Valid or not?

General principles for challenging a will

It is not uncommon for a client to approach an attorney with the challenge that a will is invalid. The reasons for such a challenge may vary from a formal shortcoming to claims of foul play. This article provides a framework for practitioners by providing an overview of the possible reasons why a will may be challenged and a summary of the general principles.

Given that a will, which is regular and complete on the face of it, is presumed to be valid until its invalidity has been established, the onus is on the person alleging invalidity to prove such allegation (see Kunz v Swart and Others 1924 AD 618). The standard of proof is the same as that which applies in all civil cases – proof on a balance of probabilities. As a rule, it is difficult to meet the requisite proof. Unless the testators’ wishes are recorded in written testamentary form they come to nought and it is very difficult for a client to dispute.

There are various reasons why interested parties want to challenge a will. It may be as a result of the relationship they had with the deceased, where they claim that the deceased promised to leave them a particular item or sum of money. They may insist that the will as it stands could not conceivably have been the deceased wishes, it could be caused by their suspicions regarding the persons who are set to benefit, or it may stem from bitterness as a result of being disinherited, feeling that they were overlooked or that they were entitled to inherit.

No person, in terms of South African law, has a right to inherit. Civil law jurisdictions recognise the legitimate portion concept that entitles recognised heirs of the deceased to a portion of the estate.
irrespective of the will. This notion of a legitimate portion is not part of modern law in South Africa as the provisions in force that allowed for this have long been abolished. However, the freedom of a testator to dispose of his or her estate as he or she wishes is not absolute and allowing a testator to disinherit his or her spouse and his or her children, there are instances where, based on public policy, the law restrains testators in the exercise of their testamentary freedom.

Therefore a will may be challenged and the testator’s freedom limited by a claim for maintenance and education of the testator’s minor children - and the fact that the child was disinherited does not deprive him or her of this claim - as well as by a similar maintenance claim against the estate by a testator’s surviving spouse. In terms of the Maintenance of Surviving Spouses Act 27 of 1990, if a marriage is dissolved by death, the survivor will have a claim against the deceased spouse’s estate for the provision of his or her reasonable maintenance needs until death or remarriage, insofar as he or she is unable to provide for such needs himself or herself. These changes may be made against the estate of the testator despite the provisions of his or her will and accordingly allow interested and affected parties to challenge a will on specific grounds.

Lack of requisite formalities

Historically the courts have strictly interpreted s 2 of the Wills Act 7 of 1953 (the Act) regarding the formalities for the validity of a will and they had no recourse provisions allowing for any deviation. This sometimes resulted in adversity for the beneficiaries. The Law of Succession Amendment Act 43 of 1992 has moderated this state of affairs to an extent by introducing provisions that allow for the possibility that a court may recognise as valid a will that does not comply with all the formalities. In terms of s 2(3) of the Act, if a court is satisfied that a document or an amendment, drafted or executed by a person who has since died, was intended to be that person’s will or his or her will and accordingly allow interested and affected parties to challenge a will on specific grounds.

be the will of the testator, must the court then grant an order directing the master to accept the document as a will.

The requirement that the document purporting to be a will must have been drafted or executed by the testator has caused interpretation issues regarding the intended meaning of the word ‘drafted’ and has resulted in conflicting legal views. Some decisions have favoured the literal interpretation that the document must have been drafted by the testator personally, while other decisions have favoured a more generous interpretation of s 2(3).

The second definitive case on the interpretation of s 2(3) is Van Wetten and Another v Bosch and Others [2003] JOL 11581 (SCA). In this case the issue on appeal was whether the deceased had intended a document that he had written to be his final will or simply instructions to his attorney to draft one. The court held that s 2(3) clearly states that a court must direct the master to accept the document as a will once certain requirements are satisfied. The court accordingly held that – because the document had been created by the deceased personally and considering the surrounding circumstances, including the deceased’s conduct at the time of drafting the document – it was clear that the deceased intended it to be his will.

