misrepresents the character or contents of the instrument signed by the testator, who does not carry out the testator’s intent. A will provision resulting from fraud is invalid, and the remainder of the will stands, unless the fraud affects the entire will or the affected provisions are in separable from the remainder of the will.”<sup>93</sup>

In civil proceedings if it is not proved that a signature is a forgery, but the court is convinced that the will is not the will of the deceased the will can still be set aside.<sup>94</sup> Brereton J found in *Re Estate of Grabrovaz* that “it is unnecessary that I find affirmatively that there is a forgery. I am simply not satisfied that the signature on the questioned will is that of the deceased”.<sup>95</sup>

### 5.3 Prevalence of contested wills

Wills contested in civil proceedings can be divided into two categories. The first are those cases where the will is *ex facie* valid (due to complying with formalities), while the second are cases in which the “documents” were not properly executed and are *ex facie* invalid. This division is not always clear and can be transcended through the institution of counterclaims. In all instances the purpose of an application will be either to “set aside the will” or “to accept a will”.<sup>96</sup> A broad overview of such cases in relevant jurisdictions is given below.

<sup>88</sup> Kerridge (n 17) 321; Peart (n 25) 335; Auld (n 83); *Fuller v Strum* (n 7); *Viccianna v Herod* (n 7) and *Gale v Gale* 2010 EWHC 1575 (Ch) were [where?] two codicils were found to be forgeries.

<sup>89</sup> Jones (n 10). Also see Jones “The butler/executor/beneficiary did it!” 16-01-2012 <http://www.lesteraldrige.co.uk> (03-05-2014) and *Estate of Taruk Ben-Ali Golde v Wilburn* A 132979 (Al Co Super Ct) No HP09432597.

<sup>90</sup> Moore “Will contests; from start to finish” 27-11-2012 *St Mary’s Law Journal* 97 ff 129-132; Dale (n 1); Croucher and Croucher (n 2) 7; Soady (n 56); *The Law Wizard Blog* (n 2) and Dumont and Mathers (n 3).

<sup>91</sup> *Estate of Raymond Zachry, deceased* (16-03-2010) Mo c Pa 07-3995 § 15; the *Diehl* case (n 77); *In re Estate of Presutti* 783 A 2d 803 (Pa Super Ct 2001) at 806; *Kwon v Tran* 2010 NSWSC 1092; *Re Estate Pierobon, deceased Clocchiatti* 2014 NSWSC 387; Croucher and Croucher (n 2) 2-3; Kako (n 36) 73 -77 and Teitelbaum (n 58).

<sup>92</sup> the *Diehl* case (n 77); the *Kwon* case (n 91) and the *Pierobon* case (n 91) § 14.

<sup>93</sup> (n 11) 5.

<sup>94</sup> the *Grabrovaz* case (n 7) § 12; *In re Kirkander* 474 A 2d 290 (1984); Auld (n 83); the *Supple* case (n 7) and Dumont and Mathers (n 3); In *Wynniczenko v Plucinska-Surowka* 2005 EWHC 2794 (Ch) the will of the deceased left her estate to a TV aerial repairman she had hired and purportedly befriended several years before. The will was made in highly suspicious circumstances, as the repairman prepared the will himself, arranged for his friends to witness it, retained it after it was executed, and failed to inform any of the deceased family of her death. The will was challenged by a family member. Although the expert evidence on the signature was inconclusive, the will was set aside.

<sup>95</sup> (n 7) § 60. Also see Kerridge (n 10) 328. It is often argued that when fraud is pleaded it must be proven to a higher degree of probability than the usual civil standard, on the balance of probabilities, but this is not true: *Cf* the *Tshona* case (n 1); the *Froud* case (n 77) and the *Supple* case (n 7).

<sup>96</sup> the *Levin* case (n 10); the *Pierobon* case (n 91); *Hills v Public Trust* Civ 2008-404-2217 (2010) § 116; the *Yokwana* case (n 85) and §§ 22 and 25; the *Diehl* case (n 77); and the *Grabrovaz* case (n 7) § 9 and 12; the *Haribans* case (n 77) § 41 and Corbett *et al* (n 13) 89 fn 18.

### 5.3.1 *Ex facie* valid will but allegations made of fraud

If the testator dies and leaves a will that complies with the formalities the will must be presented for administration or probate. Unfortunately an *ex facie* valid will is often contested on the allegation of fraud and forgery. America is known as a country where litigation is in abundance and this is also true of testamentary litigation. The well-known case is that of the estate of Hughes, which took 34 years to wind up. After his death in 1976 a battle ensued over his estate. It was a multi-state war, with Nevada, California, and Texas all claiming to be responsible for the distribution of the estate. He was thought to have died intestate, but soon different wills surfaced, although all were eventually thrown out as fakes.<sup>97</sup> When *Raymond Zachry* died in 2007 a will that was *ex facie* valid was admitted to probate and his widow was issued with testamentary letters. The mother of the deceased filed an appeal from the probate of the will, alleging the signature on it was forged. The purported will that was supposedly “written” by her deceased husband two months prior to his death was found to be forged by his widow and an attorney, and set aside.<sup>98</sup>

Another recent case that led to six years of civil action between family members involves the estates of Peter Karoly, a well-known medical malpractice lawyer, and his dentist wife Lauren Angstadt, who died when their private plane crashed. Karoly’s sister and Angstadt’s ex-brother-in-law failed to prove that the *ex facie* valid wills submitted by their attorney Karoly Jr were forged.<sup>99</sup> In very depressing circumstances the California court of appeal reversed a lower court’s decision regarding the will of deceased Ben-Ali in *Estate of Taruk Ben-Ali: Golde v Wilburn*. He was murdered by his father, who then committed suicide. A signed will was found after Ben-Ali’s death. The will was found to be forged by his father.<sup>100</sup>

The probate courts in England are flooded with cases of disputed wills and fraud and forgery.<sup>101</sup> Astounding is the case referred to above, where the wife and girlfriend of the late millionaire estate agent John were accused of forging his will in 2010.<sup>102</sup> Another high profile case is *Supple v Pender*, where a love-child of the deceased had produced a forged will in which she had attempted to take almost the

<sup>97</sup> the *Rhoden* case (n 7); the *Dummar* case (n 7) and *Soady* (n 56) and *Breinholt* (n 66).

<sup>98</sup> The *Raymond Zachry* case (n 91). Also see *In the Matter of the Estate of Lucille Sand* no A4524-10T4. After the death of their mother one of her daughters alleged undue influence, fraud, lack of testamentary capacity and forgery against her sisters after the will was admitted to probate. Her claims were dismissed. In *Gilmore and Gilmore v Cabarrus County* 03-09-2013 No COA12-1426 it was alleged that the defendants conspired to create a fraudulent will for a client’s husband and signed the fraudulent will as witnesses. The wife submitted the fraudulent will for probate.

