THE DILUTION BY THE COURTS OF THE GENERAL UNWORTHINESS PRINCIPLE

CHAPTER 1

1 Introduction

Generally all persons, born or unborn, natural or juristic and regardless of their general legal capacity, can validly take benefits conferred upon them by will or on intestacy.[1] In order to benefit in terms of the Intestate Succession Act[2] you have to qualify as an intestate beneficiary and be able to inherit at the time of death of the testator.[3] A testate beneficiary will receive a benefit when he[4] is nominated in the will of the testator.[5] The capacity to receive a benefit is determined at the time of death of the testator, unless the falling open of the estate and accordingly vesting of rights are postponed.[6] In South Africa we have absolute freedom of testation, with no forced heirship rules. A testator can accordingly nominate whomever he pleases to benefit in terms of his will. The capacity to benefit must exist at the time of the vesting of rights and when the beneficiary accepts the benefit.[7] Should it be alleged that a person does not have the capacity to benefit, the onus would be on the person making allegation to proof the alleged disqualification.[8]

1 Corbett, Hofmeyr & Kahn *The South African Law of Succession* 2nd ed (2001) 79; De Waal and Schoeman-Malan *Law of Succession* (2008) 4th ed 114.
2 Act 81 of 1987.
3 Schoeman "Bevoegdheid van persone om erfregtelik bevoordeel te word" 1992 *De Jure* 39.
4 The masculine includes the feminine unless the context indicates otherwise.
5 Schoeman (1992) *De Jure* 39.
6 De Waal and Schoeman-Malan (2008) 114.
7 Corbett *et al* (2001) 79; Schoeman 1992 *De Jure* 39.
8 Corbett *et al* (2001) 80; De Waal and Schoeman-Malan (2008) 114.
Yassen v Yassen 1965 (1) SA 438 (N); *Casey NO v The Master* 1992 (4) SA 505 (N).

In terms of South African law of succession (testate and intestate) there are however certain statutory[9] and common law[10] principles that could disqualify a beneficiary from receiving a benefit. The effect of these principals is that a person may not be entitled to receive a benefit from a will or in terms of intestacy.[11] Some statutory provisions also apply in testate succession.

1 1 Statutory disqualifications

Prior to the operation of the Law of Succession Amendment Act in 1992,[12] a person who attested the execution of a will as a witness or who signed the will in the presence and by direction of the testator or the person who is the spouse of such person was disqualified from taking any benefit under that will.[13] This disqualification applied to the nomination of executor, guardian and trustee. In terms of the common law the writer of the will was disqualified from benefiting under the will, unless the testator confirmed the bequest after execution of the will.[14]

The South African Law Commission[15] recommended that the relevant sections be repealed. The Law of Succession Amendment Act[16] enacted the current section 4A of the Wills Act,[17] which deals with the disqualifications in respect of a witness of a will. These provisions further modified the common law slightly in that it would no longer be possible for the writer of a will to receive a benefit as section 4A(2)(a) clearly sets out

9 See chapter 2 for a discussion hereof.
10 See chapter 3 for a discussion hereof.
11 De Waal and Schoeman-Malan (2008) 114.
12 43 of 1992.
13 Sec 5 of the Wills Act, now repealed by sec 8 of the Amendment Act; De Waal and Schoeman Malan (2008) 122.
14 Corbett *et al* (2001) 86; Schoeman 1992 *De Jure* 45; De Waal and Schoeman-Malan (2008) 122.
15 The South African Law Commission Project 22 *Review of the Law of Succession* June (1991).
16 Act 43 of 1992.
17 7 of 1953.

the circumstances which will enable a Court to declare a person worthy to inherit.[18]

Although section 4A of the Wills Act appears to be without problems the interpretation of the section was in dispute in the cases of *Theron and Another v Master of the High Court*[19] and *Blom v Brown*,[20] where the Court confirmed that what section 4A(1) seeks to achieve, consistent with the common law, is to permit a beneficiary who would otherwise be disqualified from inheriting, to satisfy the Court that he did not defraud or unduly influence the testator in the execution of the will.[21]

1 2 Common law unworthiness

It is a recognised principle of our common law that a person who intentionally and unlawfully murders a person is incapable of taking any benefit under the will of the deceased or in terms of intestate succession.[22]

Roman-Dutch law stipulates that a person who has intentionally caused the death of the deceased or the deceased's *conjunctissimus*[23] is not worthy of receiving any benefit from the estate of the deceased.[24] This is specific unworthiness and known as the so-called "bloody hand" principle.[25]

18 Corbett *et al* (2001) 79.
19 2001 3 All SA 507 (NC).
20 2011 3 All SA 223 (SCA).
21 Pace *et al* 2012 Service Issue 16 32(2).
22 Skeen "Unworthiness through negligence*"* *SALJ* 1993 446
23 Defined as the deceased's spouse, children and parents in *Ex Parte Steenkamp and Steenkamp* 1952 1 SA 747 H.
24 De Waal and Schoeman-Malan (2008) 119; Van der Walt and Sonnekus "Die Nalatige Bloedige hand-neem dit "erffenis"?*"* 1981 *TSAR* 30.
25 Schoeman-Malan "Privaatregterlike perspektief op onwaardigheid om te erf – die uitwerking van gesinsmoorde*"* 2013 *Litnet Akademies* 114.

The general principle of unworthiness stipulates that no person may be enriched by his own unlawful conduct.[26]

Corbett and others summarises the principle as follows:[27]

> "*The basis of the grounds of unworthiness mentioned by the authorities is that to allow the beneficiary to take the benefit would offend against public… and the general principle that no one should be permitted to benefit from his or her own wrongful act or derive benefit from conduct which is punishable."*

According to Corbett and others the Court should not be limited to the known and accepted grounds of unworthiness, but should be allowed to disqualify a person based on the specific circumstances taking into account the grounds of public policy.[28] The judgments clarifying the common law unworthiness are few and far between. This study will set out the decisions that have been made by our Courts.

1 3 Aim of Study

The aim of this research is firstly to determine if the legislature has sufficient or insufficient measures in place to ensure that undue influence and fraud is avoided without inhibiting on freedom of testation. A further question that arose is whether the Courts have the power to develop the common law principles of unworthiness by taking into account the shift in public policy over time. As stated above where the murder was intentional the answer is simple, but as soon as the question of negligence comes into play, certain problems may arise. The issue of benefits due from outside the estate such as maintenance, legal costs, insurance payments and benefits due as a

26 Schoeman-Malan 2013 *Litnet Akademies* 114.
27 Corbett *et al* (2001) 79; *Ex Parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) at 752G-H.
28 Corbett *et al* (2001) 81; Pillay v Nagan 2001 SA 410 (D)

result of a marriage in community of property will be analysed and discussed at the hand of case law and opinions of modern authors.

This dissertation attempts to answer these questions and provide solutions and recommendations.

1 4 Methodology

It is intended to analyse the current position in South African law with regards to the capacity to benefit. A critical analysis at the statutory and common law disqualifications will be conducted and suggestion to improve the current position will be referred to.

A comparative study on the current law in England and the Netherlands will further be undertaken to ascertain whether the South African position can be developed. Apart from the forced heirship rules in the Netherlands, the country's legislation clearly sets out the principles of unworthiness. England has enacted provisions with regard to the forfeiture of a benefit and has developed clear principles on how the provisions of the Forfeiture Act of 1982 must be interpreted and applied by the Courts.

The duty of the Master of the High Court and the executor to enforce the principle of unworthiness during the administration process will further be analysed. The executor has a fiduciary duty to, in the first instance, act in accordance with the provisions of the will of the deceased and secondly, in terms of the provisions of the Administration of Estates Act.[29] The executor is further obligated to act in the interests of the beneficiaries under the supervision of the Master of the High Court. The Master of the High Court does not have the authority to decide whether someone is unworthy to inherit without the interference of the Court.[30]

29 Act 66 of 1965.
30 *Ferreira v The Master of the High Court* 2001 3 SA 365 (O).

CHAPTER 2

STATUTORY DISQUALIFICATIONS

2 1 Introduction

Presently, the provisions of section 4A(1) of the Wills Act[31] deal with the competency of persons who was involved in the execution of a will to inherit in terms thereof. This section is primarily aimed at the prevention of fraud and undue influence.[32] The present day statutory provisions replaced the preceding disqualification provisions previously contained in section 5 and 6 of the Wills Act by the enactment of the Law of Succession Amendment Act[33] on 1 October 1992. The said statutory exclusions are further preceded by so-called common law disqualifications which to a certain extent remain applicable in as far as these principals have not been amended by the present day provisions of the Wills Act.

2 2 Common law disqualifications

Apart from the general rule that all persons, born or unborn, natural or juristic, regardless of the legal capacity can receive a benefit from a will or on intestacy, there were certain common law disqualifications.[34]

In terms of common law, any person who wrote out a will on behalf of the testator is disqualified from receiving any benefit therefrom.[35] A person to

31 Act 7 of 1953.
32 Du Toit "Criticism of the testamentary undue influence doctrine in the United States: Lessons for South Africa?" 2013 *JCLS* 530.
33 Act 43 of 1992.
34 Corbett *et al* (2001) 79.
35 Voet 34 8 3; Van der Merwe and Rowland *Die Suid Afrikaanse Erfreg* (1990) 2nd ed 212; Schoeman 1992 *De Jure* 45.

whom the will was dictated to and who subsequently typed out the will was likewise disqualified, but not the person who dictated the will.[36] However, the writer's parents, spouse to whom he was married out of community of property to and his children were entitled to receive a benefit from the will he had written.[37]

The principal behind the common law disqualifications are to prevent fraud and falsity and accordingly where there was no reason to suspect any fraudulent activities, the disqualification was not applicable.[38] There are however two concessions to the common law rule. Firstly, the disqualification did not apply if the testator confirmed the bequest to the said writer after the execution of the will, either orally or in writing.[39] In *Smith v Clarkson,*[40] Judge Kotzé states the following:

> "…*from all of which it clearly appears that confirmation by the testator or testatrix can take place* ***dehors*** *or apart from the will itself; as for instance in a subsequent and independent codicil or by other satisfactory proof of confirmation*".

Such confirmation should however be attended to immediately after the will comes into existence,[41] but it is not necessary for the confirmation to be on the actual document.

Secondly, if the writer would have been an intestate heir had the person died without a will, he would be entitled to receive a benefit from the will.[42]

36 Schoeman 1992 *De Jure* 46.
37 Schoeman 1992 *De Jure* 46.
38 Van der Merwe and Rowland (1990) 212.
39 Van der Merwe and Rowland (1990) 213; *Ex parte Thole* 1968 1 S.A. 158; Schoeman 1992 *De Jure* 45; De Waal and Schoeman-Malan (2008) 122.
40 1925 AD 510.
41 Van der Merwe and Rowland (1990) 213.
42 De Waal and Schoeman-Malan (2008) 122-123; Schoeman 1992 *De Jure* 46.

It is however not certain if the writer would be able to take more than his intestate share in terms of the testamentary bequest in these circumstances.[43]

The common law position in respect of mutual wills was discussed in detail in the matter of *Van Rensburg v Van Rensburg*[44] and the Court confirmed the view in *Thienhaus v The Master and Others*[45] that the common law disqualification will apply to the writer of a mutual will.

2 3 Statutory position prior to 1992

Section 5 of the Wills Act (now repealed by Section 8 of the Law of Succession Amendment Act)[46] states the following:

> *"A person who attests the execution of any will or who signs a will in the presence and by direction of the testator or the person who is the spouse of such person at the time of attestation or signing of the will or any person claiming under such person or his spouse, shall be incapable of taking any benefit whatsoever under that will."*

This section remains applicable to wills executed after 1 January 1954 and where the testator passed away before 1 October 1992.

