

# **UNIVERSITY OF PRETORIA**

## **FACULTY OF LAW**

### **The Court's power to condone a document in terms of section 2(3) and section 2A of the Wills Act 7 of 1953: A comparative analysis and recommendations**

A research paper submitted in partial fulfillment of the requirements for the  
LLM Degree Private Law (Estates Law), University of Pretoria, South Africa

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**31 OCTOBER 2012**

## Declaration

I, TAFADZWA BANDA, declare that this Dissertation which is hereby submitted for the award of Legum Magister (LL.M) in Private Law (Estates Law) is my original work. It has not been previously submitted for the award of a degree at this or any other tertiary institution. Where works of other people are used, references have been provided.

Signed

.....

Tafadzwa Banda

31 October 2012

Pretoria,

South Africa

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- My supervisor, Prof A Van der Linde for his willingness to guide me through this process, for his guidance and patience throughout. I have learnt a lot from him and it was a privilege and an honour to be his student.
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## Abstract

Sections 2(3) and 2A of the Wills Act of 1953 were incorporated into the Wills Act in 1992. The purpose of the two sections was to give the court power to condone a document that did not comply with the formalities for making a will and to empower a court to condone a legally ineffective attempt by a testator to revoke his or her will. By introducing section 2(3) and 2A of the Wills Act, the Legislature intended to eliminate the injustice and inequities which frequently resulted from non-compliance with legal requirements.

However, after the implementation of the two sections, problems arose with regard to the interpretation and application thereof. This dissertation identifies and analyses the sections to show the current issues which have been discussed in case law and writings by scholars. They are as follows:

- (a) Meaning of the word “document” in section 2(3).
- (b) Meaning of “drafted” by a person who has died since the.....drafting thereof.
- (c) Meaning of “executed” by a person who has died since the..... execution thereof.
- (d) Should there already be partial compliance with some of the formalities?
- (e) How does the court conclude that the deceased intended the document to be his will?
- (f) When must the intention be present?
- (g) Is a subsequent change in intention (even though it was present at time of making a document) relevant?
- (h) Interpretation of section 2A.
- (i) Interaction between section 2(3) and 2A.

Comparing and analysing section 2(3) with a similar provision in Canada and Australia, gives an insight into the problems they encounter and measures that are implemented to achieve the purpose of the provision. Finally, this dissertation will make recommendations regarding the possible alternative wording of the relevant section(s).

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## CHAPTER 1: Introduction

### 1 1 Introductory

South African Law of Succession prescribes formalities<sup>1</sup> for the execution of a valid will through section 2(1) of the Wills Act.<sup>2</sup> The existence of formalities offer protection against fraud and also serve an evidentiary function in respect of an important juristic act affecting the rights of the beneficiaries named in the will and other contenders in relation to the testator's estate.<sup>3</sup> However, even though section 2(1) might appear to be without problems as to the formalities to be followed, some confusion and uncertainties existed which made complying with the formalities a challenge as it was not clear what the legislature meant. For instance, the formalities require both the testator and two competent witnesses to sign the will.<sup>4</sup> However, in practice, questions arose as to whether a person's initials constituted a signature or not, since the Act did not define what a sign or signature was.<sup>5</sup> Further it remains uncertain whether the writing of a person's name in printed<sup>6</sup> or capital letters would constitute a signature.<sup>7</sup> Another point of uncertainty has been the placing of the signature in the will. Section 2(1) stipulates that the testator must sign at the "end" of the will without stating where the end of the will is. In *Kidwell v The Master*,<sup>8</sup> the court held that the will was invalid because there was too large a gap between the end of the writing and the testator's signature.<sup>9</sup> The court stated that such a gap meant that the signature was not as close as reasonably possible to the concluding words of the will. Furthermore these formalities are often not complied with for various other reasons, such as ignorance of the formalities by the testator, poor advice, unexpected death while a draft will is with the attorney. Experience has shown that an insistence on compliance with formalities may result in

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1 Corbett *et al The Law of Succession in South Africa* (2001) 58.

2 7 of 1953.

3 Corbett *et al* 58.

4 See ch 2 for the full list of formalities.

5 However, The Law of Succession Amendment Act 43 of 1992, amended the definition of "sign", to include the making of initials.

6 Reid *et al Comparative Succession Law: Testamentary Formalities* (2011) 390.

7 See *Jhajbhai v The Master* 1971 2 SA 370 (D) where the court held that this would constitute a signature. However, in the case of *Ricketts v Byrne* 2004 6 SA 474 (C), the court held to the contrary.

8 1983 1 509(E).

9 For facts see fn 44 ch 2.

the frustration of the testator's wishes notwithstanding that it is clear that the testator intended the document in question to be his or her will.<sup>10</sup> In 1991, the South African Law Commission,<sup>11</sup> while not recommending that the statutory formalities be dispensed with, recommended that the court be vested with the power to order the Master to accept a document notwithstanding non-compliance with such formalities as a person's last will. This is however, not a blanket power, but is limited through certain requirements. Flowing from these recommendations the Act was in 1992 amended by the Law of Succession Amendment Act 43 of 1992, which introduced section 2(3).<sup>12</sup> Section 2(3) reads as follows:

“If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act, 1965 as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).”

By introducing section 2(3) of the Wills Act, the legislature intended to eliminate the injustice and inequities which frequently resulted from non-compliance with the formalities required of a valid will as envisaged in section 2(1) of the Act.<sup>13</sup>

## 1 2 Problem statement

Section 2(3) has three requirements which have to be complied with before the court can condone a document as the last will and testament of the deceased. These are:

1. there must be a document;

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10 Corbett *et al* 58.

11 South African Law Commission project 22 *Review of the Law of Succession* June 1991. Currently known as the South African Law Reform Commission. Hereinafter referred to as the SALRC.

12 Corbett *et al* 58.

13 De Waal and Schoeman-Malan *Law of Succession* (2008) 69. Also see *Kidwell v The Master* 1983 1 509 (E).

2. that has been drafted or executed by a person who has died since the drafting or execution thereof;
3. with the intention that the document must be the person's will.

Despite the good intentions of the legislature with the incorporation of section 2(3), issues arose in practice over the interpretation of this section, particularly with regard to the requirement that the document must be “drafted or executed by a person who has died since” and the “intention” aspect mentioned above. The second requirement, has brought a lot of legal uncertainty in our courts as to how it must be interpreted. Other courts have followed a strict approach of interpreting this requirement. In the case of *Webster v The Master*,<sup>14</sup> the court followed a strict approach in interpreting the word “drafted” by stating that drafting should mean the document should have been drafted by the deceased personally.<sup>15</sup> In the case of *Anderson and Wagner v The Master*,<sup>16</sup> the court held that section 2(1), being in the nature of a special exemption from rigorous requirements of section 2(1), is to be strictly interpreted.<sup>17</sup> In other cases,<sup>18</sup> the court followed a flexible approach and stated that the retention of the formal requirements of section 2(1) and the peremptory nature of section 2(3) do not justify a strict interpretation.<sup>19</sup> The Supreme Court of Appeal then brought some clarity by following a strict approach to interpret the second requirement, in the case of *Bekker v Naude*.<sup>20</sup> The court held that the words of section 2(3) were clear in that the unsigned document had to be drafted by the testator and no-one else. A personal relationship was required between the deceased and the document in question. The deceased must have either executed it or drafted it in the sense of personally having drafted or prepared it.<sup>21</sup> Therefore the Supreme Court has brought clarity on interpreting the second requirement of section 2(3) in that a strict approach ought to be followed. However, the question to

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14 1996 1 SA 34 (D).

15 For a full discussion of the case see ch 3.

16 1996 3 SA 779 (C).

17 See ch 3.

18 *Back v The Master* 1996 2 All SA 161 (C).

19 Also see the cases of *Ex parte Laxton* 1998 3 SA 238, *Ex parte Williams: In re Williams Estate* 2000 4 SA 102 (C), *MacDonald v The Master* 2002 5 SA 64 (N) in ch 3 on a detailed discussion of the flexible approach.

20 2003 5 SA 173 (SCA).

21 See ch 3.

be answered is whether this clarity is correct. For instance the strict approach it has been argued, has imposed a new requirement for the application of section 2(3) namely personal drafting.<sup>22</sup>

When it comes to the third requirement, namely that the deceased must have intended the document to be his will, there is no certainty in our courts as to how the courts should approach the intention requirement. It seems in most reported cases the courts were usually convinced of the intention of the testator, if the testator:<sup>23</sup>

1. had been personally involved in the drafting of the document;  
and / or
2. had partially executed (signed) the document.<sup>24</sup>

It seems in other cases courts have looked at the document itself and surrounding circumstances, to conclude that the deceased intended the document to be his will.<sup>25</sup> It also appears that there is not complete agreement about precisely where the emphasis should be placed with regard to the testator's intention.<sup>26</sup> In *Ex Parte Maurice*,<sup>27</sup> the court found, for example, that the disputed document itself must have been intended by the testator to be his will. The court can thus not condone a document "which simply expressed the testator's wishes for the distribution of his estate"<sup>28</sup> as a will.<sup>29</sup> In contrast to this, in *Ramlal v Ramdhani's Estate*<sup>30</sup> the emphasis was placed on the intention of the testator that the contents of the document were a reflection of the way that the testator wanted his assets to be distributed.<sup>31</sup>

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22 See ch 3.

23 De Waal and Schoeman-Malan 78.

24 See *Ex parte De Swardt* 1998 2 SA 204 (C), *Mdlulu v Delarey* 1998 1 All SA 434 (W), *O'Connor v The Master* 1999 3 All SA 652 (NC) in ch 4.

25 See *Schnetler v Die Meester* 1999 4 SA 1250 (C) and *Van Wetten v Bosch* 2004 1 SA 348 (SCA) in ch 4.

26 De Waal and Schoeman-Malan 79.

27 1995 2 SA 713 (C).

28 716J.

29 De Waal and Schoeman-Malan 79.

30 2002 2 SA 643 (N).

31 De Waal and Schoeman-Malan 79.

Another problem that has become a point of contention in our courts is that section 2(3) also states that “although it does not comply with all the formalities for the execution or amendment of wills.” South African courts have argued as to whether this implies that some formalities ought to have been complied with, or if all the formalities are missing the court should still condone the document if the above three requirements have been met. In the case of *Webster v The Master*,<sup>32</sup> the court was of the view that some formalities must have been complied with. In *Back v The Master*,<sup>33</sup> the court held that had the legislature intended that the provision only apply where there was partial or attempted compliance with the formalities, it would have expressly stated this in the section.

Other questions that needed to be addressed about section 2(3) are: Whether the courts have discretion when applying section 2(3)?<sup>34</sup> When does the intention for the document to be a will need to be present?<sup>35</sup> Whether the intention can be formed at a later stage even though it was absent during drafting?<sup>36</sup> Is a subsequent change in intention (even though it was present at time of making of a document) relevant? Another problem that has been encountered by our courts is the interpretation of section 2A which I discuss in Chapter 5. With regard to section 2A I will investigate how the courts often treat the “intention” requirement in the same way as the “intention” requirement in section 2(3), which is arguably wrong. It is suggested that the judgment in *Webster v The Master*<sup>37</sup> reflects the correct approach.<sup>38</sup>

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32 1996 1 SA 34 (D).

33 1996 2 All SA 161 (C).

34 See ch 2 for a full discussion.

35 See ch 4 *De Reszke v Maras* 2006 2 SA 277 (SCA).

36 See ch 4.

37 1996 1 SA 34 (D).

38 Du Toit “Testamentary condonation in South Africa: A pyrrhic victory for private autonomy over mandatory formalism in the law of wills?” 2012 *Liber amicorum: Walter Pinter* 160, put’s it correctly when he states that, “the condonation provision of the South African Wills Act was designed to preserve testators’ private autonomy through the act of testation in circumstances where the expression of testamentary is not compliant with statutorily prescribed execution and/ or amendment formalities. However, this provision posed (and, indeed, still poses) an array of interpretation and application challenges to South African courts- to such an extent that the question invariably arises whether the current position on testamentary condonation in South African Law presents nothing more than a Pyrrhic victory for testators’ private autonomy over mandatory formalism in the law of wills?”

### 1 3 Rationale of the study

The aim of the SALRC according to the report<sup>39</sup> was to find a system that will as far as possible facilitate compliance with the testator's intention *ex facie* the testamentary writing. If cases however minimal occur in which the testator's intention is clearly frustrated as a result of mere failure to comply with formalities, the law should not remain passive. Further, by introducing section 2(3) of the Wills Act, the legislature intended to eliminate the injustice and inequity which frequently resulted from non-compliance with the formalities required of a valid will as envisaged in section 2(1) of the Act.<sup>40</sup> However this research will show discrepancies and legal uncertainties especially with the "draft" and "intention" requirements. This will show that the original aim of section 2(3) is not achieved and legal uncertainty still remains.

### 1 4 Methodology

I intend to critically analyse the position in South African positive law as it will afford us with a comprehensive analysis on how condonation has effectively been utilised. I have also done some comparative research on the positions in Canada and Australia. Canada and Australia were among the first countries to give the court the power to admit documents to probate that do not satisfy the formal requirements for execution of a will. In Canada only the provinces of Manitoba, Saskatchewan, Prince Edward Island and Quebec will the law allow for a rescue provision to be used whilst the rest are yet to incorporate such provisions into their laws. Manitoba follows the "Dispensation power" approach, in which the courts will admit a document to probate if it shows that the deceased had intended such document to be his final will. Saskatchewan follows "Substantial compliance" approach giving an indication that there must be some form of compliance before the document can be admitted to probate. In Australia all its states have a similar rescue provision. South Australia and Queensland are the only two states that will be discussed. They have followed "Dispensation power" approach which

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39 South African Law Commission: *Review of the Law of Succession* project 22 June 1991

40 De Waal and Schoeman-Malan 69.

focuses on the intention of the deceased as to whether the deceased wanted the document to be his will. In Chapter 6 I will discuss these two countries at great length and this will show how the challenges met by these two countries have been tackled by their respective courts and by the legislature.

## **1 5 Brief overview of the contents**

In chapter 2, I will look at the background and purpose of section 2(3) of the Wills Act. I will discuss the legislature's intention in the introduction of section 2(3). Finally, in chapter 2, I will look at the courts discretion to condone non-compliance. In chapter 3, I will look at the interpretation of the phrase "drafted or executed" by a person who has died since. Further I will look at whether there should be partial compliance with some or all of the formalities. In chapter 4, I will look at the deceased intention to make the document his will. I will also look at when such intention should be present. In chapter 5, I will critically analyse section 2A of the Wills Act, the power of the courts to condone an act of revocation. I will also look at the interaction between section 2(3) and 2A. In chapter 6 I will look at "Dispensation power" and "Substantial compliance" in Canada and Australia. Finally in chapter 7, I will make recommendations.

## CHAPTER 2: Background and purpose of section 2(3)

### 2 1 Background

The SALRC,<sup>41</sup> consistently attended to the review of the Law of Succession, which was included as a project in its programme during 1975. During 1979 the secretariat approached several institutions to submit proposals with regards to the identification of *lacunae* in the law of succession. In view of the comments that were received matters earmarked for investigation included the formalities for the valid execution of a will. Section 2(1) of the Wills Act,<sup>42</sup> prescribes the formalities which have to be adhered to for a successful execution of a valid will. Section 2(1)(a) states:

- (a) “no will executed on or after the first day of January, 1954, shall be valid unless-
- i. the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and<sup>43</sup><sup>44</sup>
  - ii. Such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and<sup>45</sup>
  - iii. such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and<sup>46</sup>

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41 South African Law Commission: *Review of the Law of Succession* project 22 June 1991.

42 7 of 1953.

43 S 2(1)(a)(i).

44 In *Kidwell v The Master* 1983 1 509 (E); The testator had signed the second page of his two-page will some 13 centimeters below the signature of the second witness thereto and some 17 centimeters below the attestation clause. He had signed the first page some nine centimeters below the end of the typing on the page. The court held that the requirement that the testator should sign “at the end” of a will meant that the signature should be as close to the concluding words thereof as was reasonably possible. Also see *Leprosy Mission v The Master* 1972 4 SA 173 (C) and the discussion below.

45 S 2(1)(a)(ii).

46 S 2(1)(a)(iii).

- iv. if the will consists of more than one page, each page other than the page on which it ends, is also so signed by the testator or by such other person anywhere on the page; and<sup>47</sup>
- v. if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies.<sup>48</sup>

In terms of section 8 of the Administration of Estates Act,<sup>49</sup> the Master may refuse to accept a document as being or purporting to be a will, if it appears that such document is for any reason invalid, until the validity thereof has been determined by the court. In a survey that was conducted at the Master's office in Pretoria on matters concerning testamentary writings, 8000 cases were reported and examined in the year 1980. Out of that total 6347 (98.29%) were accepted and 111 (1.71%) were rejected owing to non-compliance with formalities.<sup>50</sup> The extent of non-compliance was negligible at less than 2%. The SALRC felt however, that a solution to the problem ought to be found even if such cases rarely occur. The aim of the SALRC was to find a system that will as far as possible facilitate compliance with the testator's intention *ex facie* the testamentary writing. If cases, however minimal, occur in which the testator's intention is clearly frustrated as a result of mere failure to comply with formalities, the law should not remain passive. Further in the report, a statement by Corbett J,<sup>51</sup> in *The Leprosy Mission v Master of the Supreme Court*,<sup>52</sup> was referred to, to substantiate the dilemma in which the courts as well as heirs sometimes find themselves when a will clearly reflects the testator's intention, but is invalid as a result of failure to comply with

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47 S 2(1)(a)(iv).

48 S 2(1)(a)(v).

49 Act 66 of 1965.

50 SALRC par 27 6.

51 SALRC par 211 7.

52 1972 4 SA 173 (C).

formalities.<sup>53</sup> The SALRC looked at two instances of how the problem of non-compliance could have been dealt with. These were either:<sup>54</sup>

- (a) To give the courts the power to accept a will that does not comply fully with the formalities, namely the power of condonation
- (b) Alternatively, to relax the stringency of existing formalities of the will-making process.