<sup>99</sup> See n 80 above and specifically the *Angstadt* case. The costs involved in the challenges significantly exhausted the estates. Attorneys for the beneficiaries alleged that the estates had “racked up” \$3.74 million in administrative and other costs, leaving about \$3 million to distribute. Also see Hall “*Northampton County judge upholds Karoly wills*” 04-05-13 *The Morning Call* and “*Appeals court affirms authenticity of Karoly wills*” 04-06-2014 *The Morning Call*.

<sup>100</sup> (n 89) §§ 5 and 12. See Brenneman “*Buried body in wall identified by police*” 23-12-2008 *The Berkeley Daily Planet* for a report on the dramatic murder and suicide. Before taking his own life, Hassan had hidden his son’s body behind a wall, and perpetrated a callous fraud on Taruk’s mother, spouse, and friends about Taruk’s fate. He had impersonated Taruk and forged his name on multiple documents. Also see *Matter of Werner* 2011 NY Slip Op 52522 U.

<sup>101</sup> *The Law Wizard Blog* (n 2). Also see De Graaf “*Brother who branded his sister ‘too lazy’ to work forged his dying mother’s £200 000 will to deny her a share of the fortune, judge rules*” 13-03-2014 *Daily Mirror* Online <http://www.dailymirror.co.uk/news/article-2580288> (20-05-2014) where it is reported that Watts forged a deathbed document to take all savings from his mother. He enlisted the help of an aunt.

<sup>102</sup> See the discussion in n 72 above. *Salkeld* (n 72); and “*Will forgery claim collapse*” 07-02-2012 *Contesting Wills* <http://www.contesting-wills.co.uk/news-articles> (11-04-2013).

entire estate for herself. The son of the deceased soon noticed that the signatures on the will did not resemble his father's usual scrawl. The will was set aside.<sup>103</sup> In *Salmon v Williams-Reid*<sup>104</sup> the one daughter of the deceased couldn't believe that she inherited almost nothing and claims that the deceased's signature on the will was a forgery by her sister. The court ruled that the will was valid.

Reported cases in South Africa on fraud and forgery have increased recently. In *Froud v Lewitt*, a will apparently executed by the testatrix appeared *ex facie* to be valid.<sup>105</sup> After the deceased's death a purported will was handed to the half-sister of the deceased. She immediately realised that it was not the deceased's signature. The purported will was proved to be invalid on the basis that the signature on the will was false. Raulinga J concluded that the signature and the will were in fact forged.<sup>106</sup> The *Levin* case also deals with a disputed will that was valid on the face of it, as it was properly executed by the deceased shortly before her death at the age of 107.<sup>107</sup> The will was contested by family members who challenged the validity of the will and alleged that a signature on the will was not that of the deceased and that it came about by fraud and falsification.<sup>108</sup> The court found the signature to be authentic.<sup>109</sup> *Molefi v Nhlapo* deals with a will allegedly made by the aunt of the contesters.<sup>110</sup> The defendant alleged that the deceased subsequently made another will, in which he was named as sole heir of her estate. Instituting action, the plaintiff sought a declaration order that the disputed will was null and void. The disputed will was found to be invalid and was set aside.

In *Grill v Stoffels* the issue was narrowed down to whether the signature appended under the words "TESTATOR" on a will was the deceased's signature or not. It was the plaintiff's case that the signature was not that of the testator and it was not his intention to dispose of his assets in terms of the will, but rather in terms of an

<sup>103</sup> (n 7) § 7. Dumont and Mathers (n 3) discuss the case; Cf Rich "Behind the sensationalism of the forged will: The judgement of *Supple v Pender*" 2007 *Stone Building News* 3. Also see *Hawes v Burgess* (n 80), where the court of appeal upheld the trial judge's finding that the deceased's last will, which cut out her son as beneficiary, was invalid and that her earlier will (leaving everything equally to her three children) therefore remained unrevoked. See Pankauski "\$4.2 million estate lawsuit-fraud, forgery, undue influence or ... did mom just want to disinherit the children & not tell them?" 27-02-2014 <http://www.pankauskilawfirm.com/blog/24-03-2014>.

<sup>104</sup> 2010 EWHC 1315 (Ch). The evidence of a joint handwriting expert as to whether the signature on the will was that of the deceased was inconclusive. On its face therefore the will did not disclose non-compliance with s 9 of the Wills Act. Also see *Barrett v Honora Bem* 2009 EWHC 2597(Ch), where it was alleged that "the signature that appears on the Will is not the signature of the Deceased, and the Will upon which probate was granted is therefore not the last Will and Testament". See *McGeever v Nicol* 2012 CSOH 115: When Steven Nicol died in a road accident he left behind a daughter to his former partner and his mother living in a house he owned. A will that was produced by his mother, after his death, which left her the house, was, in fact, a forgery. His mother, disappointed as she may have been homeless, forged her son's will. Also see De Wert "Mother forged son's Scottish will – why did this happen?" 07-07-2012 <http://www.myscottishlawblog.co.uk/> (17-05-2014).

<sup>105</sup> (n 77). Cf *Nedbank v Mendelow* 2013 6 SA 130 (SCA); *Meintjes v Coetzer* 2010 5 SA 186 (SCA); *S v Maqubela* (n 54); *Diehl v The Master of The High Court* (n 77); *Strydom v Van Niekerk* 2010 JDR 0759 (GNP) and *Molefi v Nhlapo* 2013 JOL 30227 (GSJ). Also see Corbett *et al* (n 13) 89-90; Du Toit (n 25) 68; Kahn (n 2) 152-176; Kahn (n 3) 138 n 41 and Kerridge (n 17) 321 for older cases. For allegations of fraud see Serrao "Councillor in row over will" 28-12-2012 *IOL news* and the ruling by the Press Ombudsman in *Neil Diamond v The Star* 24-04-2013 reported in *IOL News*.

<sup>106</sup> The pages of this case are not numbered. The *Froud* case (n 77).

<sup>107</sup> (n 10) § 4 and § 12. She left 21 wills. Also see Schoeman-Malan (n 82) 442-445 and Sonnekus (n 10).

<sup>108</sup> § 23 and § 29.

<sup>109</sup> § 27.