The spouse referred to in section 5 of the Act is the spouse to whom the witness was married at the time of the attestation or signing of the will. The

43 Schoeman 1992 *De Jure* 46.
44 1963 1 SA 505.
45 1938 CPD 69.
46 Act 43 of 1992.

question remains whether that spouse will still be disqualified to inherit should he be divorced from the witness at the time of the death of the testator, when vesting takes place.[47]

In terms of section 6 of the Wills Act, before the 1992 amendments, a nomination as executor, administrator, trustee or guardian are also regarded as a benefit and should a spouse of a nominee attest the execution of the will, the nomination will be null and void.[48] The legislature did not specify, in section 6, which spouse of the witness cannot act as an executor, administrator, trustee or guardian.[49]

The Wills Act, prior to 1992, did not specifically indicate what the position would be if more than two witnesses attested and signed the will. According to Van der Merwe and Roland,[50] the Courts will adopt the view that it does not make a difference and that all the witnesses who had the intention to sign as a witness will be disqualified from inheriting, even if more than two competent witnesses signed.[51]

De Waal[52] describes the position prior to the 1992 amendments as unsatisfactory. In the first instance, the witness, the person signing on behalf of the testator and their spouses were disqualified in terms of the provisions of section 5 and 6 of the Wills Act, whereas the so-called writer of the will was disqualified in terms of common law. This differentiation had the irrational effect that the first class of persons (witnesses and the person signing on behalf of the testator) being absolutely disqualified, where the second class (writers) have the benefit of certain exceptions in terms of

47 Van der Merwe and Rowland (1990) 210.
48 De Waal and Schoeman-Malan (2008) 122.
49 Beinart "Testamentary Form and Capacity and the Wills Act 1953" *SALJ* 287.
50 Van der Merwe and Rowland (1990) 211.
51 Also see Schoeman 1992 *De Jure* 45.
52 De Waal "The Law of Succession (including Administration of Estates) and Trusts" 2011 *Annual Survey* 1047.

common law. Reform was accordingly necessary and came in the form of the promulgation of section 4A of the Wills Act in 1992.

2 4 Statutory position after 1992

The South African Law Commission ruled that the disqualification rules contained in sections 5 and 6 of the Wills Act impede on the intention of the testator rather than preventing fraud, as intended.[53] The Commission poignantly concluded that, in most instances, the person whom the testator trusts and wishes to benefit is the person whom he would ask to write out the will on his behalf and/or witness the will.[54] The Law Commission accordingly recommended that the disqualification of persons involved in the execution be removed from the Wills Act and that such persons should be declared worthy of receiving a benefit. The recommendation was however declined by the legislature and instead they enacted the Law of Succession Amendment Act which repealed sections 5 and 6 of the Wills Act and replaced it with section 4A. The new section is titled "*competency of persons involved in execution of will*", which according to Paisley and De Waal is a somewhat misleading title, as the section does not seek to remove the capacity of the person as a witness, but rather disqualify him from receiving a benefit in terms of the will.[55]

Section 4A(1) reads as follows:

> *"Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out a will or any part thereof in his own handwriting, and the person who is the spouse of such*

53 Schoeman 1992 *De Jure* 46 – 47.
54 Schoeman 1992 *De Jure* 46.
55 Paisley and De Waal "Forfeiture of bequests to witnesses in South Africa and Scotland*"* 2002 *Stell LR* 198.

person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will."

The abovementioned amendment to the Wills Act has extended the original section 5 to include a person who writes out the will in his own handwriting. It is clear from the wording of the Wills Act that should a person type out the will from dictation he would qualify to inherit. The disqualification will however be applicable if the writer of the will wrote out any part of the will and not just the specific part that would benefit him. Although this disqualification did not form part of the Wills Act before the 1992 amendment, it was always a disqualification in terms of common law.[56]

The type of benefit affected by the disqualification contained in section 4A(1) of the Wills Act is defined in wide terms and will include so-called outright bequests or gifts and also instances where the witness is nominated as an executor, trustee or guardian.[57]

Sections 4A(2) of the Wills Act states the following exceptions:

"*(2) Notwithstanding the provisions of subsection (1) –*

(a) a court may declare a person or his spouse referred to in subsection (1) competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will;

(b) a person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator had died intestate shall not be thus disqualified to receive a benefit from that will:

56 De Waal 2011 *Annual Survey* 1047.
57 Section 4A (3) of the Wills Act 7 of 1953; Paisley and De Waal 2002 *Stell LR* 190.

Provided that the value of the benefit which the person concerned or his spouse receives, shall not exceed the value of the share to which that person or his spouse would have been entitled in terms of the law relating to intestate succession;

(c) a person or his spouse who attested and signed a will as a witness shall not be thus disqualified from receiving a benefit from that will if the will concerned has been attested and signed by at least two other competent witnesses who will not receive any benefit from the will concerned."

A Court will only declare a person or his spouse fit to benefit if one of the exceptions in subsection (2)(a)–(c) finds application. It is clear from the Wills Act, as amended, that the common law exception will no longer allow a writer of the will to take a benefit thereunder.[58]

It is clear from the exception in subsection (2)(a) that a Court order is necessary to allow the benefit to devolve on the person. There is however no limit on the benefit that can devolve. In this instance the onus of proof lies with the person excluded from benefiting in terms of section 4A(1) and grants the Court a discretionary power to allow the benefit. Despite the discretionary nature of this provision, this remedy is described as a so called "all or nothing" remedy and leaves no room for degrees or levels of fraud or undue influence which may grant the Court the power to accordingly reduce the benefit that may be received.[59] This exception will only be applied if absolutely no fraud or duress were present.

58 If the testator confirmed the bequest to the said writer after the execution of the will, either orally or in writing.
59 Paisley and De Waal 2001 *Stell LR* 195.

In terms of subsection (2)(b) no Court order is required, but the value of the bequest is limited to the amount he would have been entitled to as an intestate heir in terms of intestate succession. The reasoning behind this specific exception is to ensure that the basic needs of the surviving family members are met should they have been involved in the execution of the will.[60] This provision according to Paisley and De Waal,[61] despite being based upon a simple principal, is difficult to apply due to the following reasons:

(i) In the first instance the Intestate Succession Act[62] determines that a person's intestate share will be calculated as at the date of death and not as at the date of execution of the will of the deceased. The difficulty here is that should the amount an intestate heir is entitled to in terms of the Intestate Succession Act be amended in the time period between when the will was executed and the date of death, it can possibly result in the beneficiary receiving an amount equal to what he would have received in terms of the will.

(ii) Secondly, a complication arises in instances where the relevant testamentary bequest is not in monetary terms. This could create difficulties when comparisons need to be made to an intestate share expressed in monetary terms.

(iii) Thirdly, the fact that benefits in terms of intestacy are free of suspensive and resolutive conditions may also complicate the required comparison between the testate and intestate benefit.

(iv) In the last instance, Paisley and De Waal highlight the possibility that this provision may result in an incentive for the witness to influence the testator as he will still be entitled to an intestate benefit if such benefit is equal to the benefit that he would have received in the

60 De Waal "The Social and Economic foundations of the law of succession" Vol 8 1997 *Stell LR* 164.
61 Paisley and De Waal 2002 *Stell LR* 193.
62 Act 81 of 1987.

relevant will.[63] If the intestate entitlement is lower than the bequest in the will, the witness will be entitled to receive the full benefit in terms of the will.[64]

In terms of subsection (2)(c) no Court order is required as long as there are sufficient other competent witnesses. Section 4A(3) confirms that the nomination of a person as executor, trustee or guardian is regarded as a benefit and therefore any person who are nominated as such or the spouse of such person shall be disqualified if one of the functions on section 4A(1) was performed.[65]

2 5 Case Law

In the matter of *Blom v Brown*[66] the Court was granted the opportunity to interpret the provisions of section 4A. In this case the deceased dictated his will which was then written by the first respondent, his spouse, in her own handwriting. The will was duly signed and witnessed and the first respondent was the beneficiary of the residuary estate. On lodging the will the first respondent was informed by the Master of the High Court that she was disqualified from inheriting in terms of section 4A of the Wills Act. The first respondent applied to Court and was granted an order in her favour that she be declared fit to inherit. The first and second appellants (the daughters from the deceased's first marriage) lodged an application to rescind the aforementioned order and requested a further order declaring that the first respondent can inherit, provided that the benefit does not exceed a child's share as per the Intestate Succession Act. In terms of section 4A(1) read with subsection (2)(b) of the Wills Act, a person disqualified from receiving a benefit under a will, may be declared

63 Paisley and De Waal 2002 *Stell LR* 192 – 194.
64 Paisley and De Waal 2002 *Stell LR* 194.
65 De Waal and Schoeman-Malan (2008) 124.
66 2011 3 All SA 223 SCA.

competent to inherit if that person would have been entitled to inherit in terms of the laws of intestate succession.

The appellants argued that subsection (2)(a) applies to non-family members and subsection (2)(b) in turn applies to family members. The Court however held that both sections apply to any person who is disqualified in terms of subsection (1) or the spouse of that person. The general principle as set out in subsection (1) is subject to the qualification and exceptions in subsection (2).[67] The Court stated that subsection (2)(a) will not only be applicable if subsection (2)(b) is not. If it was the intention of the legislature that a person contemplated in subsection (2)(b) was to be excluded from subsection (2)(a) then it would have been clear from the text of the Wills Act. The Court noted that what section 4A seeks to achieve is, to allow beneficiaries who have been disqualified due to the performance of any of the functions stipulated in section 4A(1), to satisfy the Court that they or their spouses did not defraud or unduly influence the testator in the execution of the will. This is in line with the common law position.

The aforesaid judgment accordingly granted the Supreme Court of Appeal the opportunity to clarify how section 4A must be interpreted and further highlighted the fact that statutory formalities cannot stand to inhibit the true intention of the testator if good faith is proved on the side of the disqualified person.[68]

In *In re Estate Barrable*[69] the testator bequeathed the usufruct of his estate to his wife and on her death to his five daughters. The testator's eldest daughter had written out the will in her own handwriting based on a draft prepared by the deceased. The will was duly executed, properly signed and witnessed. The executors of the estate brought an *ex parte* application

67 2011 3 All SA 223 SCA para 19.
68 De Waal 2011 *Annual Survey* 1050.
69 1913 CPD 364.

permitting them to administer the estate in terms of the will. The facts were not in dispute and it was admitted that the daughter acted in good faith and only complied with her father's request to assist him. The other beneficiaries under the will agreed to renounce any benefit that would accrue to them from the forfeiture of their sister's share. The Court noted that the Roman Law is very firm on this and that any benefit in terms of a will in favour of a person in whose handwriting the will was written shall be disregarded. Even though the writing was done at the request and direction of the testator, it was seen as *quasi-falsum* and punishable. The Court confirmed that the reason for the rule was to prevent fraud and falsity and to avoid any undue influence over people in bad health or a weak state of mind.

The Court further defined the exception that if the writer would have been a lawful beneficiary in terms of intestacy, she will be entitled to inherit exactly as if the testator had nominated her as an heir in his own handwriting. The Court noted that the *Praetor's Edict*[70] provided that the writer will not be eligible to receive a share bigger than what he would have received on intestacy. However, due to the fact that the daughter clearly acted in good faith and as her father's *amanuensis* at his special request, the Court decided that the daughter could receive what was bequeathed to her in terms of the will as it was less than what she would have received on intestacy.