The power to condone, was recommended by the law-reform bodies of several overseas jurisdictions,<sup>55</sup> and in some cases this power had already been conferred. A number of objections were raised to the award to the effect that the power to condone would result in a flood of litigation and consequently a substantial delay in the winding-up of estates; further that it would lead to uncertainty and to a proliferation of different forms of wills.<sup>56</sup> The SALRC considered the above-mentioned objections to the power of condonation and concluded that they were unfounded.<sup>57</sup> The SALRC was in favour of the power of condonation rather than easing the will-making formalities, and therefore recommended the following wording.<sup>58</sup>

“If a court is satisfied that a document or an alteration thereto by a person who has died since the drafting or execution thereof was intended to be his will or an alteration to his will, the court shall order the master to accept that document or that document as amended for purposes of the Administration of Estates Act, 1965 (Act No. 66 of 1965),

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53 184H “I recognize that this is a hard case in the sense that on the evidence of various witnesses, there does not appear to be any doubt that the document in question genuinely represents the last will of the testatrix and in that invalidity will result in a worthy beneficiaries being deprived of substantial bequests. Nevertheless there are important questions of legislative policy and principal at stake which transcend the equities of the particular case...Witnesses are not always alive to tell the facts when a will comes into operation or its validity is questioned and it is, therefore, important that the legislative rules designed to ensure solemnity or to obviate uncertainty or fraud be maintained in their full integrity.”

54 Par 212 and par 213 8.

55 E.g. Israel, South Australia, Western Australia, Queensland, Tasmania, Manitoba, Scotland, British Columbia. See fn 21 of SALRC.

56 SALRC par 214 9.

57 SALRC par 215 9.

58 SALRC 134.

as a will notwithstanding the fact that it does not comply with the formalities or the alteration of a will as prescribed in this section.”

However, when the recommended clause had been written into the existing law, thus conferring the power to condone, under section 2(3) of the Wills Act 7 of 1953, it read differently in contrast to what the SALRC had proposed and recommended. Section 2(3) currently reads as follows:

“If a court is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was intended to be his will or an amendment of his will, the court shall order the Master to accept that document as amended for the purposes of the Administration of Estates Act, 1965 ( Act No.66 of 1965), as a will although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).”

Differences can be seen between the recommendation and the final section 2(3). The SALRC’s recommended wording states that “a document or an alteration thereto by a person who has died since”<sup>59</sup> whilst the final section 2(3) wording states that “a document or the amendment of a document drafted or executed by a person who has died since”. This difference has been a major discussion point in adjudicated cases as our courts have endeavored to ascertain precisely what the legislature’s intention had been in its introduction of the words “drafted or executed by the person who has died since the drafting or execution thereof.” This matter will be discussed below.<sup>60</sup>

## **2 2 Legislature’s intention with the introduction of section 2(3)**

In most cases the purpose of the legislature in enacting laws is to improve the general life of the people in a particular country, or rendering injustices non-existent through enacting of new laws. However, in certain instances the legislative intent with the

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<sup>59</sup> This left the door open for someone to draft it on the testator’s behalf.

<sup>60</sup> See *Bekker v Naude* 2003 5 SA 173 (SCA) below in ch 3.

relevant enactment maybe considered by the judiciary when interpreting the law. The judiciary may attempt to assess legislative intent where legislation is ambiguous, or does not appear to directly or adequately address a particular issue, or where there appears to have been a legislative drafting error.<sup>61</sup> In the case of section 2(3) it is correct to say that the judiciary has attempted to assess the intent of the legislature as it became clear quite early that the wording of the section was problematic. In explaining the aim of the legislature, Corbett *et al*, states:<sup>62</sup>

“The purpose of the section is clear. The formal requirements for the execution of a valid will remain. The court is however, given the power to make the order in question so as to avoid invalidity, the consequent frustration of the testator’s intention and, frequently, inequitable results.”

This has been the accepted position in a number of cases that the courts have heard, as well as commentary by academics on the said section since its inception. In their writings Corbett *et al*,<sup>63</sup> have commented that the legislature has however, stated requirements within the framework of which this purpose is to be served and has not stated a general principal which the court can apply at all. In *Logue v The Master*,<sup>64</sup> the court was approached to condone a document left by the deceased as his valid will, even though it did not fulfill the requirements of section 2(1). The deceased had initially executed a will in 1986. On the face of it, according to the judgment, the will seemed to be compliant with all the requirements of the execution of a valid will in terms of section 2(1). It had been duly signed by the deceased and witnessed by 2 witnesses. However, the deceased had disinherited one of his relations due to an earlier disagreement. Later the relationship between the deceased and his relation was restored up to the time of the deceased death on the 27<sup>th</sup> of January 1993. It was alleged that the deceased put it to his relation that he had now included him in a new will. When the deceased died, a document in question was found amongst his documents. The document was written by the deceased in his own handwriting and it was signed and dated. However, the

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61 [Http://en.wikipedia.org/wiki/Legislative\\_intent](http://en.wikipedia.org/wiki/Legislative_intent).

62 Corbett *et al* *The Law of succession in South Africa* (2001) 58.

63 Corbett *et al* 59.

64 1995 1 SA 199 (N).

document was not witnessed and the deceased had not signed the first page. The court had to decide what the legislature's intention had been. The court held that.<sup>65</sup>

“It is apparent from these subsections that the Legislature, whilst still providing for formalities to ensure authenticity and to eliminate false or forged wills, nevertheless intended that failure to comply with the formalities should not frustrate or defeat the genuine intention of testators. The Wills Act now as amended stresses the importance of giving effect to the genuine will of the deceased expressed in a document.”

In *Ex Parte Maurice*,<sup>66</sup> the deceased left no valid executed will. The applicant who was the wife of the deceased consequently sought an order in terms of section 2(3) that a handwritten, unsigned document of the testator be accepted as the joint will of her late husband and herself. The deceased had sent the document in question to his business colleague one C. The covering letter instructed C to “knock (the document) into shape, if necessary” and to ask an attorney to put it into “legal jargon, for my approval”. The court held as follows:<sup>67</sup>

“The provisions of section 2(3) of the Wills Act are intended to save a will that would otherwise be invalid due to a formal defect in its attestation. The formal provisions for the attestation of wills remain part of our law. It is the hardship which results from a technical shortcoming in the attestation of a will which the introduction of section 2(3) seeks to alleviate. Had the Legislature intended to empower the court to give a document which simply expressed the testator's wishes for the distribution of his estate to be treated as his will, the legislature would have said so and would have focused upon the document having to reflect the testator's distribution intentions rather than his/her intention in regard to the status of the document as his or her will. Of course, to treat a document which simply reflects or expresses the testator's disposition intention as his will negates the need for testamentary formalities and allows any expression of intention to be treated as a will. The continued retention by the Legislature of the formal

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65 203F-G.

66 1995 2 SA 713 (C).

67 716H-J and 717A-B.

requirements for the validity of a will in section 2(1) of the Wills Act is inconsistent with the adoption of any alternative interpretation of section 2(3).<sup>68</sup>

In essence the intention of the legislature was to ensure compliance with the formal requirements for the valid execution of a will on the one hand but, without going to the lengths of frustrating the true intentions of the deceased on the ground that he or she had failed to comply with the formal requirements pertaining to the valid execution of the will. The underlying purpose was to alleviate or forestall injustices. The legislature's intention in conclusion, is to strike a compromise between the need to preserve a measure of formality and yet provide for some flexibility so as to prevent the testator's wishes being unnecessarily thwarted.<sup>69</sup>

### **2 3 Court's discretion to condone non-compliance**

In *Horn v Horn*,<sup>70</sup> the court was approached on the matter of its discretionary power in terms of section 2(3). It was held that where a document is in compliance with section 2(3) of the Wills Act 7 of 1953 i.e. (signed by the deceased and attested as a will), the court has no discretion<sup>71</sup> in an application for an order in terms of section 2(3). It appears from the signed English text of section 2(3) that the court "shall order the master" to accept that document. In the prescribed circumstances the court is obliged to make the order. However, Sonnekus,<sup>72</sup> observes that the court's discretion relates to its prerequisites for the exercise of its powers in terms of section 2(3).

In *Back v Master of the Supreme Court*,<sup>73</sup> the court held that it does not have discretion to decide whether or not it should order the Master to accept a document as a will in terms of section 2(3), where a court found that a document purporting to be a will was

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68 I agree with the court's decision. If the document clearly shows that the deceased had intended that the document should be his final and last testament, then such document should be admitted to probate regardless of the formal defects. See ch 4 below on the discussion of intention requirement.

69 Corbett *et al* 57-66.

70 1995 1 SA 48 (W).

71 50B-C.

72 Sonnekus "Kondonerings-bevoegdheid van Hof by Vormgebrekkige Testament" 1995 TSAR 359.

73 1996 2 All SA 161 (C).

intended by the deceased to be his or her will, but that it had to direct the Master to accept such document as a will. The word “shall” in the subsection indicated that the provision is peremptory.<sup>74</sup> In this case an application had been brought by the executors of the deceased estate who raised the issue as to whether the court had a discretion to condone non-compliance with the formalities required for the valid execution of a will. The deceased had indicated his intention to execute a new will to his attorney, who then drafted a will in accordance with his wishes. The deceased had approved the final draft of the will, but died before signing it. In its decision the court also referred to the case of *Anderson v The Master of the Supreme Court*<sup>75</sup> in which Thring J stated:<sup>76</sup>

“Moreover, the provisions of section 2(3) are peremptory: that is to say, the Court is given no discretion whether or not to grant an order as envisaged in the sub-section: once it is satisfied that the document concerned meets the requirements of the sub-section, the court ‘shall’ order the master to accept it.”

In *Ndebele v The Master of the Supreme Court*,<sup>77</sup> the court held that, in order to be successful with an application in terms of section 2(3) of the Act, it must be established that the document was drafted by the deceased; that the deceased has died since the drafting of the document; and that the document was intended by the deceased to be his will. If the court is satisfied on a balance of probabilities that these requirements have been met, the court shall be obliged to order the Master to accept the document as a will.<sup>78</sup>

In conclusion, it is clear from the judgments that the courts do not have the discretion to condone non-compliance with the prescribed formalities, provided that the requirements for section 2(3) are met. I further concur with Corbett<sup>79</sup> who states as follows:

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74 169C.

75 1996 3 SA 779 (C).

76 785E-F.

77 2000 1 All SA 475 (C).

78 479H-1.

79 Corbett *et al* 59.

“Thus the court does not have a general discretion to condone non-compliance of the prescribed formalities. The wording of the section makes it clear that if the requirements of the section are not met, more particularly if the court is satisfied that the document was intended to be the testator’s will, the court must grant an order directing the Master to accept the document as a will or an amendment to the will. If the requirements of the section are not met or if the court is not so satisfied, the court has no jurisdiction to grant such an order”.

I will proceed in the next chapter to discuss the first contentious aspect of section 2(3), namely the meaning of the phrase “drafted or executed by a person who has died since the drafting or execution thereof.”

## CHAPTER 3: Meaning of a “document” and the interpretation of the Phrase “drafted or executed by a person who has died since the drafting or execution thereof”

### 3 1 Introduction

The requirements for the application of section 2(3) are as follows.<sup>80</sup>

- (a) There must be a document;
- (b) drafted or executed by a person who has died since the drafting or execution thereof; and
- (c) the deceased must have intended the document to be his or her will.

Controversy has raged fiercely regarding the correct interpretation of the words “drafted or executed by a person who has died since the drafting or execution thereof” as used in the section.<sup>81</sup> The frequently asked question in this regard has been whether the word ‘drafted’ should be interpreted in a narrow (strict approach) or a wide sense (flexible, liberal approach). The issue prompting this question has been whether the legislature intended the drafting to be done by the testator personally, or by another party on behalf of the deceased; or whether it would be permissible for a prospective testator to address a written request to someone of his choosing to draft a will on his behalf; or whether a will thus drafted at the request of the prospective testator, but that has not been properly executed may be regarded as having been drafted and executed by a person who has died since.<sup>82</sup> The question is whether each of these cases can be deemed compliant with section 2(3) and therefore compliant with the requirement “drafted or executed by a person who has died since the drafting or execution thereof.”

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80 De Waal “The Courts’ power of Condonation in respect of the execution and revocation of Wills: Unfortunate new elements of uncertainty” 2004 *SALJ* 529 531.

81 De Waal 2004 *SALJ* 531 and case law discussed below.

82 De Waal and Schoeman-Malan *Law of Succession* (2008) 69.

### 3 2 Meaning of a “document”

Section 2(3) requires that there must be a document. However the Wills Act does not define the term “document”. The Oxford English dictionary,<sup>83</sup> describes a document, as something written, inscribed etc., which furnishes evidence or information upon any subject, as a manuscript, title-deed, coin etc. A document is usually in writing but also includes a data message.<sup>84</sup> In *MacDonald v The Master*,<sup>85</sup> the court was approached on an issue pertaining to a computer file. The deceased drafted a will on his computer at work, but failed to print it. Later he committed suicide at home leaving a note next to his body which stated that “my last will and testament can be found on my PC at IBM under directory C: WINDOWS/MY STUFF/MY WILL/PERSONAL”. Through a standard procedure at his work, access was gained to the computer and the will was printed. The court held that the deceased, a computer specialist, was the only person able to enter or store information in his own computer; it was shown on a balance of probabilities that there had been no tampering or fraud involved, hence the court ordered condonation of the document.<sup>86</sup> The court stated that the printed will and testament as found on the computer is the relevant document.<sup>87</sup> In *Van der Merwe v The Master*,<sup>88</sup> two friends decided that they would each execute a will in which the other would be the sole beneficiary. The proposed terms were set out in an e-mail and confirmed by telephone. But while the recipient of the e-mail drafted and executed a will in the agreed terms, the sender died before he could do likewise.<sup>89</sup> The Supreme Court of Appeal condoned the e-mail as the will of the deceased.

It is clear from the above two cases that our courts will condone “documents” that are in an electronic format. However it should be clear that in both these cases it was possible

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83 The Shorter Oxford English Dictionary on Historical Principles (1977).

84 De Waal and Schoeman-Malan 70. See also the Electronic Communications and Transactions Act of 2002. Although a data message is a document, this Act is not applicable to the Wills Act. See s 4(3) and Schedule 1 of the Act.

85 2002 5 SA 64 (N).

86 Du Toit “Testamentary condonation in South Africa: A pyrrhic victory for private autonomy over mandatory formalism in the law of wills?” 2012 *Liber amicorum: Walter Pintens* 167.

87 72G-H.

88 2010 6 SA 544 (SCA).

89 Reid *et al Comparative Succession Law: Testamentary Formalities* (2011) 396.

to print the documents and the courts were in fact condoning the printed documents. Du Toit points out and I totally agree that:<sup>90</sup>

“The question regarding electronic wills, particularly in the context of testamentary condonation, cannot be regarded as settled in South African Law. It remains questionable whether a court will exercise its power of condonation in respect of, for example, a document which is accessible as a computer file but which cannot, for some reason or other, be printed or otherwise converted into hard copy format.”<sup>91</sup>

### **3 3 Meaning of “drafted” by a person who has died since the drafting... thereof.**

#### **3 3 1 Strict interpretation**

A strict interpretation was adopted in a number of cases. In *Webster v The Master*,<sup>92</sup> the deceased had given instruction to his attorney to make amendments to a draft will previously prepared by the attorney. However the testator died before he could see or sign the final amended will. In refusing to condone the document as the last will and testament of the deceased, Magid J, stated:<sup>93</sup>

“The legislature has provided that a document which it is sought to have declared to be the will of the deceased in terms of section 2(3) of the Act must be ‘drafted or executed by a person who has died since the drafting or execution thereof’. In my view, this provision requires that the document be drafted by such a person personally.”

With regard to the maxim: *qui facit per alium facit per se*, on which the applicant sought to rely, the court held as follows:<sup>94</sup>

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90 Du Toit 2012 *Liber amicorum:Walter Pintens* 169.

91 In today’s world even cell phones play an important role when people communicate. For instance people nowadays communicate through SMS, Blackberry Messenger (BBM) Whatsup etc. which cannot be reduced into printed documents.

92 1996 1 SA 34 (D).

93 41B-C.

94 41C-D.

“The maxim does not in my opinion, apply. It is I think significant that in each of paras (a), (b) and (c) of section 2A the Legislature has provided that either something done by the deceased or something which he has caused to be done may be taken into account in considering whether he has evinced an intention to revoke a will. On the other hand in section 2(3) the reference is to a document ‘drafted or executed by a person...The difference in language plainly indicates a different intention.”

Magid J, stated further:<sup>95</sup>

“It is my view that the Legislature did not intend to endow an unsigned document, drafted by someone other than the testator, even an attorney, with the status of a will. If the section were given such an interpretation it would leave the door wide open to potential fraud. It would certainly not have the effect of ensuring the authenticity of such a document. What the Legislature had in mind in my view was the circumstance that the intention of a testator as demonstrated in writing in his own hand should not be frustrated because the writing does not comply in all respects with the requirements of section 2(1) of the Act.”<sup>96</sup>

In *Anderson and Wagner v The Master*,<sup>97</sup> the court held that section 2(3), being in the nature of a special exemption from the rigorous requirements of section 2(1), is to be strictly interpreted.<sup>98</sup> The court stated that for a document to fall within the ambit of section 2(3), the concerned document whether a will, or amendment of a will, ought to be drafted or executed by the person concerned with the intention that the document

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95 41E-F.

96 I disagree with the view as stated above. It is a common cause that most testator's enlist the help of an attorney to draft wills for them. The attorney will take the instructions and put them in writing and also make sure that all the legal requirements have been met. Now if we were to say that testators ought to draft their own wills without exception, many wills would fall outside the potential refine provisions in s2(3) which in my view is to assist in such circumstances. Further, I would want to believe attorneys are officers of the court, by this itself the chances of fraud are greatly reduced. I however agree with the decision that was made in *Ex parte Williams: In re Williams Estate* 2000 4 SA 102 (C)177A-F in that the very incentive for the enactment of section 2(3), which is the amelioration of hardships and injustice occasioned by insisting on the observance of the strict formalities in all cases, would in many instances be negated by requiring physical creation of the document by the testator personally and that such insistence would have the effect of excluding, for example, those who are illiterate or blind and would in any event be no guarantee against fraud.