<sup>110</sup> (n 105).

earlier will.<sup>111</sup> The court concluded that the defendant's version was problematic and unreliable. Her evidence was therefore rejected in its totality. The disputed will was declared null and void, and the dispositions made in terms thereof were set aside. A case that brought about another peculiar sequence of events was *Haribans v Haribans*.<sup>112</sup> The deceased left a will dated 2004. The will was properly executed and *ex facie* valid. The master was on the point of winding up the estate of the deceased according to this will when a copy of a later will dated 2005 came to the fore. This copy, according to the daughter-in-law of the deceased, was attached to the will of the deceased's late wife's will. The deceased's son brought an application to have the 2004 will set aside and to have the copy, found attached to his mother's will, declared to be his father's last will.<sup>113</sup> The application was granted in the court *a quo*. The older son of the deceased appealed against the ruling. The court of appeal eventually found that the later will was in fact a forgery.<sup>114</sup>

Australia and New Zealand also have immense problems with forgeries of wills.<sup>115</sup> *In Re Estate of Grabrovaz* the purported will of a 90-year-old woman who left the entire estate to her caretaker was found to be a forgery.<sup>116</sup> *Estate of Finlow; Boland v Morton*<sup>117</sup> deals with a situation where the son of the deceased produced copies of a will when the original will was not available. White J found: "The evidence not adding up is probably the gentle way of putting these matters, remembering it is not about finding forgery but the weight of doubt in the context of the relevant onus."<sup>118</sup> In *Estate of Pozniak; Morgan v Reuben* forgery was proved positively and not only was the will set aside but the matter was referred to the New South Wales Law Society for an investigation into the conduct of an attorney.<sup>119</sup>

Case law from the Far East and India needs mentioning. The court of appeal of the high court Hong Kong ruled in *Chinachem Charitable Foundation Ltd v Chan Chun Chuen*<sup>120</sup> that a will presented as the Hong Kong billionaire Nina Wang's will was a forgery. Her fortune was estimated at £7.4 billion. She also left an earlier will which made provision for a charity set up by her some years before. The latter was found to be the valid will.<sup>121</sup> Recently a case dealing with the inheritance of 200 billion rupees (estimated at \$3.3 billion) drew to a close after 20 years of litigation. It was ruled in the Indian Chandigarh Court that the will of a late Maharaja, the ruler of the princely state of Faridkot, who died in 1989, was forged more than 30

<sup>111</sup> 2011 ZAWCHC 119 § 2.

<sup>112</sup> (n 77) § 6.

<sup>113</sup> ito s 2(3) of the Wills Act he applied for condonation.

<sup>114</sup> § 21.

<sup>115</sup> Croucher and Croucher (n 2) 8-27 discuss more recent cases.

<sup>116</sup> (n 7). See Croucher and Croucher (n 2) 8-16.

<sup>117</sup> (n 7) § 137. See Croucher and Croucher (n 2) 16-21.

<sup>118</sup> (n 7) § 132-137. See Croucher and Croucher (n 2) 8-16; *Re Eger; Heilprin v Eger* 1985 BC8500997 at 72-74 and *Estate of Johnston* 2010 NSWSC 382 § 4.

<sup>119</sup> 2005 NSWSC 76 BC 200505706. Also see *Hills v Public Trust* (n 96); *Ng v Morgan; Commonwealth Bank of Australia v Morgan; In the Estate of Dell Smith* No 2 2014 NSWSC 677 and Croucher and Croucher (n 2) 13-16.

<sup>120</sup> (n 7). Also see Chu "Barrister convicted of using fake will and forging dead man's signature" 28-11-2013 *South China Morning Post*, where a barrister was convicted of using a phony will drawn up in the name of a late calligraphy master. The will left a flat to his sister, who was one of the master's apprentices. Two witnesses who purportedly signed the will did not exist, and an expert found Au's signature was a fake. See *Indian Kanoon* <http://indiankanoon.org/search/?formInput=forged%20will> (08-06-2014).

<sup>121</sup> She was once reckoned to be Asia's richest woman. See *The Law Wizard Blog* (n 2).

years ago.<sup>122</sup> His assets included forts, a palace, prime property in the capital, cash, jewellery and a nine-hectare private aerodrome in the city of Faridkot. Suspicions about the will arose, as the will excluded his mother and wife, while all the servants, irrespective of their designation, and lawyers were appointed trustees of a trust that stood to inherit his estate. His daughters will now inherit the estimated \$4 billion estate, instead of a trust run by his former servants and palace officials.

### 5.3.2 *Ex facie* invalid document – rescue provision and fraud

If a will *ex facie* does not comply with the required formalities, it is invalid.<sup>123</sup> As we have seen, the only way to allow an invalid will (that does not comply with the formalities) for administration or probate is to excuse or dispense with the requirements for execution and to condone the non-compliance of formalities.<sup>124</sup> Jurisdictions such as Australia, New Zealand, New Jersey and South Africa, which have adopted statutory provisions to condone or dispense with non-compliance of formalities, may be confronted with situations where testamentary fraud is alleged. In these circumstances an application based on the court's power to condone non-compliance or dispense with the formalities will be met with a counter-application that the document is invalid on account of fraud or forgery.<sup>125</sup>

Recent South African cases that fall into this category are *Haribans v Haribans* and *Froud v Lewitt* referred to above. In the *Haribans* case an application to condone a copy of a purported will was met with a counterclaim of forgery of the deceased's signature.<sup>126</sup> In the *Froud* case the will was *ex facie* valid. The claim that the will was a forgery was opposed and a counterclaim instituted to condone the non-compliance with formalities.<sup>127</sup> Another case where condonation and fraud were combined was the case of *Yokwana v Yokwana*.<sup>128</sup> After the death of their mother there was uncertainty as to how her estate should devolve. The son and daughter of the deceased approached the local street community for help. At this meeting it was disclosed by a nephew that the deceased did in fact execute a will. The will was apparently *ex facie* invalid and the son applied for condonation of a "copy of the document" purporting to be the will of his deceased mother.<sup>129</sup> The daughter opposed the application and contended that her mother had died intestate. She furthermore alleged that the signature on the purported will was a forgery. This signature was proved to be authentic and the will found to be valid.<sup>130</sup>

<sup>122</sup> Harinder Singh Brar was an enormously wealthy Sikh ruler of Faridkot before India's independence from Britain in 1947. Also see Bhadoria (n 8).

<sup>123</sup> Jacobs and Lambrechts (n 11) 31; De Waal and Schoeman-Malan (n 29) 88.

<sup>124</sup> § 3.3 above.

<sup>125</sup> See the authorities referred to in n 77.

<sup>126</sup> For earlier cases in SA law see De Waal and Schoeman-Malan (n 29) 68 n 133.

<sup>127</sup> The counterclaim for condonation of the will was brought because although it looked *ex facie* valid it didn't comply with the formalities, and as it was admitted that it was not signed by the deceased in the presence of two competent witnesses.