In the matter of *Theron and Another v Master of the High Court*[71] the applicant and her predeceased husband executed a joint will. The Master of the High Court however refused to accept the said document due to the fact that the applicant had not signed one of the pages of the will. In this regard, the Court held that there was no reason not to declare the will to be valid in terms of section 2(3) of the Wills Act.

70 1913 CPD 364.
71 2001 3 All SA 507 (NC).

In addition to this, the Court had to decide whether the applicant's son was competent to receive a benefit under the will, since he signed the will as a witness. The provisions of section 4A(1) accordingly disqualified him to receive a benefit. The Court considered the given facts in light of the provisions of section 4A(2)(a), which stipulates that a Court may declare a person competent to inherit if it is satisfied that there was no fraud or undue influence involved in the execution of the will.

The Court found that the evidence supports the view that there was no fraud or undue influence on the part of the surviving son and accordingly held that he be declared a beneficiary in terms of section 4A(2)(a). What is evident from the matter is the Court's willingness to declare a person competent to inherit in the clear absence of fraud and/or undue influence. Its approach correctly enforces the true intention of the said statutory disqualifications, namely the prevention of fraud and/or undue influence. Likewise it ensures that the freedom of testation is not impacted.

In the matter of *Longfellow v BOE Trust limited N.O. and Others*[72] the applicant and surviving spouse of the deceased, drafted a document purporting to be a will of his spouse. Prior to the deceased's passing, she was severely ill as she was diagnosed with brain cancer. Shortly before the deceased's passing, the applicant had purchased a so-called "CNA" will precedent and completed same on her behalf. The applicant averred that he had completed the document in the presence of the deceased and had discussed the contents with her. It transpired that the said document was never properly executed by the deceased in the presence of witnesses.

After analysing the evidence presented to Court, the Court came to the conclusion that the deceased never intended the said document to be her

72 [2010] ZAWCHC 117.

will but that the document rather reflected the intentions of the applicant. The Court further came to the conclusion that the applicant had in fact unduly influenced the deceased, specifically in light of her condition at the time the applicant had completed the will.

Further relief sought by the applicant included an order in terms of section 4A(2)(a) of the Wills Act, declaring him to be competent to receive benefits under the document purporting to be the deceased's will, even though he had drafted the document. The Court held that this relief was dependant on the document being accepted as the deceased's will, which was not the case and accordingly had to fail.

Du Toit criticises this decision of the Court by stating that it is a classic example where undue influence is used to curb the principle of freedom of testation, which has been described as the so-called "undue influence paradox".[73] Du Toit highlights the following factors to support his conclusion:[74]

1. The bequest was a so-called "natural bequest", meaning that it is a bequest to a core family member rather than an outside third party. This, according to Du Toit constitutes a strong indicator of the non-existence of undue influence.
2. The fact that the applicant and testatrix were happily married for a long period of time prior to the drafting of the will, would tend to support the bequest to the applicant.
3. The applicant requested a commercial bank to assist with the drafting of the will, and only after their failure to respond, did the applicant purchase the so-called "CNA" will precedent.
4. The elapse of approximately two weeks between the drafting of the document and the death of the testatrix meant that the testatrix had time to change the provisions of the will.

73 Du Toit 2013 *JCLS* 536.
74 Du Toit 2013 *JCLS* 536.

Du Toit states that all of the aforesaid factors lead to the conclusion that the testatrix intended to benefit the applicant.[75] The Court accordingly incorrectly applied the relevant undue influence principals which lead to the negation of testamentary freedom.[76]

The matter of *Henriques v Giles NO*[77] is a clear example where the Courts do not allow so-called statutory formalism to, in any way, inhibit testamentary intention. In this matter the husband and wife as a *bona fide* mistake signed each other's draft wills. The documents were drafted by the couple's accountants and were properly witnessed by independent witnesses in the employ of the accountants. The Court held that there can be no doubt as to the testamentary intentions of the deceased and by disallowing a document which was clearly the deceased's will for lack of compliance of formalities would be incorrect. It must however be noted that the deceased's intentions were clear and unambiguous and the circumstances under which the wills were signed and witnessed were not disputed.

75 Du Toit 2013 *JCLS* 536.
76 Du Toit 2013 *JCLS* 537.
77 2010 6 SA 51 SCA.

CHAPTER 3

COMMON LAW UNWORTHINESS

3 1 Introduction

The established common law grounds of unworthiness include the following:[78]

- Any person who murders another person is unworthy to inherit from that person; *de bloedige hand neemt geen erfenis*.[79]
- Any person who negligently causes the death of another person is unworthy to inherit from that person, particularly if the person acted in a morally blameworthy manner; *de bloedige hand neemt geen erfenis*.[80]
- Any person who murdered one or more of the deceased's *conjunctissimae personae* is unworthy to inherit from the deceased.[81]
- Any person who will receive an inheritance by reason of any unlawful act committed against the deceased is unworthy to benefit as a result of his own wrongdoing.[82]
- Any person who treated the deceased in an inexcusable manner.[83]

This is not a *numerus clausus* and furthermore, the Courts have shown that they will declare a person unworthy to inherit based on public policy.[84] This will be discussed in more detail below.

78 Du Toit "Erfregtelike onwaardigheid: Enige lesse te leer vir die Suid Afrikaanse reg uit die Nederlandse reg?" 2012 *Stell LR* 138.
79 Du Toit 2012 *Stell LR* 138.
80 Du Toit 2012 *Stell LR* 138.
81 Du Toit 2012 *Stell LR* 138.
82 Du Toit 2012 *Stell LR* 139.
83 Du Toit 2012 *Stell LR* 139.
84 Du Toit 2012 *Stell LR* 138.

Common law unworthiness can be divided into two different categories.[85] Firstly, specific unworthiness, also known as the so-called "bloody hand" principle and secondly, the general rule of unworthiness that no person may be enriched by his own unlawful conduct, or benefit from any conduct that is punishable.

3 2 Specific Unworthiness

3 2 1 Bloody hand principle

In terms of the common law it is trite law that a person that caused the death of another, intentionally and unlawfully, may not inherit from the deceased or his *conjunctissimus* (close family members), in terms of intestate succession or in terms of the deceased's will.[86] This principle is generally known as "*de bloedige hand neemt geen erf*"[87] and also extends to someone who assisted in the killing and who instructed someone else to kill a person.[88]

The *conjunctissimi personae* are persons in the closest relationship to the deceased by way of a specific relationship such as marriage.[89] Included herein are the deceased's parents, spouse and children. Excluded here from are the deceased's grandparents and grandchildren.[90] If a deceased and a victim of a crime are seen as *conjuctissimi*, the offender will

85 Schoeman-Malan 2013 *Litnet Akademies* 114.
86 De Waal and Schoeman-Malan (2008) 119; *Ex Parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) 747H; Schoeman "Nalatige Doodsveroorsaking: Statutêre Hervorming van die erfreg" 1994 *THRHR* 114; Van der Walt and Sonnekus 1981 *TSAR* 30; Schoeman 1992 *De Jure* 49; *Nell v Nell* 1976 2 SA 702 B-C.
87 *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) 748; De Groot 2 28 42; Schoeman 1992 *De Jure* 49.
88 Schoeman-Malan 2013 *Litnet Akademies* 119.
89 *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) 749-750.
90 *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) 752 -753.

accordingly not be able to receive a benefit from either the deceased or the victim.[91]

In the matter of *Ex Parte Steenkamp and Steenkamp*[92] the testators bequeathed, in terms of a joint will, their farm and certain movables to the children born and to be born from the marriage of their daughter, subject to a *usufruct* in favour of their daughter. The testator and testatrix were both murdered by their son-in-law (the husband of their daughter as well as the father of the beneficiaries), who was subsequently convicted of the murder and sentenced to life imprisonment. At the time of the murder there were two grandchildren and the daughter was pregnant with a third child, who passed away shortly after birth. The question that the Court had to determine was whether the son-in-law could inherit from his deceased child, the heir of the person(s) he murdered. Steyn J held that in this instance, it is not general unworthiness to inherit that attaches to the murderer, but specific unworthiness in relation to the deceased victim.[93] As a result of the death of the child and the fact that the son-in-law will inherit, in terms of intestate succession from his deceased daughter, the Court had to consider the principle that nobody may enrich himself by his own wrongful act or derive any benefit therefrom.[94] Steyn J ruled that before this rule could be applied, it has to be shown that there is a causal link between the crime and the enrichment.[95] In this instance, the Court held that the enrichment was as a result of the birth and death of the third child and not as a result of the murder.[96]

Hahlo[97] criticises this ruling and holds the opinion that although the birth and death of the son-in-law's daughter was the cause of his enrichment, he would not have benefited if he did not murder the deceased testators, as

91 Schoeman 1992 *De Jure* 49.
92 1952 (1) SA 744 (T).
93 Hahlo "De Bloedige Hand Erft Niet" 1952 *SALJ* 136-137; *Ex Parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) 748 B-C; Cronjé and Roos *Casebook on the Law of Succession* (2002) 181.
94 Hahlo 1952 *SALJ* 137.
95 *Ex parte Steenkamp and Steenkamp* 1952 1 SA 753.
96 *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) 754 A.
97 Hahlo (1952) 138; Cronje and Roos (2002) 181.

they would have outlived his daughter. According to Hahlo, there is a close enough connection to bring this case within the rule that no person must be allowed to benefit as a result of his own wrongful act.[98]

3 2 2 Negligence and unworthiness

The question that arises is whether the Courts should apply the common law unworthiness principle in cases where the death was caused negligently based on the fact that the conduct is morally blameworthy and against public policy.

In this instance, Schoeman-Malan[99] refers to the so-called Domat gloss principle which states the following:

> *"the causes which may render the heir unworthy of the succession are indefinite, and the discerning of what may or may not be sufficient to produce this effect depends on the quality of the fact and circumstances....But if there should happen any other case where good manners and equity should require that an heir should be declared unworthy, it would be just to deprive him of his inheritance."*[100]

In other words, that the grounds of the principle of unworthiness not be set in stone, but rather that the common law be developed to include the grounds that offend the *boni mores* of society.[101]

98 Hahlo 1952 *SALJ* 139.
99 Schoeman-Malan 2013 *Litnet Akademies* 117.
100 *Taylor v Pim* 1903 NLR 493; Schoeman-Malan 2013 *Litnet Akademies* 114.
101 Schoeman-Malan 2013 *Litnet Akademies* 114.

An example in this instance is the matter of *Taylor v Pim.*[102] The question that the Court had to decide was whether the defendant had by his own negligent conduct rendered himself unworthy, *indignus*, to succeed the deceased after he supplied her with alcohol which caused her death.[103] The Court referred to authorities such as Van Leeuwen, Voet and Brunneman that state the following:

> "… so *no one who helped kill another, or has given counsel or assistance for the purpose, can inherit any property from such other by testament...*"[104]

Judge Bale stated that "*a husband who through negligence and fault had so neglected his wife that she died in consequence of such neglect was held to be unworthy to succeed as heir to her if he had been so instituted*." [105]

Judge Bale accordingly found that the defendant was unworthy to inherit. This judgement is based on the Court's finding on the evidence of the specific and blameworthy conduct of the defendant.[106]

In the matter of *Caldwell v Erasmus NO and Another*,[107] Judge Blackwell found that there is strong authority for the proposition that a person who is found to have negligently caused the testator's death cannot receive a benefit from the testator's estate.[108] The Court further referred to the English case of *Hall v Knight and Baxter*[109] where a woman who was

102 1903 NLR 484.
103 1903 NLR 491; Cronje and Roos (2002) 183.
104 Van Leewen 3 3 9; Cronje and Roos (2002) 183; Corbett *et al* (2001) 82.
105 1903 NLR 492.
106 1903 NLR 495.
107 1952 4 SA 43 (T).
108 Van der Walt and Sonnekus 1981 *TSAR* 37; *Caldwell v Erasmus NO and Another* 1952 (4) SA 43 (T) 47G; Lategan DMDV *"Bloedige hand"-beginsel in gevalle van nalatige doodsveroorsaking en boedelbeplanning. Ongepubliseerde LLM-verhandeling* Noordwes Universiteit.
109 1914 PD 1.

convicted of manslaughter after shooting her boyfriend in bed, was found to be unworthy to succeed as an heir. The Judge stated that he would "*prefer to follow the English Law, namely that it is against public policy that a person who is guilty of feloniously killing another should take any benefit from a person's estate or under that person's will*...".[110]

Curlewis[111] confirms that there is no certainty whether the rule that a person who negligently causes the death of another is unworthy to inherit from the deceased testator in all instances.