Although an electronic will, stored on a computer hard drive for example, which has not been printed or executed is invalid due to the fact that as it is not in writing nor validly executed, it can be saved by s 2(3). In Van der Merwe v Master of the High Court and Another [2010] JOL 26090 (SCA) an appeal was brought to have an unsigned document accepted as the will of the deceased. The court noted that the lack of a signature had never, in terms of s 2(3), been held to be a complete bar to a document being declared a will. The court considered whether the document was drafted by the deceased and whether the deceased intended it to be his will. The appellant provided proof that the document had been sent to him by the deceased, giving the document an authentic quality. It was not contested that the document still existed and had not been amended or deleted; and from the title of the document the court held it to be clear that the deceased intended the document to be his will. The court upheld the appeal, declaring the will to be valid.

Forgery

A will can be challenged on the ground that the document was forged or that, despite the will being genuine, the signature appended, intended to be accepted as the testator’s signature, is forged. Where the authenticity of the will is in question or it is attacked on the basis that it is a forgery, evidence such as statements made by the testator, the testator’s instructions and statements of testamentary intention are also admissible (Corbett et al (op cit) at 90).

Another v Bosch and Others 2001 (1) SA 410 (D) involved a challenge to the validity of a will on the grounds of forgery. The plaintiff challenged the signature of the testator in the will, alleging that it was not the testator’s. The plaintiffs bore the onus of proving that the will was invalid, which the court accepted had been successfully done. The plaintiffs argued that, because of the forgery involved, the first defendant should be disqualified from receiving any benefit from the estate. The court concluded that, through such forgery, the defendant had sought to deprive his siblings of their share of the estate and therefore was considered unworthy of inheriting.

In doing so the court showed that the persons to be disqualified from benefiting from a will may include those deemed unworthy for reasons other than that they contributed or caused the persons death or did some wrong to the deceased’s property. The recognised Roman-Dutch law maxim of ‘de bloedige hand neemt geen erf’ provides that a person who unlawfully causes the death of a person cannot take a benefit under the person’s will or through intestate succession. Where a beneficiary is disqualified, no rights vest in the beneficiary and the bequest is accordingly not transmitted to the beneficiary’s heirs.

The admissibility of the evidence of handwriting experts and the usefulness of such evidence where forgery has been alleged should not be overlooked. In a recent decision in Molefi v Nhlapo and Others [2013] JOL 30227 (GS) the court had to determine whether a contested will was valid. The deceased had revoked her first will, in which the first defendant had been sole heir, and made a second will in which the plaintiff was appointed the sole heir. It was alleged by the defendant that the deceased had subsequently made another will naming him as sole heir. To support the contention that the will was a forgery the plaintiff adduced the evidence of a handwriting expert.
The handwriting expert’s opinion was that the signature on the contested will was a forgery and his reasons included that he noted differences between the deceased’s signatures on the acknowledged wills and the contested will. The expert’s evidence was left undisputed and his conclusions were not contested in cross-examination. This led the court to conclude that the defendant’s version and the circumstances under which the disputed will was signed were so improbable that the credibility had been impugned and the court accordingly rejected the first defendant’s evidence.

The court held, in light of the undisputed evidence of the handwriting expert, that the signature of the contested will was not the deceased’s and that the plaintiff had discharged the onus in proving the will was a forgery.

In terms of s 4A of the Act, any person who is a witness to a will, who signs on behalf of the testator, or who writes out the will or any part in his or her own handwriting, as well as the spouse of any person involved in such a capacity, is disqualified from inheriting or receiving any benefit in terms of the will. Certain notable exceptions, in terms of which a person may inherit despite their involvement in the execution of the will, are provided for. A court may declare a person, or his or her spouse referred to in sub (1), to be competent to receive a benefit from a will if the court is satisfied that that person or his or her spouse did not defraud or unduly influence the testator in the execution of the will.

In Blom and Another v Brown and Others [2011] 3 All SA 223 (SCA) the interpretation of s 4A was in dispute. The appellants’ submission was that the qualification and exception in s 4A(2)(a) applies to persons who are not related to the testator and that s 4A(2)(b) applied to persons who are family members. The court disagreed and held that any person, including the spouse, who writes out a will shall be disqualified from receiving any benefit from that will, subject to the qualification and exception. The court noted that what s 4A(1) seeks to achieve, consistent with the common law, is to permit beneficiaries who would otherwise be disqualified from inheriting, to satisfy the court that they or their spouses did not defraud or unduly influence the testator in the execution of the will.