<sup>128</sup> (n 85) § 1.

<sup>129</sup> § 3. It is not clear from the reported case what exactly happened to the original will and also not why the master has indicated that the will did not comply with the formalities. A suggestion that the witnesses did not sign all the pages is misleading, as it is no longer required that each page be signed by the witnesses.

<sup>130</sup> § 23.

In some jurisdictions wills that are invalid for want of compliance with formalities became known as “informal wills”.<sup>131</sup> In these cases the intention of the testator replaced the requirement for compliance with formalities. The case of *Re Estate Pierobon, Deceased Clocchiatti*<sup>132</sup> concerned an application to dispense with formalities and to accept a 2011 will. In a counterclaim the court was requested to allow a will dated 2006, allegedly made by the deceased. The main question was to establish whether the 2011 document was a valid will or a forgery. The defendant contended that the circumstances in which the disputed will is said to have come into existence are of such a nature as would excite the suspicion of the court that the will was not authentic.<sup>133</sup> In *Hills v Public Trust*<sup>134</sup> the question was whether the burden of establishing that the deceased executed a 2009 handwritten and a 2009 typewritten document, and knew and approved the contents of either or both, was discharged.<sup>135</sup>

The court was not satisfied that the deceased had written and signed the 2009 handwritten document or that he signed the 2009 typewritten document.<sup>136</sup>

“In regard to the first question, there is a significant difference between Joanne and Nicholas not admitting execution by the deceased of what is asserted to be his testamentary documents, particularly one not duly executed, and them affirmatively alleging, and proving, forgery of that document. In this case, where relevant suspicion is aroused, it is for Paul to satisfy the conscience of the Court, after a vigilant and anxious examination of the whole of the evidence, that the 2009 handwritten document and/or the 2009 typewritten document was, in fact, executed by the deceased.”<sup>137</sup>

### 5.3.3 Informal wills can lead to fraud

Recently it happened on an enormous scale that so-called “informal wills” were condoned notwithstanding the fact that no formalities with regards to signature had been complied with. Although these unsigned documents do not necessarily involve allegations of fraud and forgery, the possibility of fraudulent acts can readily be foreseen. Case law where the court found that the lack of signatures was not a barrier to accepting the document as a will includes *Van der Merwe v Master of the High Court*, where the deceased left an e-mail that was still stored on his

<sup>131</sup> See Bracegirdle (n 6); Kako (n 36) 64-77. The phrase “informal wills” is used to refer to wills that do not satisfy the formal requirements of a will. They are usually documents upon which the testamentary intentions of the deceased appear and evidence shows that it was more probable than not that the deceased intended the document to constitute his will. Also see Ellison (n 52) for a thorough discussion of the development of the dispensing power in the different states of Australia.

<sup>132</sup> (n 91) § 7.

<sup>133</sup> § 14. Also see *Tobin v Ezekiel* (2012) 83 NSWLR 757 770 § 43 and 774 § 55 and *Clocchiatti v Chadwick* 2012 NSWSC 1308 §§ 9-14 for applications by plaintiffs who have sought probate of informal will.

<sup>134</sup> (n 96) § 116. Cf *Logue v The Master* 1995 1 SA 199 (N); *Ex parte Maurice* 1995 2 SA 713 (C); *Back v Master of the Supreme Court* 1996 2 All SA 161 (C); *Harlow v Becker* 1998 4 SA 639 (D); *Kotze v Die Meester* 1998 3 SA 523 (NC); *Ndebele v The Master* 2001 2 SA 102 (C); *Ex parte Williams In re Williams' Estate* 2000 4 SA 168 (T) 172.

<sup>135</sup> § 117.

<sup>136</sup> § 282.

<sup>137</sup> § 188 See § 189: “I repeat that there has been no allegation of forgery by Paul raised by Joanne and/or Nicholas. The critical question is whether Paul, as the propounder of the 2009 handwritten document and the 2009 typewritten document has established, on the balance of probabilities, that either is, or both are, a document signed by the deceased.”



computer.<sup>138</sup> The document on the computer was not signed. The court *a quo* did not condone the unsigned document, and Tsoka J warned against the acceptance of unsigned documents.<sup>139</sup> The court of appeal accepted the document as a valid will. In *Abrahams v Francis* a handwritten, unsigned document found in the deceased's spare room was accepted as a will.<sup>140</sup>

In *National Australia Trustees Ltd v Fazey*<sup>141</sup> the issue before the court was whether the unsigned handwritten page in a notebook could be admitted to probate under section 8 of the *Succession Act 2006*.<sup>142</sup> It was noted by Windeier J that it was not an easy case to decide, but the notebook was condoned.<sup>143</sup> In *Re Trethewey* the deceased had left a will found on a computer file. Beach J seemed to have no difficulty in admitting the document as a will and concluded that although the document was not signed by the deceased it did not prevent it from being admitted to probate.<sup>144</sup> The court was satisfied that the deceased had typed his name at the bottom of the document and, in the circumstances of the case it was the equivalent of his signature.<sup>145</sup> In *Newman v Brinkgreve; The Estate of Floris Verzijden*<sup>146</sup> an informal handwritten document was condoned. There was no dispute that the document was not executed in accordance with the formalities. Although the deceased was familiar with the formal requirements for the making of a valid will the court was satisfied that the deceased intended the document to form an amendment to his previous duly executed will.<sup>147</sup>

From the discussion of informal wills it seems that, currently, the intention of the deceased is considered to be the overriding factor, and that formalities are playing an

<sup>138</sup> The document that was found was an original unsigned and undated document written in the deceased's handwriting. Also see n 50 above.

<sup>139</sup> §§ 9 and 11. § 12 discusses how the court *a quo* set out the power of the court in relation to s 2(3) and confirmed that the signatures ensure authenticity and guard against false or forged wills. *Cf* § 13.

<sup>140</sup> (n 50). Also see *Mabika v Mabika* 2011 ZAGPJHC 109; *Taylor v Taylor* 2011 ZAECPEHC 48 and the cases referred to in n 50 above. However, in *Mitchell v Mitchell* 2010 WASC 174 §§ 5 and 18 the deceased had been admitted to hospital. He gave instructions to solicitors to prepare a will. A will was prepared in accordance with those instructions. On the morning of his death, the deceased, having apparently expressed his approval of the contents of the draft will, stated that he would execute the document later that morning. He died shortly thereafter without executing the document. The document was not admitted to probate.

<sup>141</sup> (n 50). However, he admitted the document to probate under s 8 because the evidence showed that the deceased changed her intention in relation to the document. Corbould (n 52).