In the matter of *Casey NO v The Master and others*[112] the Court specifically referred to and applied the unworthiness principle in cases where the death of the testator was caused by the negligence of another.[113] In the *Casey* case[114] the Court had to decide whether someone who negligently caused the death of another will be entitled to benefit from his estate. The facts of the case are as follows:[115]

The husband (second respondent) negligently killed his wife, to whom he was married in community of property to. The couple had a joint will where the surviving spouse was nominated as the sole heir of the deceased spouse. The second respondent pleaded guilty and was convicted of culpable homicide. It was agreed that the second respondent was entitled to one-half share of the estate by virtue of their marriage in community of property. The Court however had to decide whether he was disqualified from inheriting in terms of the joint will.

110 1952 4 SA 49 D-H.
111 Curlewis "Die bloedige hand neemt geen erf" 27 Julie 2012 *Ordenuus* Prokureursorde van die Noordelike Provinsies 5.
112 1992 (4) SA 505 (N).
113 Van der Walt and Sonnekus 1981 *TSAR* 37.
114 1992 4 SA 505.
115 1992 4 SA 506.

Judge McLaren confirmed the general rule that any person can benefit under a will and seemingly that the onus of proof is on the party which avers that another party is disqualified to receive a benefit under a will.

Judge McLaren referrers to the historic writer Van Leewen who stated that "*no one who has helped to kill another can inherit any such property from such other, but the same will go to the fiscus, for no one can benefit by his own wrong, or profit by what is punishable. This would seem to include culpable homicide".*[116] Judge McLaren with reference to South African case law and English Law concluded that despite the fact that the application of the principle will be "*harsh and out of touch with the spirit of times*" for example, in a case of the negligent driving of a motor vehicle, the second respondent is not entitled to inherit in terms of the will. The offender must however have had a blameworthy condition of mind.[117] Where the offender is mentally ill at the time of the murder and therefore not criminally responsible for his actions, he would be entitled to benefit from the person he had killed.[118]

Hahlo[119] states that "*the rule that a murderer may not take any advantages from the estate of his victim is but a special application of a much wider principle which forms part of the Roman-Dutch law*". It is accordingly clear that the beneficiary can be unworthy to inherit even though he was not found guilty of a crime.[120] The *ratio* behind the *bloedige* hand principle is the reprehensible and morally blameworthy conduct, irrespective of whether the conduct was intentional or negligent.[121] The common law and South African law (unlike the English and modern Dutch law) places the emphasis on the reprehensible and morally blameworthiness of the conduct and not

116 1992 4 SA 507 (G).
117 Corbett *et al* (2001) 82; *Gavin v Kavin* 1980 3 SA 1107 A-B.
118 *Gavin v Kavin* 1980 3 SA 1104 (W); *Ex Parte Meier* 1980 3 SA 154 (T); Corbett *et al* (2001) 82.
119 Hahlo "Forfeiture by Murder" 1953 *SALJ* 3.
120 *Taylor v Pim* 1903 NLR 484.
121 *Gavin v Kavin* 1980 3 SA 1104; *Ex Parte Meier* 1980 3 SA 154.

on the subsequent criminal conviction.[122] Negligence in South African law should not be seen as purely subjective. Other aspects and objective criteria should be taken into account before an offender will be disqualified to receive a benefit from a deceased. If however, an offender's conduct is morally blameworthy, he should be excluded from receiving a benefit.[123] It therefore seems as if our Courts are moving more and more towards taking into account morally blameworthy conduct when making decisions based on the Roman-Dutch principle of unworthiness, thereby diluting the so-called "*de bloedige hand neemt geen erf*" principle.

3 2 3 Maintenance and legal costs

It is not certain in South African law whether an unworthy person is able to claim maintenance from the person whose death he has caused,[124] whether it is the common law claim by a child or a maintenance claim of a survivor in terms of the Maintenance of Surviving Spouses Act.[125] In the matter of *Caldwell v Erasmus NO and Another*[126] the Court rescinded a decision that allowed a father to receive maintenance from his deceased son as it was not a necessity forming part of the reciprocal duty to support that has been established between a parent and child.[127]

In respect of the claim of a dependent child from his parent, the Court decided that each case should be determined on its own merits.[128] Du Toit furthermore agrees with the decision in the matter of *In Re Estate Visser*[129] and notes that the question whether an unworthy person should be allowed to receive maintenance will depend on the nature of the maintenance

122 Cronje and Roos (2002) 190; Van der Walt and Sonnekus 1981 *TSAR* 44-45.
123 Van der Walt and Sonnekus 1981 *TSAR* 44-45
124 Schoeman-Malan 2013 *Litnet Akademies* 117; Corbett *et al* (2001) 71 n 101; Du Toit 2012 *Stell LR* 143.
125 Act 27 of 1990.
126 1952 4 SA 43 (T).
127 1952 4 SA 45B and 48F; Corbett *et al* (2001) 84.
128 *In Re Estate Visser* 1948 3 SA 1129 (C).
129 1948 3 SA (C)

required.[130] It is further noted that maintenance is only a possible claim against an estate and is dependent on whether the estate can afford the maintenance claimed.[131] In deciding whether an unworthy person would be entitled to maintenance from the deceased estate, the Court will therefore have to take into account the nature of the maintenance required, the requirements for maintenance claims as well as the principles of common law unworthiness.[132]

It is important to note that a conflict of interest may come into existence in the situation where someone will benefit from their own wrongdoing when a maintenance claim is granted and when that same person becomes a burden to the government.[133] All maintenance claims must be determined on the basis of reasonableness, fairness and whether it is in the interest of justice.[134] This would be of even higher importance in allowing a spouse or child to receive maintenance from a person's estate who passed away as a result of his own unlawful conduct.

In the *Lotter*-case (unreported) the siblings, accused of murdering their parents applied for maintenance and legal fees to be paid from the estate. The Court did not grant their application on the basis that they cannot benefit from their own unlawful conduct.[135]

130 Du Toit 2012 *Stell LR* 149; Schoeman-Malan 2013 *Litnet Akademies* 134.
131 Du Toit 2012 *Stell LR* 149.
132 Schoeman-Malan 2013 *Litnet Akademies* 134.
133 Du Toit 2012 *Stell LR* 150.
134 Du Toit 2012 *Stell LR* 151; Schoeman-Malan 2013 *Litnet Akademies* 135.
135 Schoeman-Malan 2013 *Litnet Akademies* 135.

3 3 General Unworthiness

The general principle is that no person may be enriched by his own unlawful conduct, or benefit from conduct that is punishable.[136] This principle is more comprehensive and does not only refer to murder specifically, but to any other blameworthy act vis-à-vis the victim[137] and further include aspects of benefits that fall outside the estate of the deceased. Examples in this regard include pension benefits, life insurance, policy benefits and benefits in terms of your marital regime.

3 3 1 Insurance and unworthiness

In the matter of *Daniels v De Wet*[138] Mrs De Wet paid for someone to assault her husband. Her husband died as a consequence of the attack despite the fact that it was not her intention for him to be killed. Mrs De Wet was convicted of conspiracy to consult and do grievous bodily harm to her husband. Subsequent to this, Mrs De Wet claimed the proceeds of life policies taken out by her deceased husband since she was the nominated beneficiary. The Court accordingly had to consider whether Mrs De Wet had a direct claim as the nominated beneficiary of the life policies. Traverso AJP held that the right to the proceeds of the policies arose after the death of the husband and therefore the joint estate does not have a claim to the asset. The Court further held that Mrs De Wet was not entitled to receive the benefit from the life policies even though she did not intend to kill her husband. Traverso AJP noted that public policy required that she would not be entitled to benefit as a result of her conduct towards her husband.[139]

136 Wood-Bodley "Forfeiture by a beneficiary who conspires to assault with intent to do grievous bodily harm: Daniels NO v De Wet 2009 (6) SA 42 (C)" 2010 *SALJ* 30.
137 Schoeman-Malan 2013 *Litnet Akademies* 117.
138 2009 6 SA 42 (C).
139 Wood-Bodley 2010 *SALJ* 32.

Sonnekus[140] criticises the aforesaid decision of Traverso AJP and holds the opinion that should there not have been any nominated beneficiary the proceeds of the policies would have formed part of the joint estate. Therefore the surviving spouse should have been entitled to her half share. Sonnekus suggests that there should be a general amendment to our law to ensure that in future the Courts would be able to rule that no person may benefit from any proprietary rights as a result of any wrongful conduct towards the testator.[141]

In *Makhanya v Minister of Finance*[142] the Court ruled that a wife, who murdered her husband will not be entitled to receive any benefit from his pension fund which she would have otherwise been entitled to.[143]

The Court stated as follows:

> "*The rule is one of public policy that precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing, and I can think of no cogent reason why this should be limited to benefits accruing directly from the estate of the victim…*"

This constitutes an example of where our Courts decided to dilute the principle of general unworthiness by taking into account public policy and extend the rule to include the exclusion of benefits outside of the estate.

140 Sonnekus "Onwaardigheid vir erfopvolging en versekeringbegunstiging" 2010 *TSAR* 182-183.
141 Sonnekus 2010 *TSAR* 184.
142 2001 2 SA 1251 (D).
143 Corbett *et al* (2001) 83.

3 3 2 Marital regime and unworthiness

In this paragraph it shall be determined whether the Court is willing to dilute the *bloody hand* principle and extend it to matrimonial property law in cases where spouses are married in community of property.

In the matter of *Nell v Nell*[144] a wife murdered her husband, who subsequently passed away intestate. The couple were married in community of property. The Court had to decide whether the wife would be entitled to her half share of the estate by virtue of their marriage in community of property as it existed at the time of death. Reference is made to the matter of *Ex Parte Vonzell*[145] where the Court held that the well-known principle that prevented a murderer to benefit from the estate of his victim does not mean that he cannot receive his share of the property which accrued to him at the time of marriage.[146] There is no rule in our law which deprives a person who had murdered his spouse of his share of the joint estate[147] since the murderer does not receive the benefit from the estate of the deceased, but rather as a result of the marriage in community of property.[148] This decision is criticised by Hahlo,[149] who stated that a wife can obtain an order for forfeiture of benefits during divorce proceedings, but once murdered she cannot, and neither can her heirs.[150] This allows the husband to receive the benefit and as a result he is put in a much better position by murdering his wife rather than waiting for the divorce to finalise.[151] Judge Human in *Nell v Nell*[152] however followed the *Vonzell* case and confirms that there should be a causal link between the crime and the benefit which does not exist in the present case and furthermore held

144 1976 2 SA 700 (T).
145 1953 1 SA 122 (C).
146 1953 1 SA 126 B-E.
147 1953 1 SA 126; Also see Hahlo 1953 *SALJ 2.*
148 Corbett *et al* (2001) 83; LAWSA (Volume 31) (1st reissue), 166/7; Curlewis 2012 *Ordenuus* 4
149 Hahlo 1953 *SALJ* 2.
150 1976 2 SA 704 H.
151 *Nell v Nell* 1976 2 SA 703 G-H; Hahlo 1953 *SALJ* 2.
152 1976 2 SA 704 H.

that the wife can receive her half share of the estate excluding the proceeds from any life policy on the life of the deceased.