97 1996 3 SA 779 (C).

98 785B-C.

itself constitute a will or amendment to a will. Furthermore documents containing instructions to an attorney, or adviser, to prepare a will or an amendment thereof, no matter how precise, are not written with the intention as specified in section 2(3) and thus do not comply with requirements of section 2(3)<sup>99</sup> laid down in that section. In *Henwick v The Master*,<sup>100</sup> supporting a strict interpretation, Foxcroft J, stated (obiter) as follows:<sup>101</sup>

“I do not think that it is necessary to insist upon a flexible approach in order to reach this conclusion.<sup>102</sup> Applying a strict interpretation to the section one could easily, in my view, reach the conclusion that a testator who dictates and later approves his dictation, has indeed drafted a will. To my mind the more appropriate meaning of the verb ‘draft’ in this context is to prepare rather than to make a rough copy. Hence it is clear from the above cases that the word ‘drafted’ means that the deceased must have drafted the document in question personally, hence the strict interpretation in each instance.”

In *Henwick*, the facts were that the applicant, the testator’s second wife, approached the court for an order declaring the testator’s joint will with his first wife to have become null and void. The deceased and the second wife had gone to a bank where they had been advised on the drafting of a will. An official entered certain details relating to the deceased and the second wife on a standard form headed “Application for appointment as executor or trustee.” The testator died six months later. Neither the application form nor the will had been signed. The applicant relied on section 2(3) and 2A(c) of the Wills Act.

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99 784G-785B.

100 1997 2 SA 326 (C).

101 335B-C.

102 Foxcroft J, was referring to the decision reached by the court in *Back v The Master* 1996 2 All SA 161 (C), which was in support of the flexible approach. I have discussed the case below.

### 3 3 2 Flexible interpretation

Other courts have opted for a liberal or flexible approach in their interpretation. In *Back v the Master*,<sup>103</sup> prior to his death, the deceased had indicated his intention to execute a new will to his attorney. The attorney complied with the client's wish by drawing up a will which the deceased approved in its final form but died before signing it.<sup>104</sup> The court held as follows:<sup>105</sup>

"I am, with great respect, unable to agree with this proposition. The retention of the formal requirements of section 2(1) and the peremptory nature of section 2(3) do not, to my mind, justify a strict interpretation on section 2(3). Not only is this inconsistent with the very purpose of section 2(3), namely to prevent the last wishes of a testator from being nullified by non-compliance with technical formalities, but it also does not take cognizance of the realities of the technological world we live in."

The court noted that many prospective testators gave full instructions as to their final wishes to their attorneys or bankers who then drafted their will in accordance with the instructions; as long as it was incontrovertible that the "testator" intended the draft to be his will, it ought to be irrelevant whether he personally or physically drafted it with his own hand. The court held that it would be incomprehensible and absurd for the legislature to require compliance with a further formality (the personal, physical drafting by a "testator") before recourse might be given to a provision aimed at removing the injustice and inequity arising from non-compliance with the existing formalities.<sup>106</sup> In *Ex parte Laxton*,<sup>107</sup> the deceased had given instructions to his attorney to draft a will. Upon perusal of the draft the deceased indicated that he required certain amendments to be made to the draft will. The amendments were effected in the manuscript of the draft will to the satisfaction of the deceased. The will was accordingly retyped, incorporating the amendments and arrangements were made to have the will signed. However, the

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103 1996 2 All SA 161 (C).

104 161.

105 173H-J.

106 174A-C.

107 1998 3 SA 238 (NPD).

deceased died before he had an opportunity to sign the amended will.<sup>108</sup> Combrinck J, held that, it is not a prerequisite that the will had to be written out by the testator in his own hand.<sup>109</sup> Further the court went on to state that:<sup>110</sup>

“To interpret the subsection the way Magid J did it would mean that those who are illiterate – and there are a vast number in this country- will not be able to benefit from the provisions of the section. Nor for that matter will the blind, the infirm and any other person who, because of an affliction, is unable to write. This surely could not have been the intention of the Legislature.”

In *Ex parte Williams: In re Williams Estate*,<sup>111</sup> the court was approached to have an unsigned document that was prepared by one F, after consultation with W and the applicant, as the will of W declared to be her last will and testament. The full court held that the legislature had refrained from expressly requiring that the document in question be created by the testator personally;<sup>112</sup> that it could be assumed that the legislature was aware that there were other ways, apart from physical creation, in which a document could be drafted or prepared for perusal and signature and that prospective testators would normally consult attorneys, banks or accountants with a view to having draft wills prepared for their approval and signature; that the very incentive for the enactment of section 2(3), which is the amelioration of hardships and injustice occasioned by insisting on the observance of the strict formalities in all cases, would in many instances be negated by requiring physical creation of the document by the testator personally and that such insistence would have the effect of excluding, for example, those who are illiterate or blind and would in any event be no guarantee against fraud.<sup>113</sup> In *MacDonald v The Master*,<sup>114</sup> the court held as follows:<sup>115</sup>

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108 238G-H.

109 244E.

110 244E-F.

111 2000 4 SA 102 (C).

112 175G-J.

113 177A-F.

114 2002 5 SA 64 (N).

115 71A-B.

“The retention of the formal requirements of section 2(1) and the peremptory nature of section 2(3) do not justify a strict interpretation of section 2(3). Not only is this inconsistent with the very purpose of section 2(3) namely to prevent the last wishes of a testator from being nullified by a non-compliance with technical formalities, but it also does not take cognizance of the realities of the technological world we live in.”<sup>116</sup>

### 3 3 3 The Supreme Court of Appeal’s interpretation

The tug of war of how our courts should interpret “drafted” was finally settled in the case of *Bekker v Naude*,<sup>117</sup> by the Supreme Court of Appeal. In this case the plaintiff and her husband (the deceased) had during 1993 gone to the local branch of their bank, where they requested an official to prepare a will according to a set of instructions given by them. The official completed a form containing the instructions and sent it to Pretoria, where the will was drafted and then returned to the original branch who further posted it to the plaintiff and the deceased. The will so prepared complied with the instructions given by the plaintiff and the deceased, but it was never signed by either. The deceased had previously been married to the first defendant, with whom he had during 1983 executed an earlier joint will, and the issue was whether the 1993 will was valid and thus superseded the earlier one. The first question the court had to answer was whether the unsigned document containing the 1993 will had been “drafted or executed” by the deceased as contemplated in section 2(3). In its ruling the court held that the words of section 2(3) were clear; the unsigned document had to be drafted by the testator and no-one else.<sup>118</sup> A “personal” relationship was required between the deceased and the document in question. The deceased must have either executed it or drafted it in the sense of personally having drafted or prepared it. A person does not draft a document when he requests someone else to do so. The court held further that the Act in section

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116 Wood-Bodley “*Macdonald v The Master*: Computer files and the rescue provision of the Wills Act” 2004 *SALJ* 34, 37 criticised this ruling by Hattings J, stating that “irrespective of who printed the document, it was authored and therefore drafted by Macdonald; and it was therefore unnecessary for Hattings J to rely on the liberal approach to rescue it. The rationale of strict approach is that the Act requires personal drafting by the would be testator when the will is unexecuted and in Macdonald case that requirement is clearly satisfied without resorting to a flexible interpretation, because Macdonald himself was the author of the computer file.”

117 2003 5 SA 173 (SCA).

118 176G-H.

2A(a)<sup>119</sup> clearly distinguished between that which was done by the testator himself and that which he caused to be done. If the legislature had intended that section 2(3) should likewise extend to documents caused to be drafted by the testator, it would have been easy enough for it to have said so. The word “drafted” in section 2A was clearly used in its literal sense and there was no reason to assume that it was used in a different sense in section 2(3).<sup>120</sup> The court stated further that to regard a will as having been “drafted by him personally” where the testator has given instructions to an attorney or banker to prepare a will on his behalf was to ignore the contrast in wording between section 2A and section 2(3), and did not do justice to the plain meaning of the word “drafted”. In no sense did a person who gave instruction to another person to draw up a draft of a document himself draft the document.<sup>121</sup>

The court stated further that, a person who dictates the actual words of a document to be typed by another was deemed to be the person who drafted the document. The word “draft” did not require that the person concerned physically had to write out the document in his own hand. More often than not modern practice in regard to drafting did not involve actual writing by the person who truly drafted the document. However, where an attorney or a banker has been told what a will should contain and then he/she prepares (drafts) it as instructed and the testator then peruses and approves the draft it would be incorrect to regard as the true originator of the document; rather in this instance the testator was deemed to be the actual drafter of the document as envisaged in section 2A. Hence the court refused to accept the draft will as the will of the deceased.<sup>122</sup> Therefore, *Bekker v Naude*,<sup>123</sup> has brought an end to the indecisive wrangling about the question whether to apply the law strictly or a more flexibly. The court clearly favoured a strict interpretation requiring that the document must have been drafted by the deceased in person.<sup>124</sup>

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119 Wills Act 7 of 1953.

120 179E-F.

121 179G-F.

122 179G-F.

123 2003 5 SA 173 (SCA).

124 In my view, by the SCA insisting on interpreting s2(3), strictly, disregards the intention of the legislature. As it has already been discussed in Ch 2, the intention of the legislature in enacting s2(3) was that, whilst still providing for formalities to ensure authenticity and to eliminate false or forged

However, the ruling in *Bekker v Naude*, has been subjected to the criticism that it has imposed new requirement for the application of section 2(3) (personal drafting) in addition to the normal formalities for the execution of wills which therefore erodes and detracts from the original intention and purpose of the result of this judgment was contrary to the initial rationale for section 2(3).<sup>125</sup> The decision results in the intention requirement being reduced in importance.<sup>126</sup> Only once there was compliance with the personal drafting requirement would the court have to look into the intention of the deceased. The contention was often preferred that the law would continue to be developed on a case-by-case basis, dependent on the facts presented to the courts, rather than on settled principles.<sup>127</sup> It has also been argued that the decision in *Bekker v Naude*, creates a potential constitutional problem.<sup>128</sup> Paleker states:<sup>129</sup>

“Section 9 of the Constitution,<sup>130</sup> the equality clause, enumerates a number of grounds of discrimination. The enumerated are not a closed list. Consequently, the equality clause may be invoked to prevent unfair discrimination against on the grounds other than those specifically mentioned in section 9(3). It is submitted that section 2(3) of the Wills Act (as interpreted by the Supreme Court of Appeal) unfairly discriminate against physically challenged, blind and illiterate people.”

However, on the above point, Wood-Bodley argues as follows:<sup>131</sup>

“Un sighted testators are, in any event, still able to draft their wills personally if they wish to do so, by using suitable computer equipment or dictating their wills to someone else to write out or type for them. An illiterate person can execute a will by making a

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wills, nevertheless intended that failure to comply with the formalities should not frustrate or defeat the genuine intention of testators. Therefore by requiring that the requirement “drafted” be interpreted strictly, it reduces the importance of the intention of the deceased.

125 See ch 2.

126 Schoeman-Malan and Van der Linde “Kondonasie van vormgebrekkige testamente-Die finale word?” 2003 *Obiter* 544.

127 Keightley *Annual Survey* 2003 534.

128 Paleker “*Bekker v Naude*: The Supreme Court of Appeal settles the meaning of ‘drafted’ in section 2(3) of the Wills Act, but creates a potential constitutional problem” 2004 *SALJ* 27.

129 Paleker 2004 *SALJ* 32.

130 Act 108 of 1996.

131 Jamneck *et al The Law of succession in South Africa* (2009) 81.

cross or thumbprint, which is all that is required to permit the making of an order in terms of section 2(3), provided that the document is intended to be a will. section 2(3) does not undermine the dignity of unsighted people. Illiteracy is not a protected category in terms of the equality clause of the Bill of Rights.”<sup>132</sup>

Therefore, because of the ruling in the *Bekker* case, courts in South Africa will interpret the word ‘draft’ in a strict sense until as suggested by Paleker, the matter is taken to the Constitutional Court which would open the possibility (thus Paleker) of achieving a different outcome.<sup>133</sup>

### **3 4 Meaning of “executed” by a person who has died since the... execution thereof.**

The term “execute” in relation to a document means the process of complying with the formalities has been embarked upon.<sup>134</sup> If something has gone wrong during the execution process and there has been only partial compliance with the formal requirements, the entire will is thereby invalidated failing condonation by the courts. This could happen, for example, where only the testator has signed the document or only one witness has signed, or where the formal certificate has not been met.<sup>135</sup> In *Ex parte De Swardt*,<sup>136</sup> one page of the document was accidentally left unsigned. In condoning the document the court held that it was quite apparent that the testatrix had been under the unfeigned impression that she was signing her last will and testament and thus giving expression to her final wishes.<sup>137</sup> In *O’Connor v The Master*,<sup>138</sup> the court was approached to condone a document that was signed on three pages with the thumbprint of the deceased. However, the certificate was defective. In condoning the document the court held that with regard to the nature of the document itself, the absence of any indication of impropriety or fraud, the lack of opposition to the application and the

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132 Author agrees with Wood-Bodley on this point.

133 Paleker 2004 *SALJ* 33.

134 De Waal and Schoeman-Malan 73.

135 *Ibid.*

136 1998 2 SA 204 (C).

137 207H-I.

138 1999 3 All SA 652 (NC).

involvement of several people in the execution of the document at different levels, stages venues (which militated “strongly against any conspiracy to achieve anything surreptitious”), the court was satisfied that the purpose of drawing the document had been to formalised<sup>139</sup> the will of the deceased.<sup>140</sup> In *Mdlulu v Delarey*,<sup>141</sup> the evidence led by the plaintiff showed that the signature of the testatrix had not been made by her in the presence of two or more competent witnesses present at the same time as required by section 2(1)(a). The court held that the purported will did not comply with the requirements of section 2(1)(a) and would therefore have to be invalid unless it could be accepted as a will under section 2(3). On the question whether the document was ‘drafted or executed’ by a person who has since died the court held as follows:<sup>142</sup>

“Am satisfied that this requirement has been met. Firstly, the signature of a purported testatrix, Mrs. Nomabamba Elde Ndudana, has not been challenged by any party and in fact it has been confirmed by the two witnesses called by the plaintiff. Secondly, on the evidence of the plaintiffs own witnesses, the probabilities are that the signature is indeed that of the deceased, who was the person that approached them and who wanted to have witnesses to the document which she said was her last will and testament.”

The court stated further that, it is beyond dispute that execution refers to the signature placed upon the document by the deceased.<sup>143</sup> In *Raubenheimer v Raubenheimer*,<sup>144</sup> the deceased signed a new document in 2006 replacing an earlier will which was executed in 2002. In 2005 the deceased had asked a Mr Hagen, an insurance broker

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139 653C.

140 The court raised a very interesting point in the ruling that the court agreed that the Master had acted correctly by refusing to accept the document as the final will of the deceased, because the officials neither identified themselves as Commissioners of Oaths, nor had they indicated that they had duly ascertained the identity of the testator, nor that the will was that of the testator (652). The court went on to quote the case of *Ex Parte Suknanan* 1959 2 SA 189 (D) 191, stating that “the reason for the certificate required by par (v) is, because a testator who signs by making a mark is probably illiterate, to ensure that he is person who, by making a mark, he purports to be, and that the document is his will. Thus the duty of the commissioner goes far beyond than that of witnesses, who need not know the nature of the document.”

141 1998 1 All SA 434 (W).

142 442C.

143 442D.

144 2012 5 SA 290 (SCA).

and investment advisor to prepare a will for him. After various subsequent discussions between the deceased and Mr Hagen, Mr Hagen went to see the deceased at his offices in Pretoria with a draft will for a signature. The deceased indicated that he was happy with the draft and wished to sign it and Mr Hagen told him that it had to be done in the presence of two witnesses. Mr Hagen suggested they should go to a restaurant managed by the deceased business partner, which was conveniently situated in the same building, to do so. The deceased refused to do so saying that he did not have the time and that, in any event, as he and his business partner had recently become embroiled in a business dispute, he did not want him or anyone else in the restaurant to act as a witness. Mr Hagen, completely improperly, then suggested that the testator should sign the will and that he would “attend to the witnessing thereof in my offices”. The testator duly proceeded to sign the will which, Mr Hagen then took back to Cape Town where, two days later, he had two of his employees sign it as if they had witnessed the testator signing in their presence.<sup>145</sup> In condoning the document the court held that:<sup>146</sup>

“The document was headed ‘testament’ and was signed by the testator, quite deliberately, on each of its three pages above the word ‘TESTATEUR’ (testator). Moreover he did so after Mr Hagen had told him that it needed to be witnessed to comply with the statutory formalities for wills. The only reason it was not properly witnessed was due to the testator’s hard-headedness in refusing to do the necessary before his business partner with whom he had fallen out and Hagen’s willingness to arrange to have two of his employees append their signatures as if they had witnessed the testator’s signature.”

It is clear from the cases above that our courts will generally condone a document if partial execution is evident on the document.<sup>147</sup>

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145 Par [4].