Testamentary capacity

Section 4 of the Act governs testamentary capacity. In addition to the requirement that the testator must have reached the specified age, the testator must have sufficient mental capacity to understand the nature and effect of the testamentary act; understand and recollect the nature and situation of his or her property; and remember his or her relations and those whose interests are affected by the will. The question is whether, as a consequence of the disturbance or impairment, the person is mentally incapable of understanding the nature and effect of his or her act. In Thirion v Die Meester en Andere 2001 (4) SA 1078 (T) the court held that the consumption of alcohol cannot in itself invalidate juristic acts, such as drawing up a will.

In the minority judgment in Tregnea and Another v Godart and Another 1939 AD 16 Tindall JA held that, in cases where a testator has impaired intelligence caused by physical infirmity, although the testator’s mental powers may be reduced below the ordinary standard, the power to make a will remains, if the testator had sufficient intelligence to understand and appreciate the testamentary act in its different bearings. Where the question arises as to whether a person had the capacity to make a will, the mere fact of old age or illness does not necessarily mean that the person is incapable of appreciating the effect of the will he or she is executing, as stated in Essop v Mustapha and Essop NNO and Others 1988 (4) SA 213 (D).

In the Essop case, the court confirmed that the decisive moment for establishing the competence of the testator is the time when the will was made and not, for example, when the deceased had issued instructions for drawing up the will. As a general test for testamentary capacity, the test quoted in Banks v Goodfellow 1870 LR 5 QB, as relied on in the Tregnea case, remains the law: "The testator must ... be possessed of sound and disposing mind and memory ... But his memory may be very imperfect ... and yet his understanding may be sufficiently sound for many of the ordinary transactions ... were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

Undue influence

The expression of a testator’s last wishes must be the result of the exercise of his or her own volition. Any impairment to the free expression of the testator’s wishes at the time the will is made may result in a will being declared invalid. In Spies NO v Smith en Andere 1957 (1) SA 539 (A) Steyn JA pointed out that acts such as flattery, professions of extraordinary love or respect, meek tolerance of continual humiliation, direct requests or unusual affection do not necessarily constitute undue influence.

To have a will declared invalid on this ground certain principle factors must be considered and conduct akin to coercion or fraud is required. The question in the Spies case was whether a person who was ‘mentally retarded’ was unduly influenced by his uncle, who was also his curator bonis, in the making of a will in which the uncle’s children benefited. The court commented as to what constituted undue influence, by holding that ‘... a last will may in fact be declared invalid if the testator has been moved by artifices of such a nature that they may be equated to the exercise of coercion or fraud to make a bequest that he would not otherwise have made and which therefore expresses another person’s will ... . In such a case one is not dealing with the authentic wishes of the testator but with a displacement of volition ‘...’.

The key question therefore is whether there has been a displacement of volition and thus whether the will contains the wishes of someone other than the testator. The testator’s mental state, his or her ability to resist prompting and instigation; and the relationship between the people concerned, are all factors to be taken into account. The mere existence of a relationship of a particular kind does not give rise to a presumption that the will of another has been substituted for the testator’s will.

In Katz and Another v Katz and Others [2004] 4 All SA 545 (C), it was alleged that the testator had been improperly influenced by his second wife to make a new will. The court emphasised that an allegation that one or more of the factors was present had to be supported with evidence and that unfounded suspicion and speculation were not sufficient. The fact that the testator was dependent on his wife after his stroke was not sufficient proof of undue influence. Further, the amount of pressure resulting in invalidity may vary from case to case. In the Katz case it was held that if, after the execution of a will, a period of time elapses during which the testator could have altered the will should he or she have wished to do so, the failure to take advantage of this opportunity is a circumstance from which it may be inferred that the will was not made against the testator’s wishes.

Conclusion

While legislation implemented by the courts has brought relief for technical and other procedural failures, oral promises or intentions not recorded cannot be saved or given effect to. To challenge a will, which on the face of it appears to be valid, based on lack of testamentary capacity or undue influence, remains for the challenger an evidentiary burden.

Johann Jacobs BA HDip Ed (Ed) (Wits) BEd MEd BProc (Unisa) is an attorney and Leigh Lambrechts BSc (UCT) LLB (cum laude) (Unisa) is a candidate attorney at Cliffe Dekker Hofmeyr in Cape Town.