In the matter of *Leeb v Leeb*[153] the First Respondent and the deceased were married in community of property. The applicants approached the Court for an order declaring that the First Respondent should not be entitled to receive any financial or patrimonial benefit from the estate of the deceased and particularly that she forfeit any right to the benefits of a marriage in community of property as a result of the fact that she murdered her husband.[154]

The Court referred to old authorities such as Papinianus[155] and Voet[156] as well as to English law and confirmed that the principle that a person is not allowed to benefit form his own wrongful conduct is firmly established in our law. The Court further held that this principal is based on the grounds of public policy.[157] According to Judge Thirion this is good enough reason to apply these principles to the benefits of a marriage in community of property.[158] In terms of common law a spouse who is the reason for divorce forfeits the benefits of a marriage in community of property and therefore there is no reason why the spouse who ends the marriage by death should be in any better position.[159] Judge Thirion also refers to the judgment in *Nell v Nell*[160] and respectfully indicates that he does not agree with this judgment by stating that this approach can provide surprising results as you cannot put the offending spouse in a better position in a case of murder

153 1999 2 All SA 588 (N).
154 1999 2 All SA 590; Cronje and Roos (2002) 196.
155 *Leeb v Leeb* 1999 2 All SA 591 (F): Papinianus said " I held than an heir who, being aware of the murder of the deceased failed to avenge his death should be compelled to surrender all the profits of the estate".
156 Voet 34 9 6 said "Most of all is one unworthy who has killed the testator or has brought about his dying through negligence. This is so whether he has been instituted as heir or has been gifted with a legacy or even a *donatio mortis causa*…and the right of taking *mortis causa*…clearly a reason for unworthiness in all such cases".
157 1999 2 All SA 194 D-E.
158 1999 2 All SA 595 D-E.
159 1999 2 All SA 595 D-E.
160 1976 2 SA 700 (T).

than he would have been at divorce. It is important to note that the benefits that the survivor would forfeit as a result of his conduct should be benefits he would have obtained as a result of the death of his spouse.[161] When explaining how forfeiture orders work, Thirion J stated that:

> "*The basis on which a forfeiture order is made is that the guilty spouse 'should not by dissolving the marriage get a benefit from a wrong act'. Underlying the provision for forfeiture is the general rule that no one is allowed to benefit by his own wrong*."[162]

Thirion J further noted that it is not true that spouses in a marriage in community of property obtained a right to the division of the joint estate in equal shares on dissolution of the marriage through the death of one of the spouses.[163] The entitlement is only during the subsistence of the marriage and on divorce there could be an order for the forfeiture of benefits. Should one of the spouses accelerate the dissolution of the marriage by murder he would receive an equal share of the joint estate that would not necessarily be the case when the marriage is dissolved by divorce. This would mean that the surviving spouse obtains the benefit by virtue of the murder and this is what should be avoided to ensure that he is not allowed to benefit from his own crime.[164]

Ultimately the Court ruled that where one spouse to a marriage in community of property, murders the other, the Court has the power to order the forfeiture of benefits that the guilty party would have been entitled to as a result of the marriage in community of property.[165] This decision was not directly based on the principles of reasonableness and fairness, but shows

161 1999 2 All SA 596 H-I.
162 1999 2 All SA 597 E-F.
163 1999 2 All SA 59 C.
164 1999 2 All SA 598 H.
165 1999 2 All SA 59 H-I.

that the Court is willing to take into account reasonableness, fairness and public policy.[166]

Hahlo[167] criticises the decision in *Nell v Nell*[168] and argues that there is a causal link between the half-share benefit and the murder. The reason for this is the fact that murder puts an early end to the marriage and if it is not for the murder the victim might have survived and succeeded in an application for the forfeiture of benefits.[169] As indicated above, this was also a concern raised by Thirion J in the matter of *Leeb v Leeb.*[170] It is further suggested that there is scope in our law to reach a different conclusion and that public policy might prevent the wrongdoer from receiving a benefit.[171]

Sonnekus[172] holds the opinion that the Courts should not dilute the standardised legal principles in our law, purely to allow for the situation to fit in with public policy. He refers to the matter of *Daniels v De Wet*[173] and argues that Mrs De Wet is entitled to the benefit of half of the joint estate as a result of the death of her husband, as she has already received that benefit when they decided to get married in community of property and no one should be deprived of their rights if the legal norm does not allow for it.[174]

To obtain legal clarity on the above, Du Toit[175] makes the suggestion that the Matrimonial Property Act[176] should be amended to relate to the

166 Du Toit 2012 *Stell LR* 146.
167 Hahlo 1976 "Murder rewarded" *SALJ* 376.
168 1976 2 SA 700 (T).
169 Cronje and Roos (2002) 94.
170 1999 2 All SA 588 (N).
171 Corbett *et al* (2001) 83.
172 Sonnekus 2010 *TSAR* 183.
173 2009 6 SA 42 (C).
174 Sonnekus 2010 *TSAR* 184.
175 Du Toit 2012 *Stell LR* 147.
176 Act 88 of 1984.

forfeiture provisions currently in section 9 (1) of the Divorce Act.[177] It should specifically be mentioned, as in the amended Dutch Civil Code,[178] that reasonableness and fairness should be considered as a factor when having to determine whether a spouse must be declared unworthy to inherit his half share of the estate as a result of his own wrongdoing. An amended clause like this will, in any event, first have to pass the limitation test in terms of the Constitution of South Africa 1996, but might be the answer to avoid any future uncertainty on the subject.

3 3 3 Fraud, duress, undue influence and unworthiness

Voet states that if someone uses fraud or duress to prevent a testator from making a will, such person is unworthy to receive a benefit from an earlier will or in intestacy on the basis that such a person should forfeit all gain which he would otherwise derive from his actions.[179] Corbett is confident that although this ground of disqualification has never been considered by our Courts, taking into account the policy consideration that no one should be permitted to benefit from his own wrongful conduct, Voet's statement may possibly be followed by our Courts should the situation arises.[180]

The same will apply to a person who, by duress, fraud or undue influence, causes a testator to make a will or specific bequest in favour of a specific person.[181] In the matter of *Pillay v Nagan*[182] the first defendant forged his mother's will and appointed himself as sole heir of her estate. The other children applied for an order that the will be declared invalid and that the deceased had died intestate.[183] The Court held that in Roman-Dutch law certain classes of persons were seen as unworthy to inherit, either via the

177 Act 70 of 1979.
178 See Chapter 4 of this thesis.
179 Corbett *et al* (2001) 84.
180 Corbett *et al* (2001) 85.
181 Corbett *et al* (2001) 85.
182 2001 1 SA 410 (D).
183 Cronje and Roos (2002) 203-204; Plliay v Nagan 2001 a SA 410 (D).

will or in intestacy and that these persons may include persons who are deemed unworthy by reasons other than some wrong they have done to the testator or his property.[184]

In the matter of *Yassan v Yassan*[185] the children of the deceased alleged that one of their siblings concealed or destroyed the will of their father. The children had not discharged the onus but the Court remarked *obiter* that a person would be unworthy to inherit provided the document that had been concealed had indeed been a will.[186]

It was therefore held that, by analogy with the aforesaid case where a legatee concealed or destroyed a will to deprive an heir of inheriting,[187] a person who forged a will and thereby depriving his siblings from receiving an inheritance, would be considered unworthy to inherit from the deceased's estate.

184 2001 1 SA 423 J 424 A: *Taylor v Pim* 1903 NLR 484.
185 1965 1 SA 438 (N).
186 Cronje and Roos (2002) 203; Yassan v Yassan 1965 1 SA 438 (N).
187 *Yassan v Yassan* 1965 1 SA 438 (N).

CHAPTER 4

A COMPARATIVE ANALYSIS

4.1 Introduction

In this chapter the laws pertaining to both the Netherlands and the English law are discussed for comparative purposes.

4 2 Netherlands

4 2 1 Bloody hand principle

In terms of Dutch legislation the statutory disqualifications to inherit are contained in Book 4 (Law of Succession) of the (new) Dutch Civil Code that came into effect on 1 January 2003.[188] Certain new provisions were introduced, but the principle of unworthiness that stems from the Dutch Civil Code reads as follows:[189]

> "*[Dit] blijkt dat onwaardigheid gebaseerd is op het algemeen rechtsbeginsel dat men niet behoort te profiten van een begunstiging welke het gevolgis van het leed dat men de begunstiger met opzet aandoet enerzijds, en de eisen van redelijkheid en bilijkheid anderzijds.*"

Du Toit[190] notes that the provisions concerning unworthiness in article 4:3:1 of the Dutch Civil Code apply to testate and intestate succession. It is

188 Du Toit 2012 *Stell LR* 140.
189 Art 4:3:1 Dutch Civil Code; Du Toit 2012 *Stell LR* 138.
190 Du Toit 2012 *Stell LR* 140.

based on public policy and can thus be applied *ex lege* by a Court. It is not only the heirs of the deceased estate that can be declared unworthy to inherit, but also includes the legatees, people who are entitled to a statutory share in terms of forced heirship rules and executors. There is however a specific list of people that the testator may not benefit in terms of his will.[191] This list includes the guardian of the family,[192] tutor of a minor with whom the minor resided,[193] the professional health carer of the testator who stayed with him and nursed him[194] and a person who cared for the testator at an institution.[195] Any bequest to any of the aforementioned individuals does not make the will invalid, but it may be nullified to undo any disadvantage suffered by the party requesting the nullification.[196] Similar to section 4A of the Wills Act[197] the reasoning behind the limitation is to prevent fraud and undue influence. The specific exclusions listed above clearly interfere with the freedom of testation, but is nonetheless incorporated because it is in line with public policy and in the interest of mainly, the family of the deceased.[198]

The prohibition of any bequests to the list of people above also applies to any person in a close relationship to that person so specifically excluded (a so-called intervening person). In terms of the Dutch Civil Code intervening persons include the parents, children and spouses of the person specifically excluded except if they are a blood relative in the direct line of the testator or the spouse of the testator.[199] Although South African law does not have the same list of exclusions, the principle of close relationship relates to the recognised South African concept of *conjunctissimus* where an offender may not inherit from the testator whose death he has caused, and is further

191 Du Toit 2012 *Stell LR* 140.
192 Art 4:57:1 Dutch Civil Code.
193 Art 4:58 Dutch Civil Code.
194 Art 4:59:1 Dutch Civil Code.
195 Art 4:59:2 Dutch Civil Code.
196 Art 4:62:1 Dutch Civil Code; Du Toit 2012 *Stell LR* 141.
197 Act 7 of 1953.
198 Du Toit 2012 *Stell LR* 141.
199 Art 4:62:3 Dutch Civil Code.

precluded from receiving a benefit from any of the *conjunctissimus*[200] of the same testator. This is not the case in Dutch law and the offender will only be unworthy to receive a benefit from the estate of the testator whose death he has caused deliberately or for the attempt to kill him or for the preparation of or taking part in such an offence.[201]

4 2 2 Negligence and unworthiness

The second pertinent difference from South African law is that the Dutch law does not make any provision for the possible inclusion of unworthiness when it involves a negligent killing. The Dutch Civil Code only refers to crimes committed deliberately. However the Dutch author Van Dijk[202] explains that the Dutch law in certain instances include intention in the concept negligence and therefore, according to Du Toit,[203] it would be possible for a Dutch Court to come to the conclusion, similar to *Casey NO v The Master and others,*[204] in that a person may declared unworthy to inherit when he negligently caused the death of the testator.