146 Par [11].

147 See also *Horn v Horn* 1995 1 SA 48 (W) and *Logue v The Master* 1995 1 SA 199 (N).

### 3 5 Should there already be partial compliance with some of the formalities?

Another point of contention that has often been raised in our courts has been the expression “does not comply with all formalities”. Although the SALRC was of the opinion that writing might be sufficient, it soon became apparent in practice that this created a problem.<sup>148</sup> The question is whether the legislature used the word “all” (the formal requirements) with a specific purpose in mind, seeing that there would be more than just writing.<sup>149</sup> In the case of *Webster*,<sup>150</sup> the court stated:<sup>151</sup>

“In this case, however, there has been no compliance with any of the formalities set fourth in section 2(1) of the Act, save I suppose for the fact that there is a document before me containing 20 pages of typescript. To that extent it might be suggested that the document is in writing and hence complies with the implied requirement of section 2(1) that a will must be in writing. I do not think that it could have been the intention of the Legislature to validate a document which does not comply with any of the formalities of section 2(1) of the Act”

It is quite clear, therefore that the court was of the view that, if no formalities had been observed the section could not be invoked.<sup>152</sup> However, *Back v The Master*,<sup>153</sup> the court found that the word ‘all’ in the section was “unnecessary and superfluous”.<sup>154</sup> The court had considered whether the words “does not comply with all the formalities” for the execution or amendment of wills meant that it could only consider a document in terms of section 2(3) where the formalities had been observed to some extent. The court held that, although it was a rule of interpretation that a meaning had to be attributed to every word in a statute, there were exceptions to the rule. A word or words might sometimes

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148 Du Toit “Artikel 2(3) van die Wet op Testamente 7 van 1953 en Substansiele Nakoming van Formaliteite: Vier Uitsprake in Perspektief” 1996 *THRHR* 472. Also see *Webster v The Master* 1996 1 SA 34 (D).

149 De Waal and Schoeman-Malan 67-96.

150 1996 1 SA 34 (D).

151 42E-F.

152 Corbett *et al* 57-66.

153 1996 2 All SA 161 (C).

154 170C.

be superfluous or tautologous and unnecessary.<sup>155</sup>The court further observed that,<sup>156</sup> The intention of the legislature in introducing section 2(3) was to validate technically invalid wills in order to give effect to the wishes of deceased “testators”. Had the legislature intended that the provision only apply where there was partial or attempted compliance with the formalities, it would have expressly stated this in the section. In *Horn v Horn*,<sup>157</sup> the court held that the use of the word “all” could indicate that there would have to be at least substantial compliance for the section to be invoked. In *Ex parte Williams*,<sup>158</sup> Swart J held that,<sup>159</sup>the Legislature has not indicated any minimum formalities requiring compliance and no logical reason presents itself why compliance with one or some unspecified formalities, irrespective of the weight which compliance would have carried, would take the matter any further. Furthermore, in cases where no formalities whatsoever have been complied with, for instance where the document has not been executed or witnessed, Swart J, stated:<sup>160</sup>

“It could not have been the intention of the Legislature that such a case falls outside the ambit of section 2(3) because the section expressly envisages cases where the document would not be executed. I think the phrase means nothing more than that the section relates to a document which is invalid as a will because the formalities have not been complied with.”

Therefore according to South African case law there is no consensus as to what the word “all” entails. De Waal and Schoeman-Malan,<sup>161</sup> have concluded that in certain cases the view has been adopted that writing is sufficient without the need for compliance with additional requirements. In other cases the view has been that there should be something more than writing. I am of the view that our courts will condone a

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155 170A-B.

156 170C-D.

157 1995 1 SA 48 (W).

158 2000 4 SA 168 (C).

159 179H-I.

160 179I-J.

161 De Waal and Schoeman-Malan 67-96.

document that all the formalities have not been complied with, if it is clear from the facts that the intention of the deceased was to make a will.

The next chapter will deal with yet a further contentious aspect of section 2(3) namely to consider the meaning of the phrase “was intended to be his will or an amendment of his will”.

## CHAPTER 4: Document must be intended by the deceased to be his will or an amendment of his will

### 4 1 Introduction

It was clear from the SALRC report that the use of section 2(3) would depend on the emphasis being placed on the intention of the testator and not on any failure to comply with formalities. Further if such intention could be inferred unequivocally from surrounding factors there was no reason why signing or partial execution should be an absolute condition. Courts in South Africa are usually convinced of the intention of the testator, if the testator has been personally involved in the drafting of the document or has (partially) executed (signed) the will.<sup>162</sup> However, it will be shown that the list is not limited to the above two, but that our courts will infer the intention of the deceased from the facts of each case individually.

### 4 2 Deceased's intention

In *Ex Parte Maurice*,<sup>163</sup> the deceased prior to his demise had drafted a document which he had sent to his friend, instructing the friend "to knock (the document) into shape, if necessary and to ask an attorney to put it into legal jargon for my approval." The court held that the deceased did not intend the document which he sent to C (his friend) to be his will. Selikowitz J, stated:<sup>164</sup>

"Had the Legislature intended to empower the Court to give a document which simply expressed the testator's wishes for the distribution of his estate to be treated as his will, the Legislature would have said so and would have focused upon the document having to reflect the testator's distribution intentions rather than his/her intention in regard to the status of the document as his/her will. Of course, to treat a document which simply reflects or expresses the testator's disposition intention as his will negates the need for testamentary formalities and allows any expression of intention to be treated as a will."

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162 De Waal and Schoeman-Malan *Law of Succession* (2008) 67-69.

163 1995 2 SA 713 (C).

164 716I-J.

The court stated that<sup>165</sup> the document was intended to constitute the deceased instructions for the drafting of his will and this was clear from the unambiguous instructions contained in the covering letter and from the fact that the deceased still wanted to approve the document after it was “knocked into shape” and put into “legal jargon”.<sup>166</sup>

In *Letsekga v The Master*,<sup>167</sup> notes were found among the testator’s possessions that appeared to be notes of future changes to his will. For example, “1(d) this amount to be increased to R50 000”. The prospective tone of the notes (“to be increased” rather than “is hereby increased”) coupled with certain other factors indicated that these were notes of changes that the testator was contemplating to be made to his will. The notes themselves were not intended to be a codicil to his will; hence an order in terms of section 2(3) order could not be made with respect to the notes. In *Anderson and Wagner v The Master*,<sup>168</sup> the court held as follows:<sup>169</sup>

“To come within the ambit of the subsection the document concerned, be it a will or an amendment of a will, must have been drafted or executed by the person concerned with a certain intention. That intention must have been that the document should itself constitute his will or an amendment of his will, as the case may be. An instruction by the testator to his attorney or other adviser to draft or prepare a will or an amendment of a will along certain lines or in certain terms, no matter how precisely defined, is not written with the intention required by the subsection, and consequently cannot be brought within its terms. The difference between a document which is intended by its maker to be his will, or an amendment of his will, on the one hand, and an instruction by him to another person to draw a will or an amendment to will is neither merely technical nor insubstantial: in my view it is fundamental.”

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165 717F.

166 I agree with the ruling that the deceased did not intend the document to be his last will and testament. If this had been the case it is unlikely that he would have requested that the document be returned to him for his approval. Hence, I concur with the court that indeed these were merely instructions.

167 1995 4 SA 731 (W).

168 1996 3 SA 779 (C).

169 784G-J.

In this case the testator had written a letter with instructions on how he wanted his will to be drawn. The court refused to condone it in light of the requirement of section 2(3). In *Ex parte De Swardt*,<sup>170</sup> a page was missing from a final print of the will, which had been executed by the deceased. The court was satisfied that the deceased had intended the document to be her will. The court held further that the testatrix had clearly thought that she was signing her last will and testament. There could be no doubt that she had been giving expression to her final wishes. She was actually frustrated by the error which had occurred in not being able to carry out her final intention.<sup>171</sup>

In *Kotze v The Master*,<sup>172</sup> the court had to decide whether a document should be accepted as the will of the deceased. On the facts before it, the court found that at the time that the deceased wrote the document in question, he did not unconditionally intend it to be his will. He knew that he had to sign the document before it became his will and he did not do so. He became ill and had to go to the hospital. He went to hospital without signing the document although he could have done so. He died in hospital. The court was not convinced that on these facts the deceased had formed the intention that the document should be his will, hence the court refused to condone the document.

In *Ex parte Laxton*,<sup>173</sup> the court condoned an unsigned document as having reflected the true intention of the deceased. The deceased had instructed his attorney to draft his will. However, he died before signing it. The court held that, in the present case the manuscript amendments were made in the deceased presence. He approved them as did his wife.<sup>174</sup>

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170 1998 2 SA 204 (C).

171 207H-J.

172 1998 1 All SA 312 (NC).

173 1998 1 All SA 289 (N).

174 296.

In *Mdlulu v Delarey*,<sup>175</sup> the plaintiff had brought an application to have the will of her deceased mother declared invalid because among other reasons it did not comply with the requisite formalities provided under section 2(1) of the Wills Act.<sup>176</sup> The evidence led by the plaintiff showed that the signature of the deceased had not been made by her in the simultaneous presence of two or more competent witnesses as under section 2(1)(a)(ii). Furthermore, section 2(1)(a)(iii) had also not been complied with as the two witnesses had not attested and signed the will in the presence of the deceased and of each other. The court concluded that the purported will did not comply with the requirements of section 2(1)(a) and was therefore invalid, unless it could be accepted as a will under section 2(3). In reaching its decision, that the required intention had been shown satisfactorily the court had considered relevant facts in light of which it's as follows:<sup>177</sup>

1. The document itself was described and referred to as the last will and testament of the deceased.
2. The content of the document also indicated that it was intended to be a will.
3. The deceased was a person of some education and worldly experience who knew well what she was doing.
4. According to the evidence considered this to be her last will.

Therefore, the court concluded that because of the above four considerations adduced as evidence, that the document in question had been intended by the testatrix to be a final disposition of her assets by way of her last will and testament.

In *O'Connor v The Master*,<sup>178</sup> the applicant sought an order declaring a document executed by the deceased to be his valid last will and testament condoning the document even though it did not comply with section 2(1) (a) (v).<sup>179</sup> The facts were that

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175 1998 1 All SA 434 (W).

176 7 of 1953.

177 443-445.

178 1999 3 All SA 652 (NC).

179 If the will is signed by the testator by the making of a mark or by some other person in the presence and under the direction of the testator, a commissioner of oaths certifies that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of

the Applicant had accompanied the deceased to the offices of his attorney of record, at his instance. After the will had been drawn up, read and explained to the deceased, and the deceased had expressed his satisfaction with the document, the attorney had sent the deceased to the local magistrate's office to have the deceased assent to the will by placing his thumbprint on it. At the Magistrate's office the will was again read out to the deceased, by an official whose designation was unknown. The deceased then attached his thumbprint to the will in the presence of the said official as well as a second official. Both officials signed above the deceased's thumbprint and an official date stamp was placed over the officials' signature. The court held that having regard to the nature of the document itself, the absence of any indication of impropriety or fraud, the lack of opposite on to the application and the involvement of several people in the execution of the document at different levels, stages and venues (which militated "strongly against any conspiracy to achieve anything surreptitious"). It was satisfied that the document was intended to be the will of the deceased.<sup>180</sup> In *Schnetler v Die Meester*,<sup>181</sup> the court gave an indication of factors (such as the document itself and the circumstances) that it could take into account in considering whether the deceased had intended a document to be a will.<sup>182</sup> In *Ndebele v The Master*,<sup>183</sup> the court relied on the account before it of events that took place between the deceased and his attorney before the deceased death. The applicant had contended that a strict interpretation of section 2(3) concerning the requirement of establishing the deceased's intention was, prescribed by all authorities in order to prevent the fraudulent introduction of a document in a situation where its supposed author was unable to verify the document. The court held as follows:<sup>184</sup>

"Such concerns did not arise *in casu* as the fourth Applicant was an experience attorney and an officer of the Court and there was no reason to doubt his version of events. The question was therefore whether the evidence of the fourth Respondent

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the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies.

180 659.

181 1999 4 SA 1250 (C).

182 De Waal and Schoeman-Malan 78.

183 2000 1 All SA 475 (C).

184 482 par 32.

established on the balance of probabilities that the deceased intended the document to be his will.”

In *Ramlal v Ramdhani's Estate*,<sup>185</sup> the court held that where a document is not drafted by the prospective testator in person, but by an attorney on the latter's instructions, whereupon the prospective testator died before reading and approving the document and its contents, it cannot be said that the inceptor of the document intended it to be his last will. Richings AJ stated:<sup>186</sup>

“Testators are notoriously fickle, there exists the possibility of their wishes changing in the interval between the giving of instructions and the final approval of what has been drafted. Every attorney knows that even where ordinary commercial agreements are concerned, it is not unknown for alterations to be suggested and effected while the document embodying the terms of the agreement is being read through for the purpose of a signature. How much more so, when the document in question is intended to embody the clients last wishes upon this earth.”

In *Van Wetten v Bosch*,<sup>187</sup> the central issue in the appeal was whether the deceased had intended the contested document to be his will, as required by the rescue provision,<sup>188</sup> or whether it was merely a letter of instructions to his attorney indicating how he wished his will to be drawn up.<sup>189</sup> In its ruling the court stated that before a question whether the deceased had intended the document to be his will can be answered, the court should look at the document and the circumstances.<sup>190</sup> The Supreme Court of Appeal held the following on the contents of the document:<sup>191</sup>

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185 2002 2 SA 643 (NPD).

186 647E-G.

187 2004 1 SA 348 (SCA).

188 Wood-Bodley “Tertius Bosch's final over: *Van Wetten v Bosch*” 2005 SALJ 52.

189 The deceased had left an envelope containing instructions to his friend that should anything happen to him this sealed envelope should be opened. Upon his death the sealed envelope was opened revealing 3 small envelopes addressed to his wife, his child and his attorney.

190 The court held that, “that it was particularly significant that the contested will had been handed over not to the attorney but to a friend, V, for safe-keeping, to be opened only in the event of something happening to the deceased or his changing his mind. It was an obvious inference to be drawn from the behaviour of the deceased that he had been contemplating suicide at the time when he had written the document. That inference led inevitably to the conclusion that, when had given the envelope to V, it had not been his intention that V should hand the enclosed document to the attorney

“The words of the contested will were not the words of a person giving instructions for the drafting of his will.<sup>192</sup> They were the words of a person who had made a decision to which immediate effect was to be given. They were his will. The very words used by the deceased were thus also decisive of the question before the court: the deceased had intended the document to be his will. The surrounding circumstances, and, in particular, the handing over of the document in a sealed envelope to V, to be opened only in the event of something happening to him, led to the same conclusion.”(own emphasis)

In *De Reszke v Maras*,<sup>193</sup> a Supreme Court of Appeal case, the Appellants conceded that the document had initially been prepared and drafted simply as instructions to the attorney,<sup>194</sup> but at a later stage “the deceased by his conduct manifested a different intention, namely that the document should be his will.”<sup>195</sup> The court concluded that it was clear from the facts rather than the will that the deceased had intended the document to be an instruction to an attorney<sup>196</sup> as to the content of a will to be drafted.<sup>197</sup> The deceased confirmed to the attorney that he indeed wanted a new will

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for him to see the drafting of his will. At the time when it was envisaged that the envelope would be opened and the document read, the deceased would be already dead. He could, obviously, not after his death have executed a will. That fact alone showed that the contested will had been intended by the deceased to be his will. The terms of the contested will bore that out.”

191 357A-C.

192 352H-I, 353A-E “As you are aware of the present situation which I am finding myself I have had a long thought about the matter and I have made the following decisions. Declare all previous will and testament not valid from this day the 5 Sept 1997 drawn up by me or Karen-Anne.....I will if the situation changes itself drastically, may consider changing my will and testament but as of today 5th September this is my will to be followed.”

193 2006 2 SA 277 (SCA).

194 De Waal and Schoeman-Malan 67-96.

195 282I-J.

196 Van der Linde “Non-Compliance with Formalities” 2006 *JQR*.

197 The reason the court gave for its decision as summarized by Van der Linde is that: The deceased confirmed to the attorney that he indeed wanted a new will to be drawn up as he was dissatisfied with the first and he gave the attorney the instructions to that effect. This is inconsistent with a belief on the part of the deceased that the document which he signed was his will. If the purpose of the document had changed from being an instruction to becoming the deceased’s will, it was not necessary that it be given to the attorney. The fact that it was eventually given is consistent with the initial intention. The deceased was an astute and meticulous businessman. He had executed an earlier will and therefore knew what was required to execute a will. The document is not consistent with that knowledge or his own prior conduct when he executed the first will. If he knew what he was doing (which was assumed) it would have been obvious to him that the document did not purport to

drawn up as he was dissatisfied with the first and he gave the attorney instructions to that effect. This is inconsistent with a belief on the part of the deceased that the document which he signed was his will. In *Smith v Parsons*,<sup>198</sup> a Supreme Court of Appeal case,<sup>199</sup> the court held that the deceased had intended the suicide note to be an amendment to his will, hence condoning the document. The reasons the court gave was that the deceased was conscious of the fact that he had a will and that it did not make provision for the appellant, hence the instructions contained in the suicide note making provisions for her. The court stated further that the instructions were clear and unequivocal. It can thus reasonably be inferred that when the deceased wrote the suicide note, the deceased intended that instructions would be implemented by the bank and his executors.<sup>200</sup> Du Toit is of the view that the Supreme Court of Appeal, rather than bringing greater clarity to the issue, instead muddied the already troubled waters of section 2(3)'s intention requirements.<sup>201</sup> Du Toit states that:<sup>202</sup>

“In the *Smith* case, too, the deceased had an existing will therefore knew what was required to execute a will. The court a quo, in reaching the conclusion that the suicide note did not evince a clear and unambiguous intention on the deceased's part that it must serve as an amendment to his existing will, attached much weight to the deceased's business acumen, his knowledge of testamentary execution requirements and the time available to the deceased (having evidently contemplated suicide for at least four days prior to committing the deed) to formalize instructions to his bank to execute an amendment to his existing will. Although the aforementioned considerations

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be a will but purported to be instructions as to how to draft his will. In the circumstances the document itself indicates that it was not intended to be the deceased's will.

198 2010 4 SA 378 (SCA).

199 The facts were that the deceased committed suicide in 2007. He had a validly executed will dated 7 May 2003 but, on the day of his suicide, drafted a hand-written suicide note, unexecuted save for his shortened name that appeared on it, addressed to the appellant (with whom he had a relationship prior to his death). The note revealed considerable remorse on the deceased's part regarding troubled relationships with, amongst others, his son as well as with the appellant. In addition, the note contained a number of statements in regard to the distribution of the deceased's house and certain monetary sums to the appellant as well as a reference to his existing will in terms of which his son was to inherit.