<sup>142</sup> (n 50). Also see *Estate of Johnston* (n 118), which concerned a witnessed testamentary document, headed "the Last Will and Testament". Mr Johnston prepared a will and 'memorandum of wishes' with respect to a trust. On the day of execution a Mr Langsford was called in to witness the signing of the wills of Mr and Mrs Johnston. Mr Langsford witnessed the memorandum of wishes, but there were no witnesses to the will. Also see *Ng v Morgan; Commonwealth Bank of Australia v Morgan; In the Estate of Dell Smith* (n 119).

<sup>143</sup> Also see 2010 NSWSC 382 4. *Bell v Crewes* 2011 NSWSC 1159: the principal question was whether an unsigned will that had been prepared for the deceased should be admitted to probate under s 8. If the document was not admitted to probate, the next question was whether probate should be granted of a will duly executed by the deceased in 2004. *Cf* Jacobs and Lambrechts (n 11) 31 and La Ratta and Osorio (n 44).

<sup>144</sup> 2001-2002 4 VR 406. See *Succession Act No 80 of 2006 (NSW)*.

<sup>145</sup> Also see the NZ case *Hills v Public Trust* (n 96) 282: "My consideration of Ms Novotny's evidence, taken with the other evidence to which I have referred, additionally leads me to not be satisfied, on the balance of probabilities, that the deceased wrote and signed the 2009 handwritten document or that he signed the 2009 typewritten document."

<sup>146</sup> 2013 NSWSC 371.

<sup>147</sup> In *Bolger v McDermott* 2013 NSWSC 919 104 two informal testamentary documents were presented as the last will of the deceased. Neither document was disclosed until many months after the death of the deceased. They were not condoned.

increasingly insignificant role. The appellate division of New Jersey decided in *In the Matter of the Estate of Ehrlich, deceased* that an unexecuted copy of a purportedly executed original document represented the deceased's final testamentary intent and that the document should be admitted into probate.<sup>148</sup> The unsigned copy in which a family member was nominated as beneficiary was found after the death. Other siblings contested the will. The document was a copy of a detailed 14-page document entitled "Last Will and Testament", typed on legal paper with the testator's name and address in the margin of each page. The document did not contain the decedent's signature or any witnesses' signatures but was nonetheless admitted to probate. In *Yazbek v Yazbek*<sup>149</sup> one of deceased's brothers put forward an informal testamentary document alleged to be the deceased's will. The deceased's parents disagreed and maintained that he had died intestate. The brother proposed that the deceased had prepared a Microsoft Word document, titled "Will.doc" on his computer before his death. He found it on deceased's computer. The document was not admitted to probate. In *Re Yu* the testator took his own life after creating a "series of documents" on his iPhone. The Supreme Court of Queensland ruled that the will created on the iPhone was valid.<sup>150</sup>

These cases illustrate how easy it has become to put forward a forged document. La Ratta and Osorio made the following comment regarding the *Ehrlich* case:

"Faced with everything from DVDs to Post-it notes, New Jersey courts are admitting to probate nontraditional "documents" as writings intended as wills. A recent New Jersey Appellate Division decision, *In re Estate of Ehrlich*, is the latest example of the movement away from strict compliance with will formalities."

#### 5.4 Onus of proof

To prove that fraud or forgery in a civil or criminal context has taken place is a matter of fact, and the evidence of eye witnesses and/or handwriting experts is of the utmost importance.<sup>151</sup> As seen above, there is a distinct difference between the onus of proof in criminal and civil cases. In the *Tshona* case Kotze JP stated as follows.<sup>152</sup>

"Yet it is possible that these alleged witnesses may be discovered, and this naturally induces me to be cautious in arriving at the conclusion that the defendant ... has brought himself within the limits of the criminal law. There is no doubt a great difference between the effect of evidence in a civil and in a criminal proceeding. We require stronger proof in the case of the latter, whereas in the former

<sup>148</sup> (n 51). Cf La Ratta and Osorio (n 44) 1 ff and Schlesinger and Katz (n 52).

<sup>149</sup> 2012 NSWSC 594 § 59. Also see Kako (n 36) 58-68. S 8 to dispense with the requirements for the execution of wills. See *Tristram, Application of Eunice Helen* 2012 NSWSC 657 where the court did not admit to probate two documents found on the deceased's computer saved with the description "willcalcs.xls" and "will.doc". Also see *Marley v Rawlings* 2012 EWCA Civ 61 2013 2 WLR 205 the purpose of a signature (proper execution) on a testamentary document was also considered and emphasised.

<sup>150</sup> 2013 QSC 322. Also see Pearson "Australian court permits probate of iPhone 'will'" 17-02-2014 <http://lawprofessors.typepad.com/04-06-2014>.

<sup>151</sup> *Ndolo v Ndolo* Nairobi CACA No 128 of 1995. In this matter it was held that the evidence of an eyewitness was preferable to that of the handwriting experts. Also see *In re Estate of Heiney* 455 Pa 574 318 A 2d 700 (1974); *Diehl v Master of High Court* (n 77) and *Fuller v Strum* (n 7) 109 E-J, where the court was not convinced that the deceased knew the content of the document he signed. Cf Victoria Law Reform (n 79) § 2 97.

<sup>152</sup> (n 1) 37. Also see Corbett *et al* (n 13) 49-50 and Kahn (n 2) 153-154.

a mere preponderance of probability, due regard being had to the onus of proof on the various issues in the suit, will frequently be sufficient to base a judgment upon it.”<sup>153</sup>

Auld, dealing with evidence in case of fraud, states:

“If the witnesses are able to attest that the formalities were complied with, it can be difficult to contest their evidence. In contrast, claims on the remaining grounds are more common: case history shows that the circumstances in which a will is made often give rise to claims on the basis of several alternative grounds. This is particularly so where the testator was elderly and potentially mentally infirm or vulnerable to exploitation.”<sup>154</sup>

Almost all cases referred to in the discussion above involved handwriting experts.<sup>155</sup> As forgery and uttering are factual questions, it is evident that the evidence of handwriting experts is routinely called for to prove the authenticity of a signature.<sup>156</sup> In *Annama v Chetty*, the court confirmed the *function* of a handwriting expert:

“His function is to point out similarities or differences in two or more specimens of handwriting and the court is not entitled to accept his opinion that these similarities or differences exist, but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors.”<sup>157</sup>

The applicant engaged the services of a handwriting expert to analyse and report on the signature. The defendant didn't prove the contrary. A signature could be forged in different ways: The “trace-over method”, is where the sheet of paper containing the genuine signature is placed on top of the paper where the forgery is required.<sup>158</sup> The signature is traced over, appearing as a faint indentation on the sheet of paper underneath.<sup>159</sup> This indentation can then be used as a guide for a signature.<sup>160</sup> The “freehand method” is where the forger, after careful practice, replicates the signature

<sup>153</sup> In *Supple v Pender* (n 7) the outcome of whether the will was a forgery depended on the credibility of the evidence of one witness who is said to have been one of the two witnesses who attested to signature on the will. There was considerable dispute as to how the will came to light. Also see Dumont and Mathers (n 3): “A graphic example was *Humblestone v Martin Tolhurst Partnership* 2004 EWHC 151 (Ch), 2004 All ER (D) 67 where the two supposed witnesses to the testator's signature had signed the will, but the testator had not”.