4 2 3 Maintenance and unworthiness

The Dutch Civil Code makes provision for maintenance claims from an estate. This can be seen as a legitimate portion and will fall away should you be unworthy to inherit.[205] Du Toit refers to Tempelaar[206] who states that one can be unworthy of any statutory right to maintenance and therefore there seems to be legal certainty on this aspect in terms of the

200 *Ex Parte Steenkamp and Steenkamp* 1952 1 SA 744 (T).
201 Art 4:3:1 (a) Dutch Civil Code.
202 Du Toit 2012 *Stell LR* 141.
203 Du Toit 2012 *Stell LR* 142.
204 1992 4 SA 505 (N).
205 Du Toit 2012 *Stell LR* 149.
206 Du Toit 2012 *Stell LR* 149.

Dutch law.[207] This is not the case in South African law and Du Toit[208] holds the opinion that South Africa can learn from the legal position in the Netherlands by taking into account the principles of reasonableness, fairness and the morally blameworthy conduct in the light of public policy.

4 2 4 Insurance and unworthiness

Article 7:973 of the Dutch Civil Code makes provision for "benefit insurance", but Du Toit comment that most policy contracts in Netherlands contains a clause that prohibits any beneficiary who murders the insured party to receive any benefit in terms of the said contract.[209] Taking into account the South African law on this aspect[210] it seems like South Africa is on par with the Dutch law.[211]

4 2 5 Marital regime and unworthiness

In the *Van Wylick* case[212] (this was decided before the new Dutch Civil Code came into effect in 2003) a young man murdered his new wife after 5 weeks of marriage. They were married in community of property. The husband was convicted and could therefore in terms of article 4:885 (now article 4:3) of the Dutch Civil Code not inherit from his wife. The question was however whether he is entitled to his half share of the estate as a result of their marriage in community of property. The Hoge Raad considered the moral standards, reasonableness and fairness and ruled that a person who intentionally and unlawfully murders another is unworthy to receive any benefit from the victim, including a benefit as a result of the marriage in

207 Du Toit 2012 *Stell LR* 149.
208 Du Toit 2012 *Stell LR* 151.
209 Du Toit 2012 *Stell LR* 149.
210 *Daniels v De Wet* 2009 6 SA 42 (C); *Makhanya v Minister of Finance* 2001 2 SA 1251 (D).
211 Du Toit 2012 *Stell LR* 149.
212 Du Toit 2012 *Stell LR* 143.

community of property.[213] The amended 2013 Dutch Civil Code however has a provision that the principles of reasonableness and fairness has an impact and should be applied to the division of the estate when spouses are married in community of property.[214]

The *Breda* case[215] required the Court to decide whether a wife was entitled to benefit from the division of her husband's estate as per their agreement. The agreement was similar to a marriage in community of property with a condition that the marriage should dissolve as a result of the death of one of the parties and that at the time of dissolution they should still be sharing a house. The Court decided that reasonableness and fairness should be considered and the wife, accordingly was unworthy to claim her share of the estate from her husband when she was the cause of his murder. Both the decisions discussed above are in line with the South African case of *Leeb v Leeb*,[216] but there remains uncertainty as a different conclusion was reached in the *Utrecht* case.[217] Here the Court decided that a wife, who murdered her husband, is entitled to receive the benefit due to her in terms of their ante-nuptial contract and that the principles of reasonableness and fairness cannot take that away from her.[218]

It is clear from the above that, as in South African law,[219] there is neither consensus nor clarity on whether public policy should play a role, nor is it clear whether it should be considered in determining whether a guilty spouse should or should not be entitled to the benefits as a result of their marriage regime. It is however agreed that a spouse should not be placed in a better position if he caused the marriage to dissolve as a result of murder than he would have been if the marriage was dissolved on divorce.

213 Sonnekus 2010 *TSAR* 183.
214 Du Toit 2012 *Stell LR* 144.
215 Du Toit 2012 *Stell LR* 145.
216 1999 2 All SA 588 (N).
217 Du Toit 2012 *Stell LR* 145.
218 Du Toit 2012 *Stell LR* 145.
219 *Ex Parte Vonzell* 1953 1 SA 122 (C);*Nell v Nell* 1976 2 SA 700 (T) *Leeb v Leeb* 1999 2 All SA 588 (N).

Waaijer[220] argues that no Court can refuse you your legal right to the benefit in terms of your marriage regime by taking into consideration the principles of reasonableness and fairness as this right does not exist as a result of death, but as a consequence of your marriage regime entered into at the time of the marriage.

4 2 6 Fraud, duress, undue influence and unworthiness

The Dutch Civil Code makes specific provision for unworthiness due to any act by threat that has forced the deceased to make a last will or who through such means has prevented the deceased from making a last will and a person who has stolen, concealed, destroyed or falsified the last will of the deceased.[221] With reference to South African law[222] and Corbett and others[223] it is clear that should the situation arise, our Courts will on the grounds of public policy rule that a person who has acted fraudulently with regards to the drafting of a will or has influenced the writer of the will in any way shall be deemed unworthy to receive a benefit. It will however be ideal if it can be specifically stated in our legislation to avoid any unnecessary confusion.

4 2 7 Further aspects of unworthiness

Art 4:3:1 (b) and (c) list two further aspects of unworthiness not part of South African law. Firstly, a person who has been convicted for deliberately committing an offense against the deceased, for which, according to the Dutch legal definition, a maximum term of imprisonment is set for at least four years, or for an attempt to, a preparation of or a taking part in committing such an offence shall be unworthy to inherit from the deceased.

220 Du Toit 2012 *Stell LR* 144.
221 Art 4:3:1 d and e.
222 *Yassan v Yassan* 1965 1 SA 438 (N); *Pillay v Nagan* 2001 1 SA 410 (D).
223 Corbett *et al* (2001) 84- 85.

Secondly, a person convicted in a so-called irrevocable Court decision to the effect that he has slanderously accused the deceased falsely of committing an offence for which, according to the Dutch legal definition, a maximum imprisonment is set of at least four years.

The Dutch Civil Code further makes provision for the fact that the deceased may forgive the unworthy person and if that is the case the unworthiness ends.[224] It is necessary to ask how the forgiveness will work practically. Does it have to be verbal or in writing, is it forgiveness if you do not remove the beneficiary from your will or is it something the Courts will have to decide?[225] Du Toit is of the opinion, and it is agreed, that the South African law should not adopt the aforesaid provision.[226]

4 3 English Law

4 3 1 Forfeiture of inheritances in respect of witnesses

Section 15 of the English Wills Act of 1837 stipulates that witnesses to a will or their spouses are precluded from benefiting from the will. This section further stipulates that the validity of the will, will however not be affected if this is the case. In England disqualification to benefit is accordingly only limited to attesting witnesses and their spouses. It is further evident that so-called gifts to be held in trust for the benefit of another is not a disqualifying factor, as long as the relevant trustee does not take any personal benefit such as remuneration.[227] With regard to the position of a surplus witness the position in South African law follows that of English law.[228] However the South African qualification contained in section 4A(2)(b) of the South

224 Art 4:3:3 Dutch Civil Code.
225 Du Toit 2012 *Stell LR* 153-154.
226 Du Toit 2012 *Stell LR* 153-154.
227 Paisley and De Waal 2002 *Stell LR* 190.
228 A surplus witness will be entitled to benefit; Paisley and de Waal 2002 *Stell LR* 192.

African Wills Act, allowing a witness to benefit if he is an intestate heir, does not exist in English law.[229]

4 3 2 The forfeiture rule

As is the case in South Africa and the Netherlands, England's so-called forfeiture rule is based on the principle that a person should not be allowed to benefit from his own criminal act.[230] This rule is grounded in public policy and is described and further qualified in the Forfeiture Act of 1982. The provisions of this rule equally applies to testate and intestate succession. Section 2(1) of the Forfeiture Act of 1982 provides the Court with what can be described as a discretionary power to modify or mitigate the effect of the rule in certain instances. In this instance Section 2(1) of the Forfeiture Act of 1982 stipulates that:

> *"Where a court determines that the forfeiture rule has precluded a person (in this section referred to as "the offender") who has unlawfully killed another from acquiring any interest in property mentioned in subsection (4) below, the court may make an order under this section modifying the effect of that rule."*

Section 2(5) of the Forfeiture Act of 1982 stipulates that a Court can modify the effect of the rule in respect of the offender acquiring interest in the deceased's property either totally or partially.[231] Section 5 of the Forfeiture Act of 1982 however limits the Court's so-called discretionary power under this section by stipulating that it shall not modify or mitigate the effect of the rule under circumstances where the offender has been convicted of murder.

229 Paisley and De Waal 2002 *Stell LR* 192.
230 *In the Estate of Hall, Hall v Knight and Baxter* (1914) 1 (CA).
231 The Law Commission *"*The forfeiture rule and the Law of Succession*"* 2005 8.

Other than in cases of a conviction of murder, the Court accordingly has the power to make the following rulings:[232]

i. Full application of the forfeiture rule in respect of all the property;

ii. Non-application of the forfeiture rule in respect of all the property;

iii. Application of the forfeiture rule on in respect of some of the property; or

iv. Other special arrangements in respect of how the property must be dealt with.[233]

It is further evident that section 47 of the Administration of Estates Act 1925 and section 33 of the Wills Act 1837 precludes a child to inherit from his grandfather if his father had murdered the child's grandfather. The reason for this is the fact that the aforesaid sections require the death of a parent before the child can inherit from the grandparents. In this instance the inheritance will pass to the grandparents' other relatives.[234] This aspect has come under severe criticism and the English Law Commission has made recommendations regarding the amendment of the aforesaid legislation to the effect that the child of an offender be entitled to inherit as if the offender was predeceased.[235]

4 3 3 Negligence and unworthiness

From the above it is clear that in England the Courts have a discretion as to the application of the so-called forfeiture rule in cases of negligence. This will include cases of manslaughter or other instances of unlawful killing.

232 The Law Commission 2005 7.
233 An example hereof includes where the proceeds of a life insurance policy is put into trust for the benefit of the deceased and the offender's child [RE S (1996) 1 WLR 235, as referred to at The Law Commission 2005 7.
234 UK Parliament *"Amending the forfeiture rule"* 1 (2014) obtained from www.parliament.uk.
235 The Law Commission 2005 4.

4 3 3 1 Judgments prior to the enactment of the Forfeiture Act of 1982

In the case of *the Estate of Hall, Hall v Knight and Baxter*, Lord Cozens-Hardy rejected the notion that murder and manslaughter should be treated differently.[236] This distinction according to Lord Cozens-Hardy equates to a "*sentimental speculation as to the motives and degree of moral guilt of a person"*. The effect hereof is strict adherence to the rule that one cannot benefit from one's criminal act, no matter its nature. In the mater of *In re Giles Deceased*[237] a wife was convicted of manslaughter in respect of her husband. Once more the Court rejected the notion that crimes in this context can be distinguished from each other by way of their degree of moral turpitude. Again the Court strictly adhered to the aforesaid rule.