200 The High Court had refused to condone the suicide note because it did not evince a clear and unambiguous intention on the deceased's part that it should be amend the provisions of the will. Par [17].

201 Du Toit “Testamentary condonation in South Africa: A pyrrhic victory for private autonomy over mandatory formalism in the law of wills?” 2012 *Liber amicorum:Walter Pintens* 178.

202 Du Toit 2012 *Liber amicorum:Walter Pintens* 177.

are not in themselves decisive to the outcome of a section 2(3) application, courts, including the Supreme Court of Appeal in *De Reszke*, places due reliance on them. It is therefore puzzling that, on appeal in the *Smith* case, the court paid little regard to these factors. Nor did the Supreme Court of Appeal take cognizance of the consideration, mentioned in *De Reszke*, that, arguably, the deceased in *Smith* should have realized that the document at hand may well not be regarded as a purported amendment of his existing will, but rather as a mere suicide note.”

In *Longfellow v BOE Trust Ltd*,<sup>203</sup> the court was once again approached to condone a “CNA precedent” type of will. The facts were that, the applicant (second husband) married the deceased (wife) in 1995. No children were born from the marriage. However, prior to her marriage to the applicant, the deceased was married to the second respondent (first husband). They had two children. In 1989, while married to her first husband, the deceased executed a will in which she left her entire estate to him. The deceased was diagnosed with brain cancer in April 2007. She underwent surgery, during which surgeons removed most of the tumour, but in August 2007, the deceased suffered a stroke and was again diagnosed with cancer of the brain. The testatrix was discharged and sent home, since there was nothing that could be done for her. The applicant realized she was dying and set in motion the circumstances that led to the drafting of the CNA precedent. He started to enquire what to do to have a will drawn up. Attempts to get help from Standard Bank failed.<sup>204</sup>

The applicant had arranged for employees of Standard Bank to witness the draft document (the CNA precedent). On 7 September 2007, two employees of Standard Bank arrived at the couple’s home in order to witness the draft document as arranged with the applicant. These employees informed the applicant that he would not be able to inherit in terms of a will that he had drafted and left without formalising the draft document. The deceased died on 21 September 2007 without signing the draft

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203 NO (13591/2008) [2010] ZAWCHC 117.

204 Van der Linde “*Longfellow v BOE Trust NO (13591/2008) [2010] ZAWCHC 117; Mabika v Mabika [2011] ZAGPJHC109; Taylor v Taylor [2011]ZAECPEHC 48 Requirements in terms of section 2(3) of the Wills Act 7 of 1953: Some comments on judgments in recent case law*” to be published in the *De Jure* 2012.

document. The applicant discovered the 1989 will, amongst the deceased's belongings. The second respondent was the sole heir in terms of the 1989 will. Further, the applicant in his affidavit had stated that.<sup>205</sup>

“I then decided to buy a will from CNA. The same day I bought one. I said to the Testator that I had a will. At the time, it was blank. I said that I was going to fill it in to reflect that I would inherit the state, that I would be the executor, that the Old Mutual policy would be shared equally by the Third and Fourth Respondents and that she would revoke all previous wills. The Testator agreed to this. The testator could not write... She stated that I should read it [the will] to her. I did so and she confirmed it was fine...”

The court ruled that it was not satisfied that the deceased had intended the document to be his last will and testament. This was so in view of the circumstances that led the applicant to start his enquiries, in order to ascertain how he could have the deceased's will drawn up. He never stated that the deceased requested him to make any enquiry. Due to his poor relationship with third respondent (deceased's daughter), the court could not accept that the deceased would expect the applicant, after he had inherited her half share of immovable property, to leave a 25% share thereof to the third respondent.<sup>206</sup>

Van der Linde,<sup>207</sup> has criticised the steps followed by the court in coming to the conclusion of this case. He argues that the court failed to address one of the requirements of section 2(3) which is that the document must have “been drafted or executed by a person who has died since the drafting or execution thereof”: The court only addressed the third requirement that the deceased must have intended the document to be his final will. Van der Linde states that:<sup>208</sup>

“The second requirement in section 2(3), besides there having to be a “document”, is that the document should have been “drafted or executed by a person who has died

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205 Par [10].

206 Par [24-28].

207 Van der Linde 2012 *De Jure*.

208 *Ibid*.

since the drafting or execution thereof". Strangely enough, nothing is said in the judgment by the court about this requirement and whether it was met. The court only addressed the third requirement, namely, the intention for the document to be a will. In *casu*, the document was not drafted by the deceased."

He went on further and stated that:<sup>209</sup>

"In *Longfellow*, the deceased did not personally write, type or dictate the content herself. The applicant completed the blank spaces. He told her he was going to fill it in to reflect that he would inherit the estate, that he would be the executor, that an Old Mutual Policy would be shared by the daughters and that she (testatrix) would revoke all previous wills. The document was read back to her and she agreed to its contents. This action can not be construed in a way to indicate that the deceased dictated her will to the drafter. The case could have been decided on this point alone, without debating the third "intention" requirement. Furthermore, reconciling oneself with a document and approving of its content, is not sufficient to comply with the requirement of 'personal drafting.'"

I totally agree with Van der Linde. It would have been easy on the court to decide on "personal drafting" than looking at whether the deceased had intended the said document to be her final will. The court overlooked the need of the document to have been "drafted or executed" by a person that has died since.

In *Mabika v Mabika*,<sup>210</sup> the deceased had approached her bankers, First National Bank prior to her demise and had issued an instruction to that institution to draft her will. The document on an FNB logo, consisted of five pages and was entitled "Application for the drafting of a will". Further, under the heading "Terms and Conditions" the words "First National Bank Trust Services and FirstRand Bank Holdings Ltd will endeavour to prepare the Last Will and Testament compatible with the client's instructions as indicated on this application form" The document stated further 'The Will is only valid

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<sup>209</sup> *Ibid.*

<sup>210</sup> 2011 ZAGPJHC 109; 2011/10308 of 8 September 2011; <http://www.Saffii.org/za/cases/ZAGPJHC/2011/109.html>.

once the completed document has been signed in terms of section (2) (a) (i) of the Wills Act as amended.<sup>211</sup> In its ruling the court held that,<sup>212</sup> she clearly intended the document to be her final will but did not survive to sign it. This is so despite the fact that the document is styled “Application for the Drafting of a Will”. It contained full personal details which the deceased intended to appear in her will.

The court stated further:<sup>213</sup>

“The surrounding circumstances are that the deceased and the first respondent, due to his cruelty towards her were estranged. They were on a verge of a divorce, but for her illness and eventual death. They no longer lived together since 2006. The deceased clearly intended to disinherit the irresponsible and unemployed first respondent from her estate. She took him to the maintenance court in order to compel him to comply with his fatherly responsibilities, including that of his own son. She even obtained an interim protection order to put an end to the persistent assaults on her. She was also hugely scared of the first respondent. That is why she never ventured to mention to him the word ‘divorce’. Under these circumstances, it will be greatly unjust not to accept Annexure “SM2” as the deceased’s final will, and the first respondent will unfairly benefit from her estate when it is clear that such was not her intention.”

In the *Mabika* case, the judge was of the view that in not accepting Annexure “SM2” it would be “unjust and unfair”. I agree with the court’s ruling to condone the document. However, I am of the view that the reasons given by the court for its ruling missed the whole purpose of section 2(3). The focus of section 2(3) should be on whether the deceased had intended the document to be his last will and testament. The moment the courts start looking at whether the document is “just” in comparison with the surrounding circumstances, the purpose of section 2(3) will completely be lost. Van der Linde states that,<sup>214</sup> although abstract values such as reasonableness and fairness are fundamental to our law of contract, they do not constitute independent substantive rules that courts

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211 9 par [11].

212 12 par [15].

213 *Ibid.*

214 Van der Linde 2012 *De Jure*.

can employ to intervene in contractual relations. Van der Linde went on to quote *Potgieter v Potgieter*,<sup>215</sup> to state that:<sup>216</sup>

“The court in *Potgieter* (par [34]) submitted that the reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as “reasonable” and “fair” is essentially that it will give rise to intolerable legal uncertainty. Reasonable people, including judges, may often differ on what is “equitable” and “fair”. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. The criterion will thus no longer be the law, but the judge.”

From the facts in *Mabika*, I am of the opinion that the surrounding circumstances were such that could have warranted the court to conclude that indeed the deceased wanted the document to be her will. The emphasis should be on the deceased intention for the document to show her wishes with regard to the distribution of her estate and not so much on the intention for the document to be a final will. It was clear that the deceased had disassociated herself from the first respondent. That she wanted to make sure that her children would not suffer when she died. In *Taylor v Taylor*,<sup>217</sup> approximately one year before his death, the deceased became aware that he was suffering from terminal lung cancer and this knowledge spurred him to undertake certain estate planning exercises. Seven months prior to his death, he executed a last will, in terms of which he bequeathed his fixed properties to his children (applicants), and his personal effects and residue to the first respondent (wife). Later on, the deceased drafted a so-called “wish list”, with regard to the distribution of some of the movable assets and the use of the fixed property after his death. It was signed by him and dated. The court was then approached to condone the so-called “wish list” as an amendment to his last will and testament. The question before the court was whether the deceased when he drafted the “wish list”, intended it to be an amendment of his existing will. The court held the following:<sup>218</sup>

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215 ([2011]ZASCA 181).

216 *Ibid* 14.

217 [2011] ZAECPHC 48.

218 Par [15].

“ . . . the language employed by the deceased in this document does not demonstrate an intention on the part of the deceased to amend his last will and testament. On the contrary, what it would appear to indicate is that the deceased intended that his last will and testament should stand but that it was his desire, notwithstanding the bequests made therein, that his family should stand together when it came to the administration of the estate and the distribution of the assets and that they should be distributed equitably amongst all the parties involved. In this regard, it seems to me, he had faith in both his children (first to third applicants) and his wife, (first respondent) to, notwithstanding the bequests made in his will, distribute his personal effects and the residue of his estate fairly and equitably and in accordance with his wishes as expressed in the wish list which was executed subsequent to his will.”

However, Van der Linde argues that:<sup>219</sup>

“An aspect the court, in my opinion, failed to address, was the sentence: “My personal effects and the residue of my estate have been bequeathed to my wife *for the sake of simplicity*” (own emphasis). What did the deceased mean/intend with this phrase? Can it not be argued that he indeed intended the “wish list” to be read as “supplement” to the will? In other words, he didn’t want to deal with the exact detail of how he wanted each and every single movable asset to be distributed in his will (but rather through a “wish list”)? Such an argument does not seem to be valid. If he wanted the list to be read with the will, he would have referred to the list in his will. It was, furthermore, only prepared some six months after the will. The format, structure, content and unambiguous wording of the document is also indicative of his intention. In *Taylor*, the deceased did not indicate that he wanted the document to be seen as an amendment, supplement or replacement of his existing will. This also supports the court’s argument (Para [15]).”

#### **4 2 1 Conclusion**

In essence it can be said that the South African courts are more readily convinced of the intention of the deceased that the document must be his will if the testator has drafted

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219 Van der Linde 2012 *De Jure*.

or executed the document personally.<sup>220</sup> However, it has also been shown from South African case law that the particular facts and circumstances of each case are of great significance with regard to the question whether the testator had intended a document to serve as his will, or not. The cases have also shown that our courts are not willing to accept that there was the necessary intention if instructions were given to another person to draft the will on behalf of the testator and the testator did not accustom himself or herself to the document. I am of the opinion that there should be clear guidelines and steps as to how the courts can conclude that the deceased intended making the document in question his will and testament.

### 4 3 When must the intention be present?

The issue as to when the intention must be present was discussed in *Van Wetten v Bosch*.<sup>221</sup> The court held that<sup>222</sup> evidence as to subsequent conduct was relevant only insofar as it shed light on what the deceased had in mind at the time of making the contested will.<sup>223</sup> In essence the court considered that the intention to execute a will need only exist at the time when the document purporting to be a will is drawn up and section 2(3) does not require that this intention be sustained until the death of the author or inceptor of such purported will.<sup>224</sup> However, Wood-Bodley differs from this view as follows:<sup>225</sup>

“In view of the conceptual difficulty around the notion of having to revoke a will that is invalid, one must wonder whether the Supreme Court of Appeal was correct in its narrow conception of the intention requirement in section 2(3). The difficulty could have

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220 De Waal and Schoeman-Malan 67-96.

221 2004 1 SA 348 (SCA).

222 It was argued for *Bosch*, on the other hand, that the deceased had changed his mind after 5 September 1997: that she and the deceased had been reconciled; that they had had another child; that she had subsequently been designated as a beneficiary under various new insurance policies (this is in issue since it was contended that the existing policies had been renewed rather than new policies taken out after the contested will was made); and that the deceased had not mentioned the contested will to anyone in the period of his illness preceding his death. He appeared to have forgotten about the document that he had entrusted to Van der Westhuizen.

223 355J-356A/B.

224 Wood-Bodley 2005 SALJ 56.

225 Wood-Bodley 2005 SALJ 56.

been legitimately avoided by requiring that the deceased's animus testandi must be sustained until his or her death, so that evidence of the change of intention would be both relevant and admissible. Such an interpretation would not do any violence to the wording of the act and would give due cognizance to the peculiar status of the invalidly executed document.”

He further concluded that there was good reason to treat the defective will differently and to view the intention requirement as an ongoing one. *De Reszke v Maras*,<sup>226</sup> also dealt with the issue as to when the testator<sup>227</sup> must have the intention to execute a will. It was held that the intention must have existed concurrently with the execution or drafting of the document, and could not be said to have existed where the facts showed that the deceased intended the document to be more than an instruction to an attorney as to the content of a will to be drafted rather than the will itself.

#### **4 4 Is a subsequent change in intention (even though it was present at time of making of a document) relevant?**

In *Van Wetten v Bosch*,<sup>228</sup> Bosch had argued that the deceased had changed his mind after 5 September 1997.<sup>229</sup> Further, Bosch had argued that she and the deceased had been reconciled, that they had had another baby and that she had subsequently been designated as a beneficiary under various new insurance policies. Lewis J A, held that<sup>230</sup> the factors were not in his view relevant in determining what the deceased's intention was at the time of writing the contested will. Evidence as to subsequent conduct is relevant only insofar as it throws light on what was on the mind of the

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226 2006 2 SA 277 (SCA).

227 Counsel for the appellant conceded that when the document was initially prepared on the instructions of the deceased it was intended to be no more than instructions to an attorney. However at some stage thereafter the deceased by his conduct manifested a different intention, namely that the document should be his will.

228 2004 1 SA 348 (SCA).

229 This was the day the deceased had written the document in question.

230 Par [20].

deceased at the time of making the contested will and that such evidence was not shown in this case. However, Wood-Bodley differs from this view as follows:<sup>231</sup>

“There is, therefore, good reason to treat the defective will differently and to view the intention requirement as an on-going one. As far as discharging the burden of proof is concerned, once an applicant established that the deceased drafted or executed the document with *animus testandi*, then the fact that it was not subsequently destroyed, and that there was no other evidence of a change of intention, should be sufficient to show that *animus testandi* was sustained. However, the Van Wetten judgment did not consider this possibility and we must live with the anomalous situation which results.”<sup>232</sup>

I completely support Wood-Bodley’s argument. The court should indeed take into consideration any evidence which is brought to show subsequent change of intention.

Section 2A of the Wills Act will be critically analysed in the next chapter.

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<sup>231</sup> Wood-Bodley 2005 SALJ 57.

<sup>232</sup> In a New South Wales (Australia) case of *Plummer v Hill* 1994 33 NSWLR 446, the court was approached as to whether dispensing power could be applied to a document that the deceased had not intended to be his will at the time he made it, but which he subsequently and without any intervening handling of the document such as writing or execution-come to regard as his will. The court answered in the affirmative. Also see Wood-Bodley 2005 SALJ 57 who discussed the case.

## CHAPTER 5: A critical analysis of section 2A of the Wills Act: power of the courts to condone an act of revocation

### 5 1 Introduction

A testator is at liberty to amend or revoke his or her will as he or she pleases throughout his or her lifetime from the day that the will is executed.<sup>233</sup> The testator can make these changes as many times as are practicable before his or her demise. The power of the Courts to condone revocation by a testator who is no longer alive will be discussed in this chapter.

Revocation is the act by which a testator can deprive a once valid will of its legal force.<sup>234</sup> In terms of the common law there are two ways in which a will can be revoked successfully in South African law. These are:

- (i) Revocation by destruction of the whole will.<sup>235</sup>
- (ii) Tacit revocation.

However because of uncertainty about certain methods of revocation of wills,<sup>236</sup> the SALRC made suggestions in Working Paper 17, in which the court is authorised to declare a will or part thereof to be revoked notwithstanding the fact that the revocation or the document from which the revocation appears does not comply with the common law methods of revocation.<sup>237</sup> The SALRC was convinced, however, in view of the existence of a power to condone in overseas systems and the uncertainty that exists in this country with regard to the validity of certain methods of revocation, coupled with the support of several respondents for the proposed provision in Working Paper 17, that

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233 There are two exceptions which restrict the freedom of revocation. (a) Where a mutual will establishes estate massing, the surviving testator who accepts the benefit of the massing cannot subsequently alter the testamentary disposition of the massed assets stipulated in the mutual will (b) Testamentary provisions contained in a duly registered ante nuptial contract cannot be unilaterally departed from or altered. See Jamneck *et al The Law of succession in South Africa* (2009) 85.

234 Jamneck *et al* 85 and Schoeman- Malan 90.

235 The destruction can be physical for example the will may be burnt or torn up as a symbolic gesture indicating and it may be symbolic.