<sup>154</sup> (n 83). Cf *Nina Kung v Wang Din Shin* 2005 HKCFA 54 § 17-20; *Estate of Raymond Zachry, deceased* (n 91); (Kerridge (n 10) 310 “They will target the potential testator and systematically acquire the knowledge required to forge the will in their name. In these sad situations there is often nobody there to challenge the will”) Jacobs and Lambrechts (n 11) 32 and Jeffreys (n 11).

<sup>155</sup> Mather “The expert examination of signatures” 1961 *Journal of Criminal Law and Criminology* 122 124; Jackson “*Forensic Science*” *Pearson Education* (2007) 235 ff; Croucher and Croucher (n 2) 8-18 for an in-depth investigation into handwriting experts' evidence in alleged forgery cases. Also see *In Re Estate of Cruciani* 986 A 2d 853 (Pa Super Ct 2009) and *Estate of Taruk Ben-Ali Golde v Wilburn* (n 89) 5.

<sup>156</sup> See the cases in n 7 above and *Yokwana v Yokwana* (n 85) § 3; *In re Kirkander* (n 94) 293; *Estate of Raymond Zachry, deceased* (n 91); the *Molefi* case (n 105); the *Levin* case (n 10); the *Haribans* case (n 77) § 34 and the *Diehl* case (n 77) 448.

<sup>157</sup> 1946 AD 142 155-156. Also see Mather (n 155) 122 124; *In re Delaurentiis' Estate* 323 Pa 70 76-77 186 A359 362 (1936); the *Presutti* case (n 91); the *Kirkander* case (n 94) 293 and the *People* case (n 7).

<sup>158</sup> See the *Haribans* case (n 77) § 34: “It is clear from even a layman's perusal of the signatures of the deceased on the disputed will and those of the undisputed signatures of the deceased, that there is a material difference in relation to the first ‘a’ in ‘Haribans’. What is significant about the difference is that it appears in precisely the same way in all three of the deceased's signatures on the *disputed will*” – my emphasis.

<sup>159</sup> § 14. Cf *Yokwana v Yokwana* (n 85) § 3.

<sup>160</sup> Jackson (n 155) 235; Croucher and Croucher (n 2) 8-18; Mather (n 155) 124 and the *People* case (n 7).

by freehand. Although a difficult method to perfect, this often produces the most convincing results.<sup>161</sup> In *S v Maqubela* a handwriting expert, who was asked by the master to assist him before accepting a purported will, testified that the signature on a will dated 2009 had changed from 2003. “If two signatures are identical, one of them is extremely likely to be a forgery.”<sup>162</sup> Also popular is the cut and paste method, which can be done manually or electronically.<sup>163</sup>

Experts can also find positively that the alleged forged signature is in fact the deceased’s signature. In *The Matter of the Estate of Muigai*<sup>164</sup> the allegedly forged will was submitted to the criminal investigations department at the request of the objectors following a criminal complaint. The document was subjected to examination and the alleged forged signature of the deceased was compared with the deceased’s known signatures. The expert document examiner concluded that the signature on the document was that of the deceased. Based on his evidence the court held that the will was not a forgery.<sup>165</sup>

## 6 Conclusion

From the cases discussed above it would appear that testamentary fraud and forgery is on the increase. Furthermore, the cases referred to are only the tip of the iceberg and represent a synopsis of the extent of fraudulent conduct. Kahn’s comment is noteworthy:

“Is forgery or falsification of a will a widespread and largely undiscovered crime? Basically, our will is the underhand will of England created by the Wills Act of 1837, so simple in form and so easy to falsify. All that are really needed are the apparent signatures of the testator and two witnesses. If a plot is considered desirable, well, as Mr Justice Jacob de Villiers put it in his dissenting judgment in *Kunz v Swart*, ‘what is easier than for a person ... to conspire with one or more persons to make a false will without a trace of such conspiracy coming out?’ If a conspiracy is too difficult to arrange, witnesses can be led to believe they are witnessing another document.”<sup>166</sup>

Jones echoed Kahn’s statement in her contribution “Forgery: When is a will not a will?” by saying: “Of course, every year many valid wills are admitted to probate where their contents have come as a surprise to those who expected to receive a legacy.”<sup>167</sup>

Several reasons have been put forward as to why testamentary fraud is on the increase. One argument is that it can be attributed to the current worldwide economic climate, combined with the recent recession, and the fact that estates in our day are commonly worth hundreds of thousands or even millions of rands, pounds or

<sup>161</sup> In the *Froud* case (n 77), in which the forger tried to simulate the deceased’s signature by using a free hand. Also see *Rex v Dlamini* (n 60); Mathyer (n 155) 123; Jackson (n 155) 235.

<sup>162</sup> (n 54). The expert concluded that the signature on the will was not a genuine signature, but a free-hand simulation. Also see the *Raymond Zachry* case (n 91).

<sup>163</sup> In the *Skelton* case (n 68), in which the signature was cut and pasted. Also see the *Grabrovaz* case (n 7) § 31; the *Haribans* case (n 77) and *Croucher and Croucher* (n 2) 4.

<sup>164</sup> (n 54).

<sup>165</sup> Also see the *Yokwana* case (n 85); the *Hawes* case (n 80) and the *Levin* case (n 10).

<sup>166</sup> Kahn (n 2) 152.