The Court's stance however changed in the case of *Regina v Chief National Insurance Commissioner, Ex Parte Connor*[238] which held that it must decide whether public policy requires it to exclude the offender from benefiting under the specific circumstances of a matter. The nature of the crime itself therefore becomes the determining factor as to whether the offender shall be allowed to benefit.

4 3 3 2 Judgments subsequent to the enactment of the Forfeiture Act of 1982

In the case of *Dunbar (As Administrator of Tony Dunbar Deceased v Plant)*[239] the Court confirmed the fact that the forfeiture rule can find application in so-called manslaughter cases and that it has to decide whether certain mitigating factors exist that justify not applying this rule. This position was further confirmed in the case of *D v Land others.*[240] The

236 (1914) 1 (CA) obtained from www.swarb.co.uk.
237 [1972] Ch 554 obtained from www.swarb.co.uk.
238 [1981] 1 QB 758 obtained from www.swarb.co.uk.
239 [1997] 4 ALL ER 289 obtained from www.swarb.co.uk.
240 [2003] EWHC 796 obtained from www.swarb.co.uk.

position in England has therefore now been settled with regard to disentitlement to benefit in situations of negligent death. The Courts have the required flexibility to make case specific determinations based on public policy when determining whether a person should be held to be disentitled to benefit.

4 3 4 Forfeiture and other forms of benefits

Section 1(1) of the Forfeiture Act defines the forfeiture rule. This section further specifically states that the rule relates to a so-called "benefit". In this regard, the rule is therefore described in wide terms, the effect of this is that there is nothing precluding this rule from applying to benefits other than by way of succession.

In the *Dunbar*[241] matter the Court noted that public policy dictates that no person should benefit from their crime which resulted in the death, and secondly that the nature of the crime determines whether this principal may be overridden or not. In this matter it was held that the survivor of a so-called suicide pact can benefit from a life policy despite same constituting an offence in terms of the Suicide Act 1961. This decision accordingly confirms the position that the so-called forfeiture rule does apply to benefits relating for insurance policies. It is therefore clear that the Courts are granted a certain degree of flexibility to make case specific determinations as to the application of the rule and its applicability to certain benefits.

241 [1997] 4 All ER 289 obtained from www.swarb.co.uk.

CHAPTER 5

ADMINISTRATION OF ESTATES

5 1 Introduction

During the administration of a deceased estate the rights to the assets vest in the appointed executor. The executor is tasked with the liquidation and distribution of the estate in accordance with the provisions of a deceased's Will and if the deceased left no valid will, then in accordance with the provisions of the Intestate Succession Act.[242] The power to appoint the executor vests in the Master of the High Court.

Unworthiness to inherit invariably has an impact on the administration of deceased estates. In light of the question of unworthiness, the following aspects are specifically considered herein:

i) Unworthiness and the appointment of the executor;

ii) Rights and duties of the executor and the Master of the High Court in the administration of the bloody estate;

iii) Beneficiary's ability to inherit;

iv) Unworthiness and interim maintenance;

v) Marriages in community of property;

242 Act 81 of 87.

5 2 Unworthiness of a nominated Executor

Executors are appointed in one of two ways, namely, via a nomination in the deceased's will, referred to as an executor testamentary[243] or upon the nomination of interested parties, known as an executor dative.[244] In both instances the Master of the High Court has the sole authority in the appointment of the executor. Despite not directly benefiting from the deceased estate, it is accepted that the executor is indeed classified as a beneficiary to the estate.[245] An unworthy act by a nominated executor will therefore have an impact on such person's capacity to act as an executor. A further aspect to be considered, is what the Master of the High Court's roll is in the appointment or non-appointment of an alleged unworthy executor.

In the first instance a nominated executor may be unworthy to act as executor due to non-compliance of the provisions of legislation. This for example will be the case were the nominated executor signs the will as a witness to the deceased signature[246] or failure to comply with the provisions of the Administration of Estates Act,[247] namely, the refusal by the executor to obtain a bond of security when requested to do so by the Master of the High Court,[248] if the nominated executor resides outside the borders of South Africa and fails to nominate a *domicilium citandi et executandi* within South Africa[249], if the grounds set out in section 54(1)(a)(ii),(iii) or (iv), or Section 54(1)(b)(iii) of the Administration of Estates Act are applicable and lastly if the nominated executor fails under oath to state that letters of executorship have not been granted by another Master of the High Court in South Africa.[250]

243 Appointed in terms of Section 14 of the Administration of Estates Act 66 of 1965.
244 Appointed in terms of Section 18 of the Administration of Estates Act 66 of 1965.
245 Section 4A(3) of the Wills Act 7 of 1953.
246 Section 4A(1) of the Wills Act 7 of 1953.
247 Act 66 of 1965.
248 Section 23 of Act 66 of 1965.
249 Meyerowitz *on Administration of Estates and Estate Duty*, (2001) ed 9 3.
250 Section 22(2) of the Administration of Deceased Estates Act 66 of 1966.

The nominated executor may also be unworthy to act in such capacity due to an alleged criminal and/or fraudulent act vis-à-vis the deceased and/or the deceased's will. In this regard, the question arises whether the Master of the High Court has a discretion not to appoint an individual as an executor to a deceased's estate if such person has either been charged or convicted of an offence relating to the deceased's death or fraud relating to deceased's alleged will.

Section 14 of the Administration of Estates Act states that:

> *"the Master shall, subject to subsection (2) and sections 16 and 22, on written application of any person who has been nominated as executor by any deceased person by a Will which has been registered and accepted in the office of the Master; and is not incapacitated from being and executor of the estate of the deceased and has complied with the provisions of this Act, grant letters of executorship to such person."*

The direct interpretation of the aforesaid section indicates that the Master is indeed obliged to issue letters of executorship in favour of a person if the stated provisions of the Administration of Estates Act is complied with together with the stated requirements. Section 22 of the Administration of Estates Act however grants the Master the power to refuse the appointment of a nominated executor in circumstances where a written objection of an interested party has been lodged with the office of the Master. In this instance, the Master of the High Court's power to refuse an appointment is qualified in that an interested party is required to first lodge an objection to the appointment of the nominated executor.

In the matter of *Ferreira v The Master of the High Court*[251] the Court had to decide upon the worthiness of an heir's estate to inherit under circumstances where there existed allegations that the heir had caused the death of the deceased. The Master of the High Court upheld an objection that was raised against the liquidation and distribution account, which benefited the estate of the alleged unworthy heir. The Master of the High Court contended that it had carefully scrutinised the evidence available under the circumstances before making its decision. The Court however held that the Master of the High Court did not have the discretion to decide on questions of fact and that the only entity able to decide on these matters were a competent court. The aforesaid decision will invariably impact on the appointment of a nominated executor by the Master of the High Court.

In the matter of *Marais v Botha NO and others*[252] the surviving spouse brought an application for the condonation of a joint will allegedly deposed to by herself and her late husband. In terms of the joint will the applicant was the nominated executor and sole heir of the deceased estate. At the time of the Court application the surviving spouse was indicted on a charge of conspiracy to the murder of the deceased.

It was held that should the application be allowed to succeed, it will lead to the appointment of the applicant as the executrix to her husband's estate and that her appointment will be in contravention of the Roman-Dutch Maxim, "*de bloedige hand neemt geen erf".* It was confirmed that the executor to a deceased estate indeed receives a benefit in such capacity and therefore the aforesaid maxim will be applicable to the appointment of executors. The learned judge further supported its conclusion by referring to a pervious judgment[253] which held that it would be contrary to public policy for a person to hold office as executor of an estate of a person he has killed or has been accused of killing.

251 2001 3 SA 365 (O).
252 [2008] ZAWCHC 111.
253 *Pu and others v Ranchod NO and Another* 2005 JOL 15767 (ZA).

It is noted that in this case the nominated executor was not convicted of any wrongdoing at the time her appointment came into dispute. Despite this however, her appointment as executrix was disallowed. It can therefore be argued that a conviction is not necessarily a prerequisite for the disallowance of the appointment of an executor.

In the case of *Bankorp Trust v Pienaar and another*[254] the Court had to decide whether it had the authority to remove an executor under circumstances not provided for by the Administration of Estates Act and to replace the executor with another person. In this case, the first respondent alleged that there was a conflict of interest as the appellant was nominated as the executor and one of its affiliated companies had a claim against the estate. In this regard it was held that the Court does not have a general power in terms of the common law to review a decision made by the Master of the High Court as to the appointment of an executor.[255] The power of appointment therefore solely rests with the Master of the High Court and the Court can only interfere with the appointment in certain circumstances and does not have a general discretion to choose a more suitable executor over one nominated in the will. However, the Court is still able to rule on the validity of an appointment as an executor.

When consideration is given to the decision in the *Ferreira*[256] case, it can be argued that a competent Court is the only entity vested with a discretionary power to order the Master of the High Court to refuse the issuing of letters of executorship to an alleged unworthy executor. This decision must however be seen in light of the *Bankorp Trust* case's confirmation of the fact that the Master of the High Court is the entity solely vested with the power to appoint an executor.

254 1993 4 SA 98 (A).
255 *Bankorp Trust v Pienaar and another* 1993 (4) SA 101 I-J.
256 2001 3 SA 365 (O).

The primary function of the Master has been described in the matter of *Wessels v The Master of the High Court*[257] *as follows:*

> *"… to protect the interests of creditors, heirs legatees and all other persons having any claim upon the Estate".*

According to Meyerowitz, the Master of the High Court's duties under the present Administration of Estates Act are to ensure that the provisions thereof are complied with, especially the time periods set out in the Act. [258]

It is submitted that clothing the Master of the High Court with discretionary powers in the appointment of an alleged unworthy executor is aligned with its duty to ensure that the administration of the deceased estate is conducted in accordance with the provisions of the Administration of Estates Act and to the benefit of all interested parties. Any party affected by the decision of the Master of the High Court's decision in this instance further has the right to apply for same to be reviewed by a competent Court.

5 3 Rights and duties of the executor and the Master of the High Court

As previously stated, the executor's primary task is to liquidate and distribute the deceased estate. In completion of his duties, the executor is totally independent and not an agent of the heirs nor of the creditors of the deceased.[259] However, he is not free to deal with the estate in any manner he sees fit as his actions are subject to the supervision of the Master of the

257 (1892) 9 SC 18.
258 Meyerowitz, (2001) 1 5.
259 *Goosen v Bosch and The Master 1917 CPD 189.*

High Court.[260] Furthermore, the executor's position has been described as a so-called fiduciary one, which means that the executor is bound to act in accordance with the provisions of the will, the law and in a *bona fide* manner.[261]

The question that arises, is whether the executor and/or Master of the High Court has the power to determine whether a person is worthy to inherit or not. In the *Ferreira* decision the Court clearly held that the Master of the High Court does not have the ability to determine questions of fact of this nature.[262] The Court also emphasised the fact that the presumption of innocence rule is also applicable to private law and therefore must be applied to questions of worthiness to inherit. When considering the above, it is submitted that an executor like the Master of the High Court cannot make a determination on an individual's worthiness to inherit without the interference of the Court. It is further conceivable that under certain circumstances, the executor will have a fiduciary duty to refer a specific matter to a competent Court for determination prior finalising the distribution of an estate.