236 Corbett *et al* 100.

237 SALRC 67 par 334.

there is a need for the implementation of such a power. Hence the end result of such recommendation was the enactment of section 2A of the Wills.<sup>238</sup>

## 5 2 Section 2A

Section 2(3) of the Wills Act, makes for a court to order that a defectively executed will be treated as if it were a valid will, provided, among other things, that the court is satisfied that the defective will was intended by the testator to be his or her will. Section 2A is a parallel provision which empowers a court to complete a defective attempt by a testator to revoke his or her will. Section 2A reads as follows:<sup>239</sup>

“If a court is satisfied that a testator has

- (a) made a written indication on his will or before his death caused such indication to be made
- (b) performed any other act with regard to his will or before his death caused such act to be performed which is apparent from the face of the will; or
- (c) drafted another document or before his death caused such document to be drafted,

by which he intended to revoke his will or a part of his will, the court shall declare the will or the part concerned, as the case may be, to be revoked.”

From the above it is evident that, a testator personally or through someone acting on his behalf must have performed an action reflecting an intention to revoke an existing will. Hence this is completely different from section 2(3) where only the testator must have personally drafted or executed the will.

Like section 2(3), section 2A is problematic when it comes to the courts interpreting the section. It is clear from our case law that the courts have adopted the use of different approaches in interpreting section 2A. Some courts have adopted a strict approach, whilst others have preferred a more flexible approach. It seems that most of the cases

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238 SALRC 68 par 3.37.

239 Jamneck *et al* 93.

that have dealt with section 2(A), also dealt with section 2(3), leading to the conclusion that there is always interaction between the two sections.<sup>240</sup> The interaction of section 2(3) and 2(A) will be discussed in more detail later in the chapter.

*Webster v The Master*,<sup>241</sup> the court dealt with section 2A. In this case an application was made for an order declaring that the will executed jointly by the deceased and his former wife prior to their divorce, had been revoked pursuant to section 2A.<sup>242</sup> On a copy of the said joint will the deceased prior to his death, had deleted the name of his divorced wife, and the mention of their marriage in community of property. He furthermore deleted the provision that the longest living of them was to be the sole heir in the joint estate. He had also instructed his attorney to draft a new will, but died before signing it. The applicant argued that the conduct of the deceased in deleting portions of his joint will, instructing his attorney to prepare a new will, and pursuing and approving the draft, demonstrated that the deceased had intended to revoke the joint will in so far as it related to his estate, and that accordingly section 2A (b) and (c) were applicable. The court held that, the will could not be regarded as revoked in terms of section 2A (a) because the writing was on a copy of the will and not the original.<sup>243</sup> However, the court concluded that the will could be revoked in terms of section 2A(b).<sup>244</sup> De Waal and Schoeman-Malan<sup>245</sup> have criticised the ruling as follows:

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240 De Waal and Schoeman-Malan *Law of Succession* (2008) 98 state: "In practice this means that if the court allows a section 2(3) application for condonation and accepts a document as a will, the later "will" expressly or tacitly revoke the previous will, which strictly renders a s2A application unnecessary."

241 1996 1 SA 34 (D).

242 Further that another document prepared by the deceased be declared the will of the deceased in terms of section 2(3).

243 Jamneck *et al* 95 has argued that the decision is difficult to understand because paragraph (b) requires the "other act" referred to be apparent from the face of the "will". The Act would seem to require that for the purposes of both s2A (a) and (b) conduct on the original will is required.

244 Wood-Bodley "The coup de grace provision- Judicial revocation of wills in terms of s2A of the Wills Act of 1953" 1998 *SALJ* 202; 205 states that "It is, with respect, doubtful whether the revocation of the will in terms of section 2A(b) was correct, for it surely a requirement of the subsection that the act which is performed with regards to the will must be 'apparent from the face of the will'. There would appear to be no justification for regarding those words as applying to the situation where the testator has caused the act to be performed, but not when he has performed it himself."

245 101 fn 131.

“It is difficult to grasp this conclusion of the court. The question of whether the copy as amended by the testator could qualify as a document in terms of section 2A(c) was not considered by the court. Although it is therefore possible to concur with the result reached by the court in the *Webster* case, we doubt whether this was done in the correct way. The question is thus ultimately whether section 2A has actually made provision for the case that presented itself here.”<sup>246</sup>

In *Letsekga v The Master*,<sup>247</sup> an application was made in terms of section 2(3) for the court to accept the document as the final will of the deceased and in the alternative to accept that the document was intended to revoke a part of a will in terms of section 2A(c). The deceased died leaving a valid will and a set of notes, written in his own hand, recording prospective amendments to the will, which may have been a reminder to the deceased of what he intended to change, or instructions to someone regarding changes to be effected. As regard the first application the court held that the deceased did not intend in making the document his last will, hence the application failed.<sup>248</sup> Concerning section 2A(c) the court held that for the same reasons given for the application of section 2(3), the document did not qualify as a document as specified in terms of section 2A(c).<sup>249</sup> The court held further that the notes themselves were not intended to revoke or amend the will. The intention of the testator in such a case is that a further document will be made in due course that will bring about the revocation.<sup>250</sup> I am of the view that, although the court had correctly turned down the section 2A(c) application, it had done so for the wrong reasons. The requirements of section 2(3) and 2A are different. The court could have refused the application on the basis that the deceased

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246 I agree with the view expressed by the source.

247 1995 4 SA 731 (W).

248 The reasons the court gave for this ruling were that the testator had probably envisaged a redrafting of his will based on the notes contained in the document (736G-H). The court stated further that the fact that the document was not signed and that the will itself was typed and ordered and that it complied with the formalities and that the deceased was an astute businessman who had a broad knowledge of the law and was meticulous, he would have seen to it that the amendment to his will was drawn so as to comply with the statutory requirements (736I-J).

249 737E-F.

250 Wood-Bodley 1998 SALJ 205 -206 supports this ruling as he believes the *Webster* case was incorrectly decided. He supports the use of s 2A(c); “since if the act performed by the testator with regard to his will envisaged in s2A(b) does not have to be apparent from the face of the will, Navsa J would also have had to concern himself with the possible application of that provision.”

had neither drafted another document nor had caused such document to be drafted with the intention to revoke his will or part of his will.

In *Henwick v The Master*,<sup>251</sup> an application was brought to declare a joint will revoked in terms of section 2A(c). The applicant, the testator's second wife, approached the court for an order declaring the testator's will of October 1972 to have been revoked and no longer of any effect. The document sought to be forming the subject of the application was a joint will that the testator had executed while married in community of property to the second respondent. They were divorced in 1986. In 1994 the testator married the applicant. Two days after the wedding the applicant and the deceased went to a bank where they were advised on the drafting of a joint will. The deceased died 6 months later before signing the joint will. In dismissing the application the court held that the difficulty with this argument was that the document itself did not indicate that the testator agreed with the contents thereof. The Legislature, in seeking to implement a testator's genuine intention, had enacted section 2A and 2(3) and had determined that a strict rather than a liberal approach was necessary. Applying a strict interpretation of section 2A(c) of the Wills provided insufficient evidence to show that the testator had performed any act which had resulted in the drafting of a will that purportedly expressed his intention to revoke his earlier will. Hence the court dismissed this application.<sup>252</sup> On the above decision Corbett *et al*<sup>253</sup> argues:

“Seen in this light, the court's approach was, with respect correct. However, while it may be correct to refer to a strict or liberal interpretation of the word ‘draft’ in section 2(3), it does not seem to be entirely appropriate to use this language when dealing with the question of whether or not the testator caused the document to be drafted and/or

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251 1997 2 SA 326 (C).

252 Wood-Bodley 1998 *SALJ* 205-206 is of the opinion that this judgment should not be considered binding to the effect that a strict approach has to be adopted to the interpretation of s2A, because such an approach is actually not necessary to the decision. It would seem that the intention of ss 2(3) and 2A is to ameliorate the sometimes harsh consequences of a strict application of the Act; and for this reason it is submitted that a flexible approach is to be preferable, where the language of the Act allows. Such an approach would also accord more closely with the Law Commission's comments that in deciding whether there is a revocation of a will, the court should not concentrate on whether there has been some recognised act of destruction; and that the only precondition should be that the act of revocation be apparent from the face of the will or from another document.

253 103 fn 126.

whether the testator had the necessary intention in terms of section 2A. Reference to a strict interpretation usually connotes attributing a narrow rather than a wide meaning to language. The language of section 2A is clear. What arose for decision in *Henwick's* case is whether or not the facts justified a finding that the deceased had caused the drafting of the document in question. It is the approach of the courts to this question and the question of the existence or otherwise of an intention to revoke (and not the interpretation of the section) which must be strict rather than liberal.”

In *Olivier v Die Meester: In re Boedel Wyle Olivier*,<sup>254</sup> a codicil that was not compliant with the statutory requirements was drawn up by the testator’s accountant.<sup>255</sup> In terms of this document new clauses were inserted in place of existing clauses in the testator’s will. The survivor of the testators applied for an order declaring the codicil to be valid in terms of section 2(3) and for certain provisions of the will to have been revoked in terms of section 2A. Smit J held that, the codicil contemplated both a partial revocation and an amendment and that the intention was that the revocation would only take place if the substituted clause took effect and therefore precluded application of section 2A.<sup>256</sup>

On this decision Wood Bodley<sup>257</sup> states the following:

“On the particular facts of the case, this decision seems, with respect, to have been correct because it is unlikely that the testator would have intended the separate implementation of the revocatory aspects of the codicil. However, the reason for the court’s decision is ambiguous. The court commented that there is a potential conflict between section 2(3) and section 2A in that although a partial revocation of the will would bring about an amendment of the will, the requirements for an order under section 2A implementing a partial revocation of the will are quite different from the requirements for an order under section 2(3) that an invalid codicil be treated as valid. The Court appeared to be of the view that in order to resolve this potential conflict between the two interrelated provisions of the Act, applications for revocations in terms of section 2A must be limited to pure revocations in which no additional matter is

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254 1997 1 SA 836 (T).

255 Corbett *et al The Law of Succession in South Africa* (2001) 103.

256 841I-842C.

257 Jamneck *et al* 96.

simultaneously introduced into the will, and all other applications for revocations must be handled in terms of section 2(3).”

Further,<sup>258</sup> Nortje<sup>259</sup> has suggested that the judgment is ambiguous and that it is possible that the court was not laying down a general rule regarding when section 2A can be used, but was simply holding that where the provisions were intended by the testator to comprise one transaction (this intention being objectively determined from the will and admissible evidence of relevant circumstances), then section 2A cannot be used. Wood-Bodley<sup>260</sup> further holds that it is not necessary to seek “reconciliation” of the two sections in this way, provided that sufficient attention is paid to the requirement of intention in section 2A, and in particular to the need for the applicant to show either that

- the testator’s *animus revocandi* was not contingent on the execution of a valid will; or
- it was so contingent, but that the (invalid) will qualifies for validation by the court in terms of section 2(3).

In *Mdlulu v Delarey*,<sup>261</sup> the plaintiff sought to have the will of her deceased mother declared invalid on grounds that the deceased had acted under duress; that the will did not comply with the formalities prescribed under section 2(1) and that the will was subsequently revoked by the testatrix herself. The court held that section 2A had to be interpreted cautiously since its provisions were peremptory; once a court was satisfied that a testatrix intended her will to be revoked, it had to issue a declaration to that effect. *In casu* there was no document available to the court indicating that the testatrix had intended to revoke her will. According to common law a will could not be revoked orally and section 2A did not have any specific provisions changing the common law position in this regard. Section 2A(c) specifically provided for the existence of “another” document “drafted” by the testatrix. The court concluded that, at the very least, the production of a document reflecting the intention of the testatrix to revoke her will was

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258 Jamneck *et al* 96.

259 Nortje “Partial validity of a substitution—*Olivier v Die Meester: In re Boedel Wyle Olivier*” 1998 SALJ 1. 260 1998 SALJ 202 212.

261 1998 1 All SA 434 (W).

required. As no such document had been produced in the instant case, the court found that the testatrix had not revoked her will.

However Wood-Bodley has commented as follows on this ruling:<sup>262</sup>

“Unfortunately, after stating unequivocally that a ‘written document’ is required by section 2A, the Court muddied the waters later in the judgment by stating that ‘[a]bsent the document before the Court (and for the purposes of this consideration I envisage that a document may include a video or film of the testator)’ the Court cannot be satisfied as to the revocatory intention of the testator.<sup>263</sup> (The comment concerning videos and films is obiter.) In view of the Court’s earlier emphatic statement that a written document is required, and the words ‘for the purposes of this consideration’ in the passage just quoted, it seems possible that the court may simply have envisaged that the written document, and the testator’s intentions arising from it, may be proved by video or film evidence.”

In *De Reszke v Maras*,<sup>264</sup> the court had to decide whether a written instruction to an attorney to draft a will qualified as the testator’s last will in terms of section 2(3), alternatively whether the document revoked his previous correctly executed and valid will in terms of section 2A, particularly in terms of section 2A(c). In its ruling with regard to section 2A, namely that the document constituted a revocation of the prior validly executed will, the court concluded that the inference could be drawn that the deceased intended the revocation of the prior will to be conditional and contingent upon the document in question being declared a valid will. However, De Waal<sup>265</sup> has criticised this ruling as follows:<sup>266</sup>

“An initial problem that arises in this context is a formal one, namely whether a document of the type at issue in this case could ever form the basis of a section 2A(c)

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262 Jamneck *et al* 94.

263 455.

264 2003 6 SA 676 (C).

265 De Waal “The Courts’ power of condonation in respect of the execution and revocation of wills: Unfortunate new elements of uncertainty” 2004 *SALJ* 529.

266 De Waal 2004 *SALJ* 536.

condonation. The court did not address this issue directly, but apparently proceeded on the assumption that it could.<sup>267</sup> It is suggested that the court was wrong in this assumption (if indeed that is what was assumed).”

De Waal continues:<sup>268</sup>

“According to the principle expounded in cases such as *Ex parte Maurice* (supra) and *Anderson and Wagner* (supra), only a document that was *itself* intended to be a will, and not a document with mere instructions to draw up a will, can be condoned in terms of section 2(3). Taking the italicized phrase into account the logic seems inescapable that the same principle should apply with regard to an application for condonation based on section 2A(c). In other words, the document in question must itself contain the required intention to revoke.”

### 5 3 Interaction between section 2(3) and 2A

From our case law it is clear that when a section 2(3) application is made an alternative application is normally made in terms of section 2A.<sup>269</sup> In other cases this has happened in reverse order. We first see the interaction between these two sections in *Logue v The Master*.<sup>270</sup> In this case an application was made for an order declaring a will of a testator to have been revoked.<sup>271</sup> Secondly an order was applied for directing the Master to accept a certain document to be the will of such testator. The court held that, it was satisfied that the second document had been intended to be the will of the deceased.<sup>272</sup> In this case the sequence was that a section 2A application was made first in which context it was found that the first will had been revoked. Then it was found in the context with the second application in

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267 689D-E The Court has already found that annexure A, [the disputed document] is not a valid will of the deceased in terms of section 2(3). This does not necessarily detract from the fact that the revocation clause in annexure A could pass muster in terms of the requirements of s2A(c) which has a wider connotation than section 2(3).

268 De Waal 2004 SALJ 536.

269 If there exist an earlier valid will.

270 1995 1 SA 199 (NPD).

271 As to s2A.

272 Although the court never said anything about the s2A application it is clear from this case that the court had tacitly revoked the first will that had been executed by the deceased.

terms of section 2(3) that the document had been intended to be the last and final will and testament of the deceased.

In *Horn v Horn*,<sup>273</sup> a section 2(3) application was made and the court ordered the Master to accept the document as the last will of the deceased. It went on to say that the 1993 document (now declared a will) had revoked the 1986 document. The court held that this was in line with section 2A.<sup>274</sup>

In *Letsekga v The Master*,<sup>275</sup> an application was made for the court to order the Master to accept a document as an amendment of a will in terms of section 2(3), alternatively to accept that the document was intended to revoke a part of a will in terms of section 2A(c). The court turned down both applications. The court held that the deceased had not intended for the document to be his last will and testament. The court also found that the deceased had not intended to revoke the said will.

In *Webster v The Master*,<sup>276</sup> an application was made for an order declaring the revocation of the joint will of a testator and his wife to the extent that it related to the estate of the testator, and further that an unsigned draft will be accepted as the will of such testator. Section 2A application succeeded,<sup>277</sup> while the section 2(3) application failed.<sup>278</sup>

The interdependency between section 2A and section 2(3) can therefore be described as follows;

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273 1995 1 SA 48 (WPA).

274 50C-D.

275 1995 4 SA 731 (W).

276 1996 1 SA 34 (D).

277 40B-C "The conduct of the deceased in deleting portions of the joint will, in instructing him (Kleyn) to prepare a new will, and in perusing and approving the draft thereof demonstrates that the deceased intended to revoke the joint will insofar as it affected his estate and that accordingly in terms of paras (b) and (c) of s 2A of the Act the Court should declare the joint will to be *pro tanto* revoked."

278 40G "It seems to me therefore, that annexure 'MEK 2' was not, as is required by section 2(3) of the Act, intended by the deceased to be his complete will. It constitutes only a portion thereof. It follows, therefore, that am not satisfied that annexure 'MEK 2' was intended to be the will of the deceased and I cannot therefore make an order in terms of that section."

- If a section 2A application succeeds the new document revokes the first will. But a section 2(3) application is still necessary in order to have the new document declared the last will of the deceased.
- If a section 2(3) application succeeds a section 2A application in the alternative is rendered unnecessary by that token.
- It is advisable however to bring a section 2(3) and a section 2(A) application because, as it appears from *Webster*, if the section 2(3) application fails, at least there is an application to have the earlier will declared revoked based on any one of the grounds on section 2A.

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## 5 4 Conclusion

In summary it is clear that the significance of section 2A is much wider than that of section 2(3). It has given us more scenarios in which a court can condone revocation. However, from the above cases it is clear that there is no consensus with regard to a definitive interpretation of section 2A. In some instances the courts have adopted a rather liberal or flexible approach while in others they have opted for a rather stricter approach. They have shown however that it is critical to ascertain that the deceased intended conclusively to revoke his will failing which (i.e. clearly showing the intention to do so) the court will not find that the document has been revoked.