<sup>167</sup> Kahn (n 3) 138; *Cf Dale* (n 1); *Croucher and Croucher* (n 2) 1-2; *Bracegridle* (n 6); *Jeffreys* (n 11); *Wood-Bodley* (n 3) 11, who remarks that in South Africa “fraud is rife” and *Dumont and Mathers* (n 3), who indicate how easy it is to forge a will in England.

dollars. This makes the estate assets a tempting target for fraudsters.<sup>168</sup> Many people are financially distressed and begin to depend on an inheritance as part of their own financial plan. Another reason is that society has become more litigious in recent years.<sup>169</sup> Furthermore, the wider availability of will-drafting software and websites encourages people to make online wills at home, which also makes it easier for someone else to create a forged will on behalf of the deceased.<sup>170</sup>

Indisputably, in jurisdictions where underhand and homemade wills are the chosen form of execution, the likelihood of fraudulent acts is much higher.<sup>171</sup> Shakespeare and Bracegirdle opine that homemade wills are in principle contributing to the increase in the number of fraud allegations.<sup>172</sup> In this regard Ryznar and Devaux, in a comparative study of fraudulent conduct regarding wills, make an interesting observation:<sup>173</sup>

“In contrast, France’s legal system has nearly eliminated will contests on the grounds of undue influence and fraud. In French wills law, very few cases arise involving litigation of the validity of a will, and, of those that do, all concern issues of conformity with formalities rather than lack of capacity, fraud, or undue influence. While France is currently addressing other issues in its wills law, those related to will contests have largely been resolved.”<sup>174</sup>

It is submitted that contributing to the socio-economic and easy will-making process mentioned above is the current move towards the simplification of formalities. When Osborn, in 1937, put the blame for the increase in fraud cases outright on easy-going requirements in many states of America, he hit the nail on the head. He goes so far as to comment:

“If the laws of certain states do not actually encourage forgery of wills and codicils to wills, they certainly make success easier for those who seek to profit by fraudulent documents of this kind. Easy-going requirements in many states regarding the physical form of wills also open the door to fraud. In certain states a will may be made up of several disconnected, undated and unnumbered pieces of paper.”<sup>175</sup>

<sup>168</sup> Jones (n 10 and 89). The size of the average estate in the UK has risen from £150 000 to £265 000 in a decade. According to Teitelbaum (n 58) the motive for estate theft is simple: “MONEY. One signature on a piece of paper is all it takes to shift unlimited amounts of wealth from one person to another. The temptation is often too much to resist. ... Estate theft happens too often because of a number of factors.”

<sup>169</sup> Ryznar and Devaux (n 11) 2 n 5 “The United States is the home of capacity litigation.”

<sup>170</sup> Ryznar and Devaux (n 11) 2 indicate that contested wills in the US affect up to 3% of all wills. See Kahn (n 2) 152.

<sup>171</sup> Lang (n 33) 113. If the holographic will is written, dated and signed by the testator it can be guaranteed to be authentic, but as soon as non-compliance with these requirements is excused the problem of forgery can increase here as well.

<sup>172</sup> Shakespeare (n 1) opined that figures released by the court service showed that the number of high court cases involving disputed wills rose 175% in 2011, and Bracegirdle (n 6) remarked: “The thing that all these fraudulent crimes have in common is that they involve homemade wills. Without an independent party such as a solicitor to prove the validity of a will, it usually comes down to one person’s word against another. This can mean going to court and putting your family’s private affairs in a public arena, where a judge will decide if the will is real.” *Cf* Sonnekus (n 10) 92, who also warns against homemade wills.

<sup>173</sup> Ryznar and Devaux (n 11) 17 says that when the underhand will is compared with the notary will it is clear that as far as securing authenticity is concerned the notary will, although more expensive, is a much more protected option.

<sup>174</sup> Also see Pintens (n 30) 62; Reid, De Waal and Zimmermann (n 17) 449-450 and Scalise (n 17) 362 and (n 35) 110. Shakespeare (n 1): “The best way to avoid your will adding to these statistics is to use a solicitor to prepare your will.”

<sup>175</sup> (n 1) 122.

The warning by Selke J in *Ex parte Sewnanden: in re Estate Poolbussia* against testamentary fraud is still very relevant to the current predicament. It emphasises the importance of a properly signed will:

“But it is hardly conceivable that, at a very early stage, it was not recognised that the making of provisions of the *post mortem* disposition of a man’s property furnished exceptional opportunities for *chicanery and fraud*. At all events, it is apparent that in the course of time, the religious significance of the matter tended to fade more and more into the background, and that the rules and formalities became more and more directed to *curtailing opportunities for malpractice and fraud*, and to securing that, so far as possible, the will reflected the genuine and freely made dispositions of the testator. ... Thus, it seems, the formalities ... represent the precautions considered necessary and adequate to protect the testator, and to safeguard the validity of his dispositions.”<sup>176</sup>

Although the excusing of formalities (dispensing power) could be seen as an innovative initiative, the direction the judiciary has taken in the expansion of the principles unfortunately appears to be another reason for the concurrency of testamentary fraud and forgery. Excusing non-compliance with formalities to the point where an unsigned document can easily lead to testamentary deception does not help to secure authenticity after the death of a testator. Sherwin made the following negative remark regarding the dispensing power:

“For reasons to be developed, this compromise is ultimately misguided, or at least far less promising than [*sic*] it first appears. My conclusion is that there is no escape, in this context and probably in others as well, from the choice between serious rule enforcement and no rule enforcement.”<sup>177</sup>

Between the execution of a will and admitting a will to probate or for administration lies the undesirable possibility of fraud and forgery. Over time, the importance of formalities for the execution of wills have been shifted to the background as the intention of the “deceased testator” became the overriding factor to decide whether a will is valid. This has resulted in uncertainty and legal confusion as to what the role of formalities is.<sup>178</sup> Although much can be said against formalism and strict interpretation of formalities, it cannot be argued that the signature, of either the testator or witnesses, could be negated and has lost its importance without more.<sup>179</sup> La Ratta and Osorio concluded:

“*Ehrlich*, 427 NJ Super at 74. The appellate court also noted that, as late as 2008, the decedent “repeatedly orally acknowledged and confirmed the dispositional contents therein to those closest to him in life.” The court further concluded that the fact that the document was only a copy of the original sent to the decedent’s executor was not dispositive, since NJSA § 3B:3-3 does not require that the document be an original. The court determined that the evidence was compelling as to the testamentary sufficiency of the document, so as to rebut any presumption of revocation or destruction due to the absence of the original. The holding in *Ehrlich* demonstrates that the erosion of the requirements of testamentary formalities is well underway. After all, who would have foreseen that an *unsigned copy* of a will could be admitted to probate?”<sup>180</sup>

<sup>176</sup> 1948 1 SA 539 (D) 543-5 (my emphasis). Also see Croucher and Croucher (n 2) 2.

<sup>177</sup> (n 19) 454.

<sup>178</sup> Lang (n 33) 113: “The issue has been posed by academics and by Law Reform Commissions whether the solution to the problems illustrated in the judicial decisions with reference to wills formalities is by relaxing the formalities, or by providing a dispensing power, or both.”

<sup>179</sup> The most viable way to ensure that a will is valid remains proper execution. *Cf* Kolkman (n 30) 166, who stated that without a signature nothing has actually been declared, and Croucher and Croucher (n 2) 2, who emphasise that appropriate signing contributes to prevent fraud and negates the possibility of a contested will.

