

CURRENT TRENDS IN TESTAMENTARY SUCCESSION

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SUMMARY

In this article some current trends in testamentary succession are considered in order to establish a practice-based perspective *re* the rules of testamentary succession. The research was undertaken by means of the distribution of questionnaires to practitioners specialising in wills, trusts and deceased estates. The data received are hereby described and analysed.

1 INTRODUCTION

The law of testamentary (or testate) succession comprises a complex of legal norms that regulate inheritance in terms of the intention of a testator as expressed in such testator's will.¹ The rules of testamentary succession not only regulate testamentary formality in respect of the execution, amendment and revocation of wills, but are also concerned with the content of wills, regulating provisions and institutions typical to testamentary disposition such as conditions and time clauses, the *modus*, direct and fideicommissary substitution, the usufruct, the trust, massing of estates and accrual. Legal practitioners who advise on, draft and oversee the execution of the wills of their clients put the rules of testamentary succession into practice almost daily. Such practitioners are perhaps best placed to evaluate the translation of the rules of testamentary succession into practice, in so doing providing valuable insight into current trends in testamentary succession. In order to establish some such trends and to determine the extent to which many of the rules of testamentary succession are indeed put into practice, I conducted research amongst legal practitioners in the fields of succession, trust and estate law. My findings are enumerated and analysed in this contribution.

2 RESEARCH METHODOLOGY

The research was conducted by means of questionnaires forwarded for completion to practitioners in the fields of succession, trust and estate law, the majority of whom are based in the Cape Town area. These respondents, ten in total, were drawn from two distinct groupings: six were employees of the trust and estate divisions of insurance companies, banks and other

¹ De Waal and Schoeman-Malan *Introduction to the Law of Succession* (2003) 3.

financial institutions, whereas four were attorneys dealing with wills, trusts and estates in their respective firms or practices.² The questionnaires contained questions on matters pertaining to testamentary formality as well as testamentary content.³ Three types of responses were elicited from respondents:

- (a) “Select the appropriate option” – respondents were requested to select the appropriate or most prevalent option from a list of possible alternatives. Only one option had to be selected.
- (b) “Indicate the incidence” – respondents were requested to indicate the incidence or prevalence of a particular event, occurrence or trend on a scale from 1-10, 10 indicating high incidence, 5 indicating average incidence and 1 indicating little or no incidence (or any number in between).
- (c) “Provide a written submission” – respondents were requested to elaborate by way of a brief written submission on a response to question type (a) or (b) above or to provide any additional information deemed pertinent to a response to question type (a) or (b) above.

3 THE RESEARCH RESULTS

3 1 Making a will

3 1 1 Testamentary capacity

Section 4 of the Wills Act⁴ regulates a testator’s capacity to make a will by stipulating that every person aged 16 years or more may make a will unless, at the time of making the will, s/he is mentally incapable of appreciating the nature and effect of his/her act. The burden of proof that s/he was mentally incapable at such time rests, in terms of this section, on the person alleging the same. Testamentary capacity therefore comprises an age element – a testator must be at least sixteen years of age when making a will – as well as an element of mental capacity – a testator must possess the mental capability to appreciate the nature and effect of the act of testation.

- (a) Having regard to the minimum age for will-making prescribed by the above section, respondents were requested to indicate the average age

² I wish to express my gratitude to all the practitioners who contributed to this research project by responding to the questionnaires. I refrain from acknowledging the respondents by name or by institution, company, firm or practice, as the majority of them expressed the wish to participate in the research based on their personal experience as legal practitioners, rather than officially on behalf of their institutions, companies, firms or practices. The analysis of the responses received and the conclusions drawn therefrom, are my own and are not to be ascribed to any of the respondents.

³ Specific questions and the responses thereto are enumerated and analysed below.

⁴ 7 of 1953.

upon which testators usually make their *first* wills. Respondents had to select the appropriate option from the following possibilities:

16-25 years
26-35 years
36-45 years
46-55 years
56-65 years
66-75 years
76 years and above

Nine respondents selected 26-35 years as the average age of first will-making, while one indicated 16-25 years.