The position in Canada and Australia, two countries that have rescue provisions for wills that were not properly executed will be considered in the next chapter. I have chosen these two countries as they were among the first countries to enact a rescue provision which is similar to that of South Africa and they have a vast amount of jurisprudent regarding this matter.

## CHAPTER 6: “Dispensation power” and “Substantial compliance” in Canada and Australia: A brief comparative overview

### 6 1 Introduction

Like South Africa, Canada and Australia have their own rescue provisions for non-compliance with the will-making formalities. In both these countries the courts are vested with this form of power. In Canada however, it does not extend to all the country’s provinces and it is not applied in the same manner in those provinces that it is in force. In Australia, the rescue provision is uniform in all Australian states. The states and provinces of these two countries have either followed the “Substantial compliance” approach or the “Dispensation power” approach. The choice of Canada and Australia for discussion in this regard is that these two countries were among the first in the world to enact such a rescue provision, and that consequently there is a considerable body of relevant jurisprudence in these two countries, as will be seen from the discussions below.

### 6 2 Canada

Out of the ten provinces in Canada, only in Manitoba, Saskatchewan, Prince Edward Island and Quebec does one find a rescue provision of documents that do not comply with will making formalities. The rest have yet to incorporate such provisions in their laws.

#### 6 2 1 Manitoba

##### 6 2 1 1 Section 23 of the *Manitoba Wills Act* before changes in 1995

Manitoba was the first province to enact a rescue provision in 1983.<sup>279</sup> Initially section 23 of the *Manitoba Wills Act*<sup>280</sup> provided the following:

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<sup>279</sup> Sokol *Mistakes in Wills in Canada* (1995) 22.

### “Substantial compliance

Where, upon application, if the court is satisfied that a document or any writing on a document embodies

- (a) the testamentary intentions of a deceased; or
- (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,<sup>281</sup>

the court may, notwithstanding that the document or writing was not executed in compliance with all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.”

However the heading of this section was “Substantial compliance” in execution of will even though there was no mention of the word “Substantial compliance” in the section.

<sup>282</sup> This caused considerable controversy in that it seemed as if a court ruling on the matter was contingent upon some form of compliance. Among the first case to be heard on this matter was that of *Re Pouliot; National Trust Co v Sutton*.<sup>283</sup> The testator made informal alterations, without attestation, to his formally drawn will. Hanssen J, acknowledging that the new section of the *Wills Act* was preceded by and entitled “Substantial compliance”, nonetheless concluded that the exercise of the powers given under section 23 was not contingent upon finding any degree, however slight of compliance with the statutory formalities, and that provided the court was satisfied that the document met the threshold requirement of expressing the testamentary intentions of the deceased,<sup>284</sup> the informal alterations would be permitted to stand.<sup>285</sup>

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280 The Wills Act, C.C.S.M.c. W150.

281 It is interesting to note that in the Manitoba law one section, contains the provisions for both s2(3) and s2(A) of the South African law.

282 ALRI 19.

283 1984 17 ETR 224 (Man QB).

284 Sokol 22.

285 Also see *Back v the Master* 1996 2 SA 161 (C) above in ch 3 where the South African Court’s ruling is similar to the above when the issue of substantial compliance was raised.

In *Re Briggs*,<sup>286</sup> a document was found upon the testator's death which was wholly written by the deceased purporting to be his will; however, it was signed at the beginning and not at the end. The court held that the initial handwritten words containing the testatrix's full name could constitute due execution of the holograph will, hence the document represented the testator's intention and was admitted to probate accordingly.

In *Re Langseth Estate; Mc Kie v Gardiner*,<sup>287</sup> which is a Court of Appeal case, the court was approached on the issue of "Substantial compliance" and gave some final clarity as to how section 23 should be interpreted.<sup>288</sup> In this case the testator had executed a typewritten will fully in compliance with statutory requirements, but some time later had made three alterations to the will of which only one was initialed by him. The alterations were all unwitnessed. Also left with the will was an unsigned memorandum confirming the testator's authorship and acceptance of the alterations. In its split ruling the court held in majority (Philp and Lyon JJ.A.), that in construing section 23 of the Act, regard must be to the formal requirements of execution found in other sections of the Act and to the purposes they are intended to fulfill.<sup>289</sup>

Conversely, O'Sullivan JA, in dissent but concurring in the result boldly stated his position as follows:<sup>290</sup>

"while I agree that the legislature did not intend to revive all the law as it was prior to the *Wills Act* of 1837, I also am of the view that it is now no longer necessary to have any formalities in a will other than writing. The sole question, where the *Wills Act* formalities are not complied with, is whether or not a writing or document is testamentary or not. I do not agree that in applying section 23 of the Act the court must

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286 1986 21 ETR 127 (Man QB).

287 1990 39 ETR 217 (Man CA).

288 Sokol 23-24.

289 See judgment 495.

290 Sokol 24.

be satisfied that there has been some compliance or some attempt to comply with the formal requirements.”<sup>291</sup>

As there was no compliance at all, the majority held that alterations could not be admitted to probate. Therefore the Law in Manitoba prior to 1995 as applied with respect to the Supreme court ruling was that, invoking the statutory “Substantial compliance” doctrine was contingent on the condition that the lower court had to find some degree of compliance, or attempt at compliance, with the statutory formalities regulating wills.<sup>292</sup>

## **6 2 1 2 Section 23 of the *Manitoba Wills Act* after 1995 changes**

After 1995 section 23 reads as follows:

### **“Dispensation power**

Where, upon application, if the court is satisfied that a document or any writing on a document embodies

(a) the testamentary intentions of a deceased; or

(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;

the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.”

Changes that were made to section 23 were due to recommendations made by the Manitoba Law Reform commission.<sup>293</sup> The heading “Substantial compliance” of section 23 was repealed and replaced by “Dispensation power”. Further in part (b) the wording

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291 See judgment 484.

292 Sokol 24.

293 *Manitoba Law Reform* “Section 23 of the Wills Act Revisited” Informal Report 22B( 1992).

“was not executed in compliance with any or all of the formal requirements” was substituted for “was not executed in compliance with all of the formal requirements”. Hence this meant that the courts could order that a testamentary document was effective “notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements ...” so that, apart from the requirement of a document, proof of testamentary intention become the only prerequisite for the document to be regarded as the final will of the testator.<sup>294</sup> In *Re Shorrocks estate*,<sup>295</sup> there was a formal will and was witnessed by one witness. The court held that it was no longer a requirement that some formal requirements must have been met to grant probate. The court concluded that the document represented testamentary intention.<sup>296</sup> In *George v Daily*,<sup>297</sup> the testator advised his accountant that he wished to change his previously executed will. The accountant made the changes on the will as instructed, then wrote to a lawyer relaying the instructions he had received from the testator. The lawyer met the testator, who confirmed his desire to revoke, as well as his proposed dispositions. However the lawyer advised the testator to obtain a medical certificate of competence. Nothing further happened, and the testator died 2 months later. The motions court held that the accountant’s letter’s constituted a will. However on appeal the Court of Appeal reversed the decision. It held that<sup>298</sup> at best the letter contained instructions and was never touched by *animus testandi*. Furthermore two months delay militated against a finding of testamentary intention.<sup>299</sup>

### 6 2 1 3 Conclusion

Before the changes enacted in 1995 the heading of section 23 of the *Manitoba Wills Act* contained the expression “Substantial compliance”. However, this caused problems as no mention of “Substantial compliance” was made in the wording of the section. This

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294 ALRI 20.

295 1996 109 Man. R. 2d 104 (Man QB).

296 See *Back v The Master* 1996 2 All SA 161 (C) where it was also concluded that intention by the deceased in declaring the said document as his last and final will is of importance regardless of whether there was any compliance.

297 1997 15 ETR 2d 1 (ManCA).

298 ALRI at 58.

299 The facts and the decision are similar to those of *Ex parte Maurice* 1995 2 SA 713 (C).

issue was only put to rest by the majority ruling of the Court of Appeal in the case of *Re Langseth Estate: Mc Kie v Gardiner*, which stated that substantial compliance was indeed a requirement for a court to validate a document that did not comply with the will-making formalities. After 1995 the only obstacle that the courts had to overcome with a view to accepting a document for submission to probate was the actual document itself and its reflection of the testator's clear intention to ensure that the document would be his final will.

## **6 2 2 Saskatchewan**

Saskatchewan province incorporated a rescue provision in its *Saskatchewan Wills Act* of 1996<sup>300</sup> and has since gone through transformation from the initial provision under section 35.1<sup>301</sup> to the current provision under section 37.

### **6 2 2 1 Section 35.1 of the *Saskatchewan Wills Act* before 1996**

Section 35.1 of the *Saskatchewan Wills Act* stated as follows:

#### **“Substantial compliance”<sup>302</sup>**

Where, on application, if the court is satisfied that a document or any writing on a document embodies:

- (a) the testamentary intentions of a deceased; or
- (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will; the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will

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300 1996c. W-14, s.

301 Wills Act, R.S.S. 1978, W-14 s.

302 As in Manitoba, the heading was “Substantial compliance” although there was no mention of compliance in the text.

of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.”

It is clear that section 35.1 had the same heading as section 23 of the *Manitoba Act*. In *Re Warren Estate*,<sup>303</sup> the testator made certain bequests to his sisters who were also witnesses to the will. The court held that the purpose of section 35.1 of the *Wills Act* was to validate formal and holograph wills that were not in compliance with all the relevant provisions of the Act; and further that once the necessary testamentary intention was found, any irregularity could be remedied by applying section 35.1. The court found that the testator intended to benefit his sisters; hence the document was allowed as the last and final will of the deceased. In *Re Mc Dermid Estate*,<sup>304</sup> the deceased and his wife had obtained two commercial Last will and Testament forms. On June 12, 1980, one of the said forms was filled in by hand by each of them. He by his will left all of his estate to her and appointed her executrix. She by her will left all of her estate to him and appointed him executor. Each then executed what they then believed to be the wills prepared by them for their respective signatures in the presence of two witnesses. The deceased died on July 8, 1994 whereupon it was found that the deceased had inadvertently signed the Will prepared for his wife's signature and that she had inadvertently signed the will intended for his signature. The wife applied for probate of the will he intended to sign, but which she in fact had signed. In granting probate and accepting the document as the final will of the deceased the court held that under section 35.1 of the *Wills Act* the court can find any document to be valid as a testamentary document if it is satisfied that it embodies the deceased's testamentary intentions; further that under the circumstances, it was clear from the materials filed that the will prepared for the husband, but executed by the wife, embodied the testamentary intentions of the husband. The court directed that the will prepared for the wife but inadvertently signed by the husband should be appended to the husband's intended will,

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303 1994 (112) Sask R. 62.

304 1994 (5) ETR(2d) 238 (Sask QB).

such that the contents of the husband's intended will and his signature from the wife's will could be admitted to probate.<sup>305</sup>

The *Saskatchewan Wills Act* was repealed in 1996. section 35.1 was replaced by section 37.

## **6 2 2 2 Section 37 of the *Saskatchewan Wills Act* after 1996**

Section 37 of the *Saskatchewan Wills Act* reads as follows:

### **“Substantial compliance”<sup>306</sup>**

The court may, notwithstanding that a document or writing was not executed in compliance with all the formal requirements imposed by this Act, order that the document or writing be fully effective as though it had been properly executed as the will of the deceased or of the testamentary intention embodied in that other document, where a court, on application is satisfied that the document or writing embodies:

- (a) the testamentary intentions of a deceased; or
- (b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will.”

In *Re Mate Estate*,<sup>307</sup> the applicants sought an order declaring that the instructions for a new will delivered by the deceased to her lawyer before her death constituted her final will. The deceased had left unsigned notes with her lawyer. The court held that if the deceased had intended the notes to be final, some form of attestation would have followed. The notes of the lawyer indicate that the deceased's intention had not set irrevocably at the time when the notes were left with the lawyer. Some form of execution was required on documents if they were to be admitted to probate. Section 37 does not

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305 See *Ex Parte Swardt* 1998 2 SA 204 (C) where the facts and the final outcome are similar to the above case.

306 Unlike Manitoba, Saskatchewan has not changed the heading to “Dispensation power”, giving the impression that “Substantial compliance” was still a requirement.

307 1999 CanLII 12652 (SK QB).

dispense entirely with the section 7 requirements (formalities for the valid execution of a will) but rather grants relief from the formality of the section.<sup>308</sup>

In *Re Walmsley Estate*,<sup>309</sup> the applicant sought to have admitted to probate a printed form of will, purporting to be the last will and testament of Melvin James Walmsley, upon which someone filled in the blank spaces in handwriting. It was signed by the deceased and witnessed by the applicant and the deceased's wife. In dismissing the application the court held that the document did nothing more than "deputise" the estate trustee to distribute the estate property. The document was not testamentary in nature. As the deceased did not dispose of the property himself there was no testamentary disposition, which precludes any finding of testamentary intention. To be considered testamentary, the document had to evince a clear disposition effect or testamentary intention. The court held further that although the document was signed by the deceased it did not evince a testamentary intent, hence it could not be condoned in virtue of section 37, the "Substantial compliance" provision, which allowed the court to order a will to be fully effective despite its failure to meet all of the formal requirements of the Act.<sup>310</sup>

In *Bulziuk v Pischnot*,<sup>311</sup> the applicants asked for an order setting aside the grant of Letters of Administration and granting Letters Probate with respect to a document purporting to be the will of the deceased. The document was a draft will prepared by the deceased's solicitor, which was never signed. In dismissing the application the court held that section 37 of the *Wills Act* permits the court to order a document to be fully effective as a will notwithstanding that it was not executed in compliance with all the formal requirements imposed by the Act. However the discretion granted to the court does not extend to endorsing a document as testamentary which does not comply with any of the formal requirements of the Act as to execution, and in particular, not to endorsing a document that does not bear the signature of the deceased.

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308 See *Letsekga v The Master* 1995 4 SA 731 (W) where the facts and the outcome are similar.

309 2001 SKQB 105.

310 This decision is much more flexible and wider than the above mentioned South African case of *Ex Parte Maurice* 1995 (2) SA 173 (C).

311 2004 SKQB 12.

In *Porohowski v Kalyniuk*,<sup>312</sup> the deceased had signed a last will and testament on October 28, 2002, in the presence of his lawyer. After his death, his daughter found a copy of the October 28, 2002 will which had notations on the copy of the will whereby the will signed on October 28 2002 was revoked. The court reviewed the law and was satisfied that it could review the copy of the will tendered with a view to establishing the testamentary intentions of the deceased. The court held that the substantial compliance provisions of the *Saskatchewan Wills Act*, specifically allows consideration of the intentions of the deceased to revoke his will whereof the substance could be contained in a document other than a will. The court reviewed the case law and found the onus of proof on an application relying on the substantial compliance provisions or section 37 of the Act is significant. The court was satisfied that the handwriting signified testamentary intention expressed in a holograph statement. The court held that the deceased had intended to revoke his will of October 28, 2002 in its entirety. The comments he made after his holographic declaration were merely comments or thoughts expressed by him on events that had recently happened in his life, but the declaration bore no evidence of a testamentary intention.

### **6 2 2 3 Conclusion**

The path of followed in Saskatchewan has been different from that followed in Manitoba. As noted, the heading of the rescue provision in Manitoba was changed from “Substantial compliance” to “Dispensation power”. This meant that after 1995 the only obstacle to the courts’ accepting a document for submission to probate was the actual document itself and its reflection of the testator’s clear intention to execute the document as his last and final will. In contrast, in the case of Saskatchewan before 1996, the heading of the section was substantial compliance but there was no mention of substantial compliance in the wording of the text. However the courts did not require

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312 2006 SKQB 265.

any form of compliance towards execution of the documents<sup>313</sup> for admission to probate provided that proof was produced to the effect that the document was intended to be the last and final will of the deceased. However after the 1996 changes courts have differed on the interpretation of the rescue provision. Some decisions have concluded that there has to be some form of compliance for a court to admit a document to probate<sup>314</sup> while others have looked to the intention of the deceased to determine whether the document constituted his/her last and final will.<sup>315</sup> Thus it is clear from most adjudged cases that “Substantial compliance” is an overriding condition in Saskatchewan, hence most cases that would be granted probate in Manitoba are likely to be refused probate in Saskatchewan, even if the intention to execute a will is evident.

### 6 2 3 Prince Edward Island

Prince Edward Island also has a rescue provision. Section 70 of the *Prince Edward Island Probate Act*<sup>316</sup> states the following:

**“Substantial compliance”<sup>317</sup>**

If on application to the estates section the court is satisfied

- (a) that a document was intended by the deceased to constitute his will and that the document embodies the testamentary intentions of the deceased; or
- (b) that a document or writing on a document embodies the intention of the deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will,

the court may, notwithstanding that the document or writing was not executed in compliance with all the formal requirements imposed by this Act *but provided that the document or writing is signed by the deceased*, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with

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313 See above, *Re Warren Estate* 1994 (112) Sask R. 62 and *Re McDermind* 1994 (5) ETR(2d) 238 (Sask QB), where it was held that proof of the testamentary intention of the deceased was of paramount importance.

314 See *Bulziuk v P ischnot* 2004 SKQB 12 and *Mate Estate Re* 1999 CanLII 12652 (SK QB) above.

315 *Walmsley Estate Re* 2001 SKQB 105.

316 RSPEI 1988, c P-21.

317 As in Saskatchewan, the heading of the rescue clause in Prince Edward Island is substantial compliance although no mention is made of the substantial compliance in the wording of the text.

all the formal requirements imposed by this Act as the will of the deceased or as therevocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.”

It seems, however, that no cases have been brought forward pertaining to this section. But what does stand out in the wording of the legal provision is that the deceased must at least have signed the document in person.