In the matter of *Faro v Bingham*[263] the Master of the High Court requested the applicant to provide security to be appointed as executor due to the fact that her marital status to the deceased was in dispute. The applicant failed to provide security and was forthwith removed as executrix by the Master. The newly appointed executor further failed to recognise the applicant as a surviving spouse in the liquidation and distribution account. The applicant lodged an objection in terms of section 35(7) of the Administration of Estates Act. The Court held that the primary duty to assess disputed claims lies with the executor. Rogers J held that the executor has to make due and proper enquiries and to obtain all the information possible to correctly identify the beneficiaries. It was further held that should the Master rejects the objection, the claimant can approach the Court for relief.

260 Meyerowitz 2001 12 20.
261 *Lindenberg v Giess* 1957(3) SA 31 (SWA).
262 2001 3 SA 370 F-G.
263 [2013] ZAWCHC 159.

5 4 Beneficiary's ability to inherit

A beneficiary must be competent to inherit at the moment he obtains a vested right against the executor in respect of his inheritance.[264] He however only obtains a right to claim his inheritance after the executor's liquidation and distribution account has lain for inspection, free of any objections.[265]

As stated above, neither the Master of the High Court, nor the executor has the discretionary right to make a determination on a person's worthiness to inherit. The provisions of section 35(4) and section 35(5) of the Administration of Estates Act[266] further requires the executor to lodge his liquidation and distribution account with the Master of the High Court for examination prior to giving the executor consent to advertise the account in terms of section 35(5) of the aforementioned Act. In the premises, and specifically in light of the *Ferreira* decision, it is doubtful that the Master of the High Court is able to grant the executor consent to advertise a liquidation and distribution account in which the executor has exercised his discretion to exclude a beneficiary from inheriting as a result of an alleged crime or fraud vis-a-vis the deceased, in the absence of an order of Court to that effect. Furthermore, Master of the High Court's supervisory roll and its lack of discretionary powers in respect of questions of fact has the effect of precluding the executor from excluding a beneficiary from inheriting without a Court order. It is accordingly clear that a Court order must be obtained prior to disqualifying a beneficiary from inheriting from an estate.

264 De Waal and Schoeman Malan *Inleiding tot die Erfreg* (2003) 3rd ed 7.
265 Schoeman-Malan 2013 *Litnet Akademies* 139.
266 Act 66 of 1965.

In contrast to the above, in the matter of *The Master v Van Zyl*[267] it was held that the executor has no general duty to administer an estate in accordance with the directions of the Master of the High Court but only in accordance with the provisions of the Administration of Estates Act. It is to be noted that none of the provisions of the act, precludes the Master of the High Court or the executor from distributing the estate in accordance with the principals of unworthiness to inherit. Furthermore, section 35(7) of the Administration of Estates Act allows a beneficiary to lodge an objection with the Master of the High Court thereby giving an aggrieved party some form of protection from being unlawfully precluded from inheriting. It must also be kept in mind that a beneficiary whom has been excluded from benefiting from an estate will always be entitled to approach the Court in order to protect his rights.[268] It is submitted that the effect of allowing the executor a discretion to exclude a beneficiary from benefiting as a result of a crime or fraud vis-a-vis the deceased, may bring about the shifting of the onus to the beneficiary whom has been excluded.

It is further submitted that when cognisance is taken of the above and the legal status of the executor, namely, that he is not a mere agent or procurator of the heirs; that he has no principal, that he acts upon his own responsibility and that he holds a fiduciary position which requires him to act legally and in good faith at all times, then it is conceivable that the executor should be clothed with the power to exclude a beneficiary from inheriting under certain circumstances. It is however submitted that a prudent executor must approach the Court for a declaratory order if there is any element of uncertainty.[269]

267 1944 TPD 211.
268 *Jones v Beatty* 1998 3 SA 1097 T.
269 *Faro v Bingham* [2013] ZAWCHC 159.

5 5 Unworthiness and interim maintenance

Certain individuals are entitled to claim interim maintenance from a deceased estate.[270] These individuals include the dependents of the deceased, usually being the surviving spouse and children. The executor may be placed in a very difficult position when faced with an interim maintenance claim from a dependant who stands accused of a crime or fraud vis-a-vis the deceased. In this instance the executor has to apply a higher standard of care before any payments are made.[271] Section 26(1A) of the Administration of Estates Act gives the executor the power to disburse an amount of money from the estate, with the Master of the High Court's consent, prior to the lapse of the inspection period of the liquidation and distribution account. This amount must be sufficient to provide for the subsistence of the deceased's family or household. By obtaining the Master's consent, the executor avoids incurring personal liability for an incorrect pay out in this instance.[272] The same factors highlighted above, it is submitted, will have an effect in this regard.

5 6 Marriages in community of property

The executor may be faced with a decision whether a surviving spouse in a marriage in community of property is entitled to his half share of the estate where he murdered or negligently caused the death of his spouse. In the matter of *Ex Parte Vonzell*[273] it was held that the husband's half share of the communal estate does not constitute benefit which he inherits, but rather is a consequence of the marriage in community of property. This principal was confirmed in the matter of *Nell v Nell*[274] where the judge further held that there was no causal link between the benefit and the crime committed.

270 Schoeman-Malan 2013 *Litnet Akademies* 139.
271 Schoeman-Malan 2013 *Litnet Akademies* 139.
272 Meyerowitz 2001 12.2.
273 1953 1 SA 126 B-E.
274 1976 3 SA 704 H 705 A.

However in the matter of *Leeb v Leeb*[275] the Court held the opinion that where one spouse murdered the other, the Court could order that the surviving spouse forfeited the benefits of the marriage in community of property.[276]

It is submitted that based on the foregoing, it is not necessary for the executor to obtain a declaratory order in this instance.[277]

275 1999 2 All SA 588.
276 Cronje and Roos (2002) 196.
277 Schoeman-Malan 2013 *Litnet Akademies* 139.

CHAPTER 6

RECOMMENDATIONS AND CONCLUSION

The aim of this research in the first instance was to determine whether the legislature has sufficient or insufficient measures in place to ensure that undue influence and fraud are avoided without impacting on the right to freedom of testation.

The repeal of sections 5 and 6 of the Wills Act by the Law of Succession Amendment Act were widely welcomed and provided more clarity regarding the capacity to inherit.[278] As mentioned above, the main purpose of section 4A of the Wills Act is to prevent undue influence and fraud.[279] However, most people would trust the beneficiaries mentioned in the will too also act as a witness. The mere fact that there is a special relationship between the parties is not sufficient to justify a presumption of undue influence.[280] The fact that they are beneficiaries does not necessarily mean that they have influenced the testator in any way. More often than not the bequests are a true reflection of the testator's intentions. It can therefore be argued that section 4A of the Wills Act inhibits the freedom of testation instead of protecting the testator's right to freely dispose of his property.[281] To compensate for the fact that you will automatically be unworthy to receive a benefit if you act as a witness, the legislature protects family members in section 4A(2)(b) and allow them to inherit in terms of intestate succession. In addition to this the provisions of the Maintenance of Surviving Spouses Act[282] provides the surviving spouse with additional protection.

278 De Waal 2011 *Annual Survey* 1048.
279 The South African law on testamentary influence is rooted in the Roman-Dutch law.
280 Cronje and Roos (2002) 155.
281 Du Toit 2013 *JCLS* 513-514.
282 Act 27 of 1990.

Du Toit makes the point that if a testator asks a beneficiary who would not be an intestate heir to his estate to witness his will, it can result in an intestate heir, who the testator not intended to benefit by leaving him out of his will, to secure an intestate share and the person, whom the testator wanted to benefit, will not receive any benefit. The result hereof may be that the wishes of the deceased are in fact frustrated by the current legal principles of undue influence. It is submitted that there should be a balance as to ensure that the wishes of the deceased are respected and adhered to whilst providing sufficient protection from undue influence and fraud. A flexible approach is proposed that allows the Court to make a determination under specific circumstances by taking into account public policy considerations.

This approach will enable the Court to find a sufficient balance between freedom of testation and family protection.

The matter of *Pillay v Nagan*[283] confirmed that our Courts are not limited to the known and recognised principles of unworthiness, but that they could be expanded on the basis of public policy. The Courts look at the conduct of the beneficiary towards the deceased in order to determine whether the beneficiary is unworthy to inherit or not.[284] It is submitted that not all forms of conduct should on face value render the beneficiary unworthy, but that morally blameworthy conduct, ought to preclude the beneficiary from inheriting.[285] Although the rules regarding common law unworthiness are not clearly set out, the Court cases referred to in this study shows that the Courts are willing to dilute the general principles of unworthiness and is willing to take into account principals of reasonableness, fairness and the public policy considerations when deciding on the unworthiness of a person. The Court must however take cognisance of the specific circumstances of each situation when developing the common law principles. The Courts

283 2001 1 SA 410 (D) 423.
284 Cronje and Roos (2002) 181.
285 Van der Walt and Sonnekus 1981 *TSAR* 45.

must however be wary of the fact that the power to develop the common law lies with the legislature and not the judiciary.[286]

There have been several recommendations made by various authors to the effect that our legislation be amended to include common law principles of unworthiness.[287] The South African Law Commission further recommends that the bloody hand rule be incorporated into the Wills Act in order to regulate the practical implications thereof and further to take into account any form of forgiveness by the testator.[288] Both these aspects form part of the modern Dutch law and has not yet been included in South African law as same will lead to unnecessary litigation.[289]

Du Toit's[290] recommendation that the Matrimonial Property Act be amended to include the forfeiture of benefits as a possible solution to obtain clarity regarding the aspect referred to above. In this instance the Court would in any event be able to use the principles of general unworthiness as a ground to order forfeiture of benefits.[291]

Schoeman-Malan[292] suggests that a section be added to the Wills Act and the Intestate Succession Act to regulate and clarify the common law position. This should clearly state that any person who is responsible for the intentional killing of the testator and his *conjunctissimi* as well as any person who acted in a morally reprehensible way towards a testator must be disqualified from receiving any benefit from the estate or from any benefits due from outside the estate. Schoeman-Malan goes further and suggests that should a person be convicted of a crime, such conviction should be enough to declare him unworthy to inherit. This should be

286 *Carmichelle v Minister of Safety and Security* 2001 10 BCLR 995 (CC) par 36.
287 Schoeman-Malan 2013 *Litnet Akademies* 142-143.
288 Schoeman-Malan 2013 *Litnet Akademies* 142.
289 Schoeman-Malan 2013 *Litnet Akademies* 142.
290 Du Toit 2012 *Stell LR* 147.
291 *Leeb v Leeb* 1999 2 All SA 588 (N); Schoeman-Malan 2013 *Litnet Akademies* 142.
292 Schoeman-Malan 2013 *Litnet Akademies* 144.

compared with the provisions of the Forfeiture Act in England and the Dutch Civil Code which clearly states that you will not be able to inherit from a person who you have unlawfully killed. Dutch law stipulates that you will be disqualified if you have been convicted. In terms of the common law and South African law there are no need for a criminal conviction to determine unworthiness, as is the case in England and the Netherlands.[293] English law further precludes someone from inheriting if you have unlawfully killed the testator, but provides the Court with the discretionary power to waive this rule.

It is submitted that should the legislature decide to regulate the principles of unworthiness discretion must be given to take into account all the facts and specific circumstances of each case.

The administration of the estate further plays a very important role and the executor and the Master of the High Court must accordingly have knowledge of the unworthiness principles so as to enable them to determine when it is necessary to approach the Court for a declaratory order or whether to wait for a criminal conviction.[294]

Presently, it is clear that our Courts are willing to broaden the general principles of unworthiness to take into account any shift in public policy and will determine unworthiness on a case by case basis.

Word count: 18 390

293 Van der Walt and Sonnekus 1981 *TSAR* 45.
294 Schoeman-Malan 2013 *Litnet Akademies* 144.

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