It is hardly surprising that all but one of the respondents reported first wills to be made by persons between the ages of 26 and 35. At this stage of the average person's life, s/he has left the parental home, has found employment and, in so doing, has, for the most part, achieved financial independence. The financial means yielded by employment usually occasions the acquisition of assets and the incursion of debts – in other words, the average person starts to actively amass an estate between ages 26 and 35. Financial independence and the consequent growth in a personal estate usually prompt the average person to undertake some form of estate or financial planning. The making of a will is usually an integral part of any estate or financial planning exercise. First-time will-making can therefore be regarded as a direct consequence of the financial independence and the growth in his/her personal estate usually experienced by the average person between the ages of 26 and 35.⁵ The 26 to 35 age period moreover constitutes the time during which the average person generally encounters, for the first time, two of the foremost events that occasion will-making, namely the conclusion of a marriage and the birth of a child or children.⁶ These two events usually prompt such a person to arrange for the financial security of his/her new spouse or child(ren). The making of a first will by a newly-wed or new parent to safeguard the financial position of his/her spouse or child(ren) in the event of the former's death, is often an essential feature of such arrangements.

- (b) Having regard to the requirement of mental capacity prescribed by section 4 of the Wills Act, respondents were asked how they usually satisfy themselves that testators indeed possess the requisite mental

⁵ This explanation is proposed with due cognisance of South Africa's high unemployment rate and the absence of legal and commercial sophistication prevailing in many South African communities. The first time testator in the present context therefore refers to the person whose financial position not only warrants estate or financial planning and thus the making of a will, but who also possesses the requisite sophistication to do so and who, moreover, does not suffer from "general testators' apathy" (see 3 1 2 in the latter regard).

⁶ See 3 1 2.

capacity when making wills. The majority of respondents indicated that observation of testators' general demeanour (when giving instructions for the drafting of wills as well as at the execution of such wills) and evaluation of testators' questions or replies to advice given or explanations provided by practitioners, are more often than not a sufficient measure of such testators' mental capacity. A number of respondents reported that, before the execution of a will, they expressly inquire from the testator whether s/he comprehends fully the bequests made in the will and whether, before signing, s/he might have any further questions as to the dispositions contained in the will. A number of respondents also indicated that, in instances of doubt, a medical evaluation of the testator is usually requested, to be provided either by the testator's personal physician or by an independent medical expert. One respondent reported that, in instances when a medical evaluation is sought from a testator's own physician (and such evaluation confirms the testator's mental capacity), it is endeavoured to have such physician act as one of the witnesses at the will's execution.

3 1 2 *Events that occasion will-making*

Respondents were requested to indicate the incidence of eleven events that may prompt a testator to make a will (whether it is a first will or subsequent (new) will). The results, in order from high incidence to low incidence of events, appear as follows:

Order	Event	Average incidence out of 10
1	Conclusion of marriage by testator	8.5
2	Serious illness of testator	7.5
3	Birth of a child to testator	7.4
4	Divorce of testator	6.8
5	Death of a family member of testator	5.9
6	Disinheritance of a beneficiary appointed in earlier will of testator	5.0
7	Changes in legislation	4.4
8	Adoption of a child by testator	3.8
	Emigration by testator	3.8
9	Growth in personal estate of testator	3.7
10	Long-term cohabitation by testator	3.2

- (a) The financial security of a new husband, wife or child is often uppermost in the mind of a spouse or parent when a marriage is concluded or a child is born. As indicated above,⁷ the making of a will is frequently part and parcel of the arrangements made to ensure such financial security. High incidence of will-making subsequent to the

⁷ See 3 1 1.

conclusion of a marriage or the birth of a child is therefore to be expected. High incidence of will-making by seriously ill testators is similarly to be expected. The realisation of mortality, occasioned by serious illness, is indubitably in itself a powerful motivation to have final wishes properly documented in a will. Moreover, two respondents reported that they had, on occasion, drafted wills for clients who had been advised by their physicians to “get their affairs in order”, as illness or a surgical procedure holds the risk of impending death, whereas one respondent indicated that seriously ill or aged testators are often prompted by family members to regularise their affairs.