<sup>180</sup> (n 46).



Is it possible to turn the situation around? Is there something that can be done to limit and prevent will fraud and forgery of wills? Although academics and lawyers are outspoken about the increase in instances of fraud and forgery, the problem has not been seriously addressed by the legislator in jurisdictions under attack. A general warning through lawyers or academics alike is not enough to resolve the problem. The onus is therefore currently on will-drawers and potential testators to take precautions when executing a will in anticipation of possible fraud, both during execution of a will and even after the death of the testator.<sup>181</sup>

One cautionary measure that can be reconsidered by the legislators is the option of a more secure form of will, as an alternative to the current underhand will. This has already been suggested by several stakeholders.<sup>182</sup> Jurisdictions where the notary will currently is not the preferred choice of form seem reluctant to accept it due to possible expenses and inaccessibility for testators.<sup>183</sup> Another option that has been suggested by several scholars is a registry system where wills can be deposited after execution. Although this does not interfere with the execution process it can contribute to validation. Sonnekus also poses the question as to the implementation of a National Registry: "all in all registration is merely another way to ascertain that the last will of the testator is honoured. With computerised technology there seems to be no sound reason why a central register could not be set up in South Africa."<sup>184</sup>

It seems that a registry is the direction most stakeholders are heading for. Recently an online website known as the "South African Registry of Wills and Testaments" was launched in South Africa. It identified a need in the current legal system pertaining to the administration of deceased estates.<sup>185</sup> In England a spokesman for Certainty National Will Registry, which registers wills, prepared by qualified and regulated professionals, said he believes the use of the will register would make forgeries almost impossible.<sup>186</sup> Australia has a similar system.<sup>187</sup> All these registry systems are currently voluntary, but at least it is a start in the direction of more control over wills to the extent that fraud and forgery can be curtailed.

In conclusion, it is submitted that the question is no longer whether there is a will that won't be accepted due to non-compliance with a formality or some formalities. The question has become: "What happened to the formal will"? In the flight from formalities did jurisdictions forget what the reason for the flight was? The flight

<sup>181</sup> Schoeman-Malan (n 82) 705; Shakespeare (n 1) and Bracegridle (n 6). Lang (n 33) 109: "If wills formalities have a functional purpose then it is wrong in principle to dispense with those formalities which are considered important. Furthermore, the existence of a dispensing power will tend to reduce the importance of the formalities and might encourage testators to ignore them. It will tend to create and authorise a multiplicity of will forms, including holograph wills." Cf Wood-Bodley (n 3) 11 and 12 and Corbould (n 52).

<sup>182</sup> Kahn (n 3) 138 ff; Wood-Bodley (n 3) 12; Shakespeare (n 1); Schoeman-Malan (n 82) 702.

<sup>183</sup> See Reid, De Waal and Zimmermann (n 17) 469. It seems that it would not be viable to make notary wills obligatory. The Law Society of Scotland also launched a campaign calling on the government to make will-writing a reserved activity. The purpose of this would be to regulate all will-writers and provide greater protection for the general public when making wills. Cf <http://www.lawscot.org.uk/> (17-06-2014).

<sup>184</sup> (n 10) 92. Also see Shakespeare (n 1) and Schoeman-Malan (n 82) 702.

<sup>185</sup> See <http://www.sarwt.org/for-the-professional>. They feel that registration will ensure that a person's will does not go undetected following his or her passing, and ensuring that one's last wishes are adhered to.

<sup>186</sup> Shakespeare (n 1) Certainty "National Wills register and Will Services" <http://www.certainty.co.uk/> (18-06-2014).

<sup>187</sup> For Austria see [https://theaustralianregistry.com.au/willregistry/why\\_register](https://theaustralianregistry.com.au/willregistry/why_register) and Victoria Law reform commission (n 79) § 2 99.

was never supposed to be a flight from authenticity to fraudulent acts. The flight was to rescue documents purporting to be a will but not complying with the strict formalities. After all is said and done the question still remains whether there is a valid will. If there is a suspicious document a long litigation process looms. From this document the intent of a deceased person has to be drawn. It seems that this is not enough.

#### **BEDROG EN VERVALSING VAN DIE TESTAMENT OF HANDTEKENING VAN DIE TESTATEUR: DIE VLUG WEG VAN FORMALITEITE NA GEEN FORMALITEITE**

Bedrog en vervalsing is wêreldwyd 'n bekende misdryf. By die opstel en verlyding van testamente kom bedrog en vervalsing vry algemeen voor deurdat óf die testament óf die handtekeninge van die erflater en/of getuies vervals word. In hierdie artikel word die toename in bedrieglike handelingte ten aansien van 'n testament, en meer spesifiek met betrekking tot vervalsing van handtekeninge, onder die loep geneem.

Die vraag word eerstens gevra of daar 'n toename in vervalsing van testamente is wat deur uitgifte van die vervalste dokument as bedrog manifesteer. In die bespreking word die voorkoms van bedrog en vervalsing by onderhandse testamente, wat "tuisgemaakte" en, meer onlangs, ook holografiese testamente insluit, met die notarieel verlyde testament vergelyk. Daar word geredeneer oor die afwatering van streng formaliteitsvereistes deur wetgewing in sekere jurisdiksies en die verlening van 'n kondonasiëbevoegdheid in die verband aan die howe.

Die toename van bedrog in jurisdiksies wat deur die Engelse *Wills Act* van 1837 beïnvloed is, word beoordeel en die impak en voorkoms van bedrieglike handelingte op testamente ondersoek. In die proses om wêg te beweeg van die gedetailleerde vormvereistes, het die klem verskuif van formalisme by verlyding van die testament na die bedoeling van die testateur wat na die dood bepaal word. Verskeie jurisdiksies het die formaliteitsvereistes verslap en in sommige gevalle 'n reddingsboei in die vorm van 'n kondoneringsbevoegdheid van die howe verleen.

Nadat die probleem geïdentifiseer is, word moontlike oplossings oorweeg en tot die gevolgtrekking gekom dat die instelling van 'n notariële testament moontlik nie aanvaarbaar vir wetgewers is nie en dat in die alternatief 'n stelsel van registrasie van testamente oorweeg behoort te word. Uit die evaluasie blyk dit dat die vereenvoudiging van formaliteite en kondonering van nienakoming van formaliteitsvereistes tog meewerk tot die algemene voorkoms van en toename in gerapporteerde sake waarby ook bedrog ter sprake mag wees. Die verskoning van gebreke met die nakoming van formaliteitsvereistes het ontwikkel tot op die punt wat 'n "dokument" in enige vorm van skrif oogluikend gekondoneer word en daar met alle handtekeninge weggedoen kan word.