## 6 2 4 Conclusion

Canada has a vast body of jurisprudence as different provinces have different laws. Some provinces like the ones discussed above have adopted a rescue provision, whilst others are yet to do so.<sup>318</sup> It is quite clear that each province has adopted its own unique requirements for the use of the rescue provision, which are as follows:

- In Manitoba the heading of the rescue provision is couched as “Dispensation power.” This means that the courts have the power to admit to probate a document which does not comply with any will-making formality. Instead overriding importance is attached to deciding whether of the deceased had intended the document to be his or her final will.
- In Saskatchewan the heading of the rescue provision is “Substantial compliance”, although this consideration is not mentioned in the text. However, it is clear from the pronounced court judgments that there must be some form of compliance before the courts can look at the intention of the deceased. This means that documents that are likely to be admitted for probate in Manitoba are likely to fail in Saskatchewan.
- In Prince Edward Island, apart from the heading being couched as “Substantial compliance” the document must bear a signature, failing which the court will not consider evidence of the intention of the deceased. Therefore documents that

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318 E.g. The province of Alberta has no rescue provision even though there have been countless calls for the province to adopted such provision.

are likely to be granted probate in Manitoba and Saskatchewan will fail in Prince Edward Island.

## **6 3 Australia**

In Australia, all its states have adopted a uniform rescue provision for documents that do not comply with will making formalities. Australia has followed the “Dispensing power” approach. The utilization of a “Dispensing power” to temper formalism in the law of wills is directed principally at the negation of “harmless errors” that occur in (a purported) compliance with statutory directives on formalities.<sup>319</sup> Initially as it will be discussed, some states the overriding consideration was substantial compliance while in others it is dispensing power. Since a uniform rescue provision subsists in all Australian states the present discussion will be confined to South Australia and Queensland which were the first to adopt a rescue provision.<sup>320</sup>

### **6 3 1 South Australia**

#### **6 3 1 1 Section 12(2) of *South Australia Wills Act of 1975***

In 1974 the Law Reform Committee of South Australia took up the question of excusing blunders that render documents un compliant with the *Wills Act* an incidental topic in a report dealing mainly with a projected overhaul of the intestacy laws. The committee observed that the number of intestate estates could be reduced if the courts were empowered to validate wills that suffered “technical” execution defects.<sup>321</sup> In November 1975 section 12(2) was enacted to read as follows:<sup>322</sup>

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319 Du Toit “Testamentary condonation in South Africa: A pyrrhic victory for private autonomy over mandatory formalism in the law of wills?” *Liber amicorum: Walter Pintens* 2012 161.

320 Langbein “Excusing harmless errors in the execution of wills: A report on Australia’s tranquil revolution in probate law” *Columbia Law Review* 1987.

321 Langbein 1987 Col LR 9.

322 Issues Paper 10 1996- “Uniform Succession Laws: The Law of Wills” *Law Reform Commission: New South Wales*, hereinafter referred to as LRCNSW.

“A document purporting to embody the testamentary intentions of the deceased person will, notwithstanding that it has not been executed with the formalities required by this Act, be taken to be a will of the deceased person if the Supreme Court, upon application for admission of the document to probate as the last will of the deceased, is satisfied that there can be no reasonable doubt that the deceased intended the document to constitute his or her will.”

Like section 2(3) of the Wills Act in South Africa, section 12(2) presented a number of challenges to the South Australian courts. It was argued that section 12(2) did not address the intimate connection between errors in execution and errors in revocation, which left the courts to extend the statute to include revocation.<sup>323</sup> Further, section 12(2) required a burden of proof as in criminal cases that the court had to be satisfied that there could be “no reasonable doubt” as to the intention of the testator. The first case to be decided in this regard concerned *Estate of Graham*.<sup>324</sup> In this case an ailing testatrix signed her will in private and sent her nephew, the principal beneficiary, to “get it witnessed” by a pair of neighbours. The attestation thus violated the requirement of section 8 of the *South Australian Wills Act* which requires that the testator sign “in the presence of two or more witnesses present at the same time”. The will had been drafted by an officer of a trust company in accordance with the instructions of the testatrix and without involvement by the nephew, so there was no ground to suspect imposition. The testatrix’s signature was independently verified. Jacobs J concluded that<sup>325</sup> “upon these facts I have not the slightest doubt that the deceased intended the document which is before me to constitute her will.”<sup>326</sup>

In *Baumanis v Praulin*,<sup>327</sup> a hospital patient gave instructions for a will to be drafted. After perusing the draft, he made some minor alterations. The draft was taken away to be re-typed and was going to be brought back later in the day for execution. However, the patient died before he was able to execute the will. Mitchell J refused to admit the

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323 Langbein 1987 Col LR 10.

324 1978 20 SASR 198.

325 201.

326 See *Mdlulu v Delarey* 1998 1 SA 434 (W).

327 1980 25 SASR 423.

document to probate despite being satisfied that the document expressed testamentary intentions because section 12(2) had provided for satisfaction beyond reasonable doubt. Mitchell J held as follows:<sup>328</sup>

“There is no evidence here that the deceased intended the document which is before me to constitute his will. The evidence is quite to the contrary. He intended to execute another document in the like terms to the document which he had read but with the variations which he required ... In order to admit the document to probate the court must be satisfied therefore that the deceased intended that document, not a document in similar form, to be his will.”

In *Estate Vauk*,<sup>329</sup> the testator gave instructions to an officer of the Public Trustee to prepare a new will to replace his previous will. The testator did not sign the document prepared according to the instructions taken and carried out by the officer. A draft will was prepared and ready for execution a few days later. However, the testator committed suicide before executing the will. By the testator's body was a piece of paper with the following badly smudged words: “There....will....the ...pu...Trustee....unsigned...-changed” Legoe J, concluded that although the testator had not seen the draft will, there could be no doubt of his intention that the document prepared by the Public Trustee would constitute a will. Further, Legoe J, took into account the consistency of the terms of the altered copy of the 1983 will with the terms of the new will drawn up at the Public Trustee's office upon the testator's rather urgent instructions. Finally, Legoe J, was swayed further by the suicide note in the testator's handwriting to the effect that the changed will at the Public Trustee was 'to be valid'. Thus Legoe J, could conclude that there was no reasonable doubt that the unsigned document constituted the last will of the deceased. The court dispensed with all the formalities, including the signature and witnesses. The unsigned will prepared by the Public Trustee's officer was admitted to probate. However because of the complications

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328 426.

329 1986 41 SASR 242.

arising from the requirement of ‘no reasonable doubt’ the section has been substituted several times.<sup>330</sup>

### **6 3 1 2 The current section 12(2) *South Australia Wills Act*<sup>331</sup>**

The current section 12(2) reads as follows:

“Subject to this Act, if the court is satisfied that-

- (a) a document expresses testamentary intentions of a deceased person; and
  - (b) the deceased person intended the document to constitute his or her will the document will be admitted to probate as a will of the deceased person even though it has not been executed with the formalities required by this Act.
- (3) If the court is satisfied that a document that has not been executed with the formalities required by this Act expresses an intention by a deceased person to revoke a document that might otherwise have been admitted to probate as a will of the deceased person, that document is not to be admitted to probate as a will of the deceased person.”

This meant the burden of proof had shifted from “no reasonable doubt” to a balance of probability. The court had to be “satisfied” that the deceased had intended the particular document to be his last will and testament. In *Ashley David Schwartzkopff*,<sup>332</sup> an application was made for an order that a document purporting to express testamentary intentions of the deceased be admitted to probate. The draft will did not provide for the deceased’s son. The deceased died before viewing or executing the will. In refusing the application the court held as follows:<sup>333</sup>

“I have reached this conclusion having regard to the heightened civil onus discussed in *Briginshaw*.<sup>334</sup> However, even if a lower civil onus were to be applied, I would reach the same conclusion. The fact that the draft did not accord with the deceased’s intention as

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330 245.

331 S12(2) was amended in 1990 and then substituted in 1994, 1998 and 2000 to the current one.

332 2006 SASR 131.

333 Par [57].

334 *Briginshaw v Briginshaw*; (1938) 60 CLR 336.

expressed to the applicant both before and following the giving of instructions is telling. This factor, coupled with the delay and the circumstance that the deceased at no time had seen or had read over to him the draft will, would lead me to the same conclusion on a simple preponderance test.”

In *Hendrikus Ignatius Hennekam*,<sup>335</sup> the deceased and his wife instructed an officer of the Public Trustee to prepare ‘mirror’ wills. The two wills were signed in the presence of two witnesses. However the deceased inadvertently signed the will prepared for his wife while she signed the will prepared for the deceased. The question before the court was whether it was appropriate to utilise section 12(2) of the *Wills Act* to admit to probate or whether rectification power in section 25AA of the *Wills Act* was preferable. In admitting to probate the court held that:<sup>336</sup>

“Having regard to the materials outlined above, it is appropriate to utilize section 12(2) in the circumstances before this Court. The legislative intention demonstrates that these circumstances are precisely the “mischief” to which the section is directed. Section 12(2) is fundamentally concerned with remedying documents which have not complied with the statutory formalities and risk being held invalid as a consequence.”

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Therefore it is clear from the current legislation and adjudicated court cases in South Australia that the law regarding the rescue provision has evolved significantly since its inception. It is clear that the intention of the deceased is the overriding consideration. Further, the change of the burden of proof has made the rescue provision be quite effective.

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335 2009 SASC 188.

336 Par [36].

337 See *Re McDermid Estate* 1994 (5) ETR(2d) 238 (Sask QB).

## 6 3 2 Queensland

The state of Queensland initially adopted a “Substantial compliance” doctrine in 1981.<sup>338</sup> section 9 of the *Queensland Succession Act* of 1981 read as follows:

- (a) The court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator; and
- (b) the court may admit extrinsic evidence including evidence of statements made at anytime by the testator as to the manner of execution of a testamentary instrument.

Although the standard of proof required was that the court needs to be satisfied of the testator’s intention, the requirements that there be “Substantial compliance” proved so great a stumbling block that the jurisdiction had poor success.<sup>339</sup> The first case to be decided on substantial compliance was that of *McIlroy*.<sup>340</sup> In this case<sup>341</sup> one witness testified that the other had not been present when the will was executed, while the other witness testified to the contrary. McPherson J, held that it was unnecessary to resolve the dispute, since even assuming that only one witness had been present at the time of signature, the formal requirements of the *Wills Act* had been substantially complied with. In *Re Grosert*,<sup>342</sup> the testator had his daughter-in-law attest his will when he was in her company with no-one else present, hence not in the joint presence of the second witness. In its ruling the court held that<sup>343</sup> the will could not be admitted to probate as there had been lack of compliance with what would be regarded as the most important provision.<sup>344</sup> In the unreported case of *Henderson*,<sup>345</sup> the only witness, a justice of the

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338 Langbein 1987 Col LR 9.

339 LRCNSW 3.

340 Unreported QSC Case No E375, 1984.

341 Langbein 1987 Col LR 20.

342 1985 1 Qd R 513.

343 Langbein 1987 Col LR 20.

344 Langbein 1987 Col LR 20, criticised this ruling stating that the court failed to apply the purposive analysis that the substantial compliance doctrine presupposes. The right question under the doctrine is whether the testator’s conduct satisfied the formalities of the *Wills Act*. The particular idea is that when the formalities in essence are observed, noncompliance with the letter may be excused. The purposes of the present requirements are to protect the testator against imposition; and to enhance

Peace, informed the testator that his attestation would suffice. In refusing the document to probate, the court held as follows:<sup>346</sup>

“There is an essential difficulty in saying that substantial compliance with the requirements of the Wills Act has occurred if the two witnesses have not been involved in some way or other in the testator’s execution or acknowledgment. In the present case there are no such two witnesses involved but one only, and in the case of such a basic deficiency I am not prepared to regard substantial compliance as having occurred”.

In *Stephens v Stevens*,<sup>347</sup> the deceased had left a will which was executed in 1988 and had also been in possession of an amalgam instrument comprising of six stapled sheets. The issue that arise was whether 1988 will or the amalgam instrument (and if so what parts of it) is liable to be admitted to probate. The amalgam instrument did not comply with the statutory formalities as only one witness signed. The court held follows:<sup>348</sup>

“While the substantial compliance proviso is neither a rule of maximum nor minimum formalities, it is not a rule of no formalities. Nevertheless, it is important to bear in mind that s9 is a beneficial provision designed to enable a departure from the previously rigid attitudes that had been developed by the courts, in an exercise of excessive formality. Its purpose, as Atkinson J observed in *Public Trustee of Queensland v Attorney General of Queensland*,<sup>349</sup> is thus to provide a means "to relieve from the unbending requirements of formal execution" in respect of a document which represents the testamentary intention of the testator, so that it can be admitted to probate notwithstanding a failure to strictly comply with the formal requirements referred to in s9.”

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the solemnity of the execution ceremony, in order to assure that the instrument represents the considered intent of the testator.

345 QSC, Case No 231, 1985.

346 Langbein 1987 Col LR 21.

347 2007 QSC 16.

348 Par 26.

349 2004 QSC 32.

The court further stated as follows:<sup>350</sup>

“It has been observed that, while there is no presumption that any one formality is of greater importance than another, the need for execution by the testator and the witnesses is a weighty formality. However, notwithstanding the liberal approach appropriate in applying the "substantial compliance" proviso emphasized in decisions such as *Re Johnston*,<sup>351</sup> the earliest Queensland cases decided under s9 adopted a strict view of the need to comply with the formal witnessing provisions and regarded witnessing by one signatory as such a basic defect that there could be no question of substantial compliance. Those decisions were reviewed by Williams J in *Re The Will of Eagles*,<sup>352</sup> who endorsed the liberal approach to the application of the proviso, although his Honour cautioned against a view that, in all cases where the relevant document expressed a testamentary intention, but had been attested by only one witness, there would be substantial compliance.”

However section 9 has since been supplanted by section 18 which no longer requires Substantial compliance. The section reads as follows;

**“Court may dispense with execution requirements for will Alteration or revocation**

- (1) This section applies to a document, or a part of a document, that—
- (a) purports to state the testamentary intentions of a deceased person; and
  - (b) has not been executed under this part;
- (2) The document or the part forms a will, an alteration of a will, or a full or partial revocation of a will, of the deceased person if the court is satisfied that the person intended the document or part to form the person’s will, an alteration to the person’s will, or a full or partial revocation of the person’s will:
- (3) In making a decision under subsection (2), the court may, in addition to the document or part, have regard to—
- (a) any evidence relating to the way in which the document or part was executed; and

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350 Par 27.

351 1983 1 Qd R 516.

352 1990 2 Qd R 501.

- (b) any evidence of the person's testamentary intentions, including evidence of statements made by the person;
- (4) Subsection (3) does not limit the matters a court may have regard to in making a decision under subsection (2);
- (5) This section applies to a document, or a part of a document, whether the document came into existence within or outside the State."

### 6 3 3 Conclusion

The deceased's intention that the document at hand be a will (or amendment or revocation thereof) constitutes the basis upon which dispensing powers in the various Australian jurisdictions are founded.<sup>353</sup>

Thus it is clear that Australian states have moved away from substantial compliance to dispensing power, mainly because of the cases that were brought before its courts. These states have accepted that where the rescue provision is concerned the testator's intentions should be the only consideration that could be a hindrance in having a will admitted to probate. Australian courts generally follow a document-centered approach to the intention requirement. The deceased must have contemplated finally that document as constituting the will. As a result dispensing powers cannot be invoked readily to admit draft wills, particularly if not seen by the testator to probate.<sup>354</sup>

In the next chapter recommendations with regard to possible amendments to section 2(3) of the South African Wills Act will be made, to which end court judgments and opinion from the authors as well as the two countries discussed above will be adduced.

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353 Du Toit 2012 *Liber amicorum:Walter Pintens* 162.

354 Du Toit 2012 *Liber amicorumWalter Pintens* 162.

## CHAPTER 7: Recommendations and changes that can be made to section 2(3)

### 7 1 Introduction

It is clear from what I have discussed in chapter 2 to 5, that many problems have been encountered with regard to the interpretation of section 2(3) as well as section 2A of the wills Act. I will make some recommendations on the sections which I believe that if implemented, can reduce the problems faced by our courts in interpreting these two sections.

### 7 2 Recommendations

- 1 On the requirement that there must be some form of writing or a written document, I suggest the following: The Wills Act must define “document” to include any material on which writing appears and anything from which sounds, images, or writings can be produced with or without the aid of anything else. It thus captures not only standard paper wills, but also computer files and discs, microfiches, photographs, text messages on mobile phones, emails, as well as video and audio tapes.<sup>355</sup> We are moving into an age where documents can be written and saved in different form.
- 2 Even though South African case law and foreign case law require that the document show finality, I suggest the following: The only requirement to be proved at death should be whether the document expressed the intention of the deceased before his or her demise as to the “distribution of his estate”. The intention required should be “distributive intent” by the deceased.
- 3 The words “a document drafted or executed by a person who has died since” should be replaced with, “a document or any writing on a document that embodies the distributive intention of the deceased. With this change the

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355 Reid *et al Comparative Succession Law: Testamentary Formalities* (2011) 351.

argument as to whether the deceased must have drafted or executed the document personally is removed. There is an impression that this has created another requirement that has to be fulfilled first before the intention requirement.<sup>356</sup>

- 4 The words “does not comply with all the formalities” should be removed as they create an impression that some formalities have to be complied with. The words should be replaced with words that will allow a document that does not comply with any or all of the formal requirements hence this broadening the courts authority.
- 5 Section 2(3) and 2(A) can be incorporated into one section hence reducing the uncertainty the courts have had on these two sections and this section should read as follows:

### **Condonation**

**“Where, upon application, if the court is satisfied that a document or any writing on a document embodies**

**(a) the distributive intentions of a deceased; or**

**(b) the intention of a deceased to revoke, amend or revive a will of the deceased or the distributive intentions of the deceased embodied in a document other than a will;**

**the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, amend or revival of the will of the deceased or of the distributive intention embodied in that other document, as the case may be.”<sup>357</sup>**

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356 As it stands because of *Bekker v Naude* there is an impression that there must be personal drafting first before the courts can look at the intention of deceased hence defeating the whole purpose of section 2(3).

357 As is the case in Manitoba.

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