- (b) Divorces of testators occasion a relatively high incidence of will-making, ostensibly in order to deny erstwhile spouses any testamentary benefit(s) bequeathed to them in earlier wills.⁸ In addition to such exclusion of a former spouse, one respondent alluded to the fact that will-making after a divorce often occurs as part of a new financial dispensation effected by a divorced parent in favour of his/her children or other family members.
- (c) Deaths in testators’ families occasion a slightly above average incidence of will-making. This is to be expected, particularly if the deceased was a beneficiary in terms of an earlier will of a testator and such beneficiary’s death prompts the testator to effect a new testamentary dispensation. This will in all likelihood occur upon the death of a testator’s spouse, child or even parent(s), as these close family members frequently constitute the primary beneficiaries under most wills. The passing of any one or more of these primary beneficiaries often necessitates a redirection of testamentary benefits to other beneficiaries, which, in turn, occasions the making of a new will.
- (d) Average incidence of will-making was reported in respect of the disinheritance of beneficiaries in earlier wills of testators. This result permits the conclusion that, on average, a testator is more likely to execute a new will so as to effect a disinheritance, rather than to cancel the bequest to the affected beneficiary by means of an amendment to or partial revocation of the will in which the particular beneficiary is benefited. This conclusion is supported by the fairly low average incidence of the amendment of wills as opposed to the revocation of existing wills and the execution of new wills reported by respondents.⁹

⁸ S 2B of the Wills Act provides that, if a person dies within three months after his/her marriage was dissolved by divorce or annulment by a competent court, a will executed by such person before the date of such dissolution shall be implemented as if his/her previous spouse had died before such dissolution. However, such implementation of the will is precluded if it appears from the will itself that the testator intended to benefit his/her previous spouse, notwithstanding the dissolution of the marriage. De Waal and Schoeman-Malan 98 cite recent case law that shows divorced persons to very rarely attend to will making within the three months following a divorce.

⁹ See 3 3.

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- (e) Changes in legislation, be it in respect of the laws of succession, taxation, property or otherwise, occasion below average incidence of will-making, possibly because such changes occur relatively infrequently. One respondent remarked that will-making in consequence of legislative changes usually occurs upon the instigation of testators' legal advisors, rather than upon the initiative of testators themselves. This remark underscores the importance of not only engaging the services of an experienced legal and/or financial advisor when conducting estate or financial planning, but also of actively maintaining the relationship with such advisor in order to ensure current expertise at all times.
- (f) It is somewhat surprising that the adoption of a child results in relatively low incidence of will-making, whereas the birth of a child occasions such high incidence. The incidence of adoption is, of course, far lower than that of the birth of biological children. Moreover, parents who have biological children of their own (which children they benefited under a testamentary class bequest) and who then adopt another child, need of course not provide for such adopted child by way of a special testamentary bequest, as the adopted child is regarded as the natural child of his/her adoptive parents and is hence, unless otherwise stipulated, included in any testamentary class bequest to such parents' children.¹⁰ The same applies in respect of parents who already have adopted children and then adopt once more. However, in all other instances of adoption, adoptive parents must give due consideration to the interests of the adopted child and should preferably effect testamentary dispositions accordingly.
- (g) Emigration from South Africa, although ostensibly on the increase over the past decade, remains a relatively limited occurrence and therefore yields an understandably low incidence of will-making. Testators who make wills before emigrating apparently do so to provide for those family members and others who do not join in the exodus. One respondent reported a high incidence of will-making amongst people who, although not emigrating, are about to travel extensively and who will therefore be away from family and loved ones for a lengthy period of time. These people are often mindful of the possibility that tragedy may befall them while on their travels and they therefore see to their wills (and make new ones, if need be) before departure. One can but surmise that the ever-present terrorism threat (whether real or perceived), occasioned by events such as the 11 September 2001 attacks on the United States of America and the subsequent invasions of Afghanistan and Iraq, has contributed greatly to the attitude of many travellers that even a short trip abroad necessitates an up-to-date will.
- (h) Respondents reported a relatively low incidence of will-making in consequence of the growth in testators' personal estates. This

¹⁰ S 2D(1)(a) and (c) of the Wills Act.

phenomenon may be ascribed to what may be termed “general testators’ apathy”. Sadly, many people simply do not view the making of a (new) will as a matter of priority (the “Well, I am not about to die” attitude) and hence fail to ever make a will or to update an existing will. This they do at the peril of their family members and other beneficiaries, as large estates may well be distributed imprudently to such family members and beneficiaries on intestacy or in terms of outdated wills. One respondent reported above average incidence of will-making (6 out of 10) by testators who were pressured by spouses or other family members to regularise their affairs and to hence make a (new) will. The fact that many testators do not make wills of their own volition, but have to be prompted thereto by others, emphasises the unfortunate prevalence of “general testators’ apathy”. On the other hand, another respondent reported that testators are indeed moved to will-making by specific events that impact on their estates. This respondent indicated that, for example, the sale of the subject-matter of a legacy results in above average incidence of will-making (6 out of 10), whereas the granting or obtaining of a loan to/from another family member occasions high incidence of will-making (8 out of 10). It therefore appears that specific changes in testators’ personal estates do bring about above average will-making, but a general growth in such estates will not necessarily yield a similar result.

- (i) A most surprising result is the low incidence of will-making amongst parties to long-term cohabitation relationships (whether heterosexual or same sex relationships), particularly when compared to the very high incidence of will-making in consequence of the conclusion of marriages. A possible explanation for this phenomenon is the often-encountered belief that long-term (heterosexual) cohabitees are engaged in some form of common law union that permits succession on intestacy, hence the need for will-making is obviated. However, this belief is mistaken, as, at the time of writing, only the spouse who was married to the deceased at the time of the latter’s death, can succeed on intestacy.¹¹ Another possible explanation for the absence of will-making in instances of long-term cohabitation, is that, despite the duration of the relationship, it is still regarded (even by the parties to the relationship) as of a less permanent nature than a marriage. A cohabitation relationship can thus be terminated far more readily than a marriage, which may give rise to reluctance amongst cohabitees to provide for

¹¹ See the decision of the Cape High Court in *Daniels v Campbell NO 2003 9 BCLR 969 (C)* on a redefinition of the spousal concept for purposes of the Intestate Succession Act 81 of 1987 and the Maintenance of Surviving Spouses Act 27 of 1990 with regard to a marriage concluded under Muslim rites. See also the (unreported at the time of writing) decision of the Constitutional Court CCT40/03, delivered on 11 March 2004, in the *Daniels* case. Also note a corresponding redefinition of the spousal concept for purposes of the Maintenance of Surviving Spouses Act with regard to parties to a “permanent life partnership” in *Robinson v Volks NO 2004 6 BCLR 671 (C)* and see generally the South African Law Reform Commission’s Discussion Paper 104, Project 118, on Domestic Partnerships.

each other through testamentary disposition. However, long-term cohabittees are advised to make wills to provide for partners and/or dependants (should the need or wish to do so arise), as the law of intestate succession will not necessarily secure a benefit for such partners and/or dependants, nor will any contractual arrangement between the cohabittees that vests benefits upon death – the latter arrangement may well constitute an invalid *pactum successorium*.

3 1 3 Will-making by spouses

Respondents were asked whether spouses are likely to make separate wills, on the one hand, or joint or mutual wills, on the other hand. The number of respondents (out of ten) that selected each option is indicated below:

Separate wills	4
Joint or mutual wills	5

It appears that one form of will is not greatly preferred over the other. Interestingly, the one respondent who did not commit to either option, indicated that, in his experience, the making of separate wills is more common amongst spouses married with an antenuptial contract, whereas joint or mutual wills are traditionally made by spouses married in community of property.

3 2 Testamentary execution formalities

Section 2(1)(a)(i)-(v) of the Wills Act prescribes the formalities to be complied with for the execution of a valid will. In short, these formalities entail the signing of the will by the testator or someone on the testator's behalf (the amanuensis), the signing of the will by at least two competent witnesses and the certification and signing of the will by a commissioner of oaths in the event of the will having been signed by the testator with a mark or by someone signing on behalf of the testator.

- (a) Respondents were asked to select the appropriate option as an indication of the average testator's general knowledge in respect of testamentary execution formalities. The options that were put to respondents and the number of respondents (out of ten) that selected each option are indicated below:

Very knowledgeable	1
Fairly knowledgeable	4
Ignorant	5

The above results permit the interpretation that the average testator either has little knowledge of the fact that a will has to comply with certain execution formalities in order to be valid, or, if the testator

knows that such formalities apply, s/he is only fairly knowledgeable as to what such formalities entail and how compliance with these formalities must occur. This is of particular concern with regard to testators who do not seek professional assistance when making wills, but rather choose to utilise so-called “commercial wills” that can be purchased from some stationery stores or even downloaded from the internet. Such wills usually come with instructions in respect of their execution, but some testators may find even the most precise instructions somewhat bewildering. The utilisation of “commercial wills” therefore holds the risk of non-compliance with the prescribed execution formalities (and hence invalidity of such wills) in consequence of testators’ limited knowledge with regard to such formalities.¹² It stands to reason that testators’ knowledge in respect of testamentary execution formalities varies in accordance with their sophistication and general legal knowledge and experience. For example, the one respondent who reported testators to be very knowledgeable in respect of testamentary execution formalities stated that his firm “only operates in the very top end of the market” and that his clients are therefore generally well educated and informed.

- (b) One of the execution formalities prescribed by the Wills Act is the signing of a will by the testator. In doing so, a testator may employ his/her “regular signature”, initials, a mark or, alternatively, may request an amanuensis to sign the will on his/her behalf.¹³ Respondents were requested to indicate the average incidence of each of the aforementioned modes of the signing of wills by testators. The results, in order of high incidence to low incidence of modes, appear as follows:

Order	Modes	Average incidence out of 10
1	Signature	9.5
2	Initials	1.9
3	Mark	1.3
4	Amanuensis	0.8

It is hardly surprising that testators employ their “regular signatures” in the vast majority of instances of signing wills. This is indeed the mode generally employed in the signing of documents of any sort. The fact that respondents reported testators’ use of initials when signing wills, albeit of low incidence, evidently justifies the express inclusion of initialing in the definition of “sign” in section 1 of the Wills Act.¹⁴ Two

¹² Such invalid wills can, of course, be “rescued” through the High Court’s power of condonation under s 2 (3) of the Wills Act, but obtaining condonation on application to the High Court is an expensive and time-consuming exercise.

¹³ S 1 and 2(1)(a)(i) and (iv) of the Wills Act.

¹⁴ The definition of “sign” was substituted by s 2(e) of the Law of Succession Amendment Act 43 of 1992.

respondents reported that they usually insist on testators signing the final page of multiple-paged wills by means of a “regular signature,” but allow testators to sign the preceding pages by making their initials. Predictably, respondents indicated that marks are frequently employed by illiterate testators who do not have a “regular signature” or initials, whereas severely ill testators, who are physically too weak to make a signature or initials, usually employ an amanuensis.

- (c) Respondents were requested to indicate whom they usually employ to attest and sign wills as witnesses. The options that were put to respondents and the number of respondents (out of ten) that selected each option are indicated below:

Colleagues or employees of the practitioner overseeing the will's execution	10
Family members or friends of the testator	1
Other	1

All the respondents indicated that their colleagues or employees are usually requested to attest and sign testators' wills as witnesses. Such colleagues or employees are readily available to perform this function and it therefore stands to reason that they are the obvious choice in this regard. The fact that the colleagues or employees of the practitioner who oversees the execution of a will are not familiar with the contents of such will, does not negate their capacity to act as witnesses to such will. De Waal and Schoeman-Malan¹⁵ state the proposition as follows:

“The aim of signing and attestation [by witnesses] is to confirm the signature of the testator and the witnesses do not have to have knowledge of the contents of the will.”

One respondent admitted to employing accompanying family members or friends of testators as witnesses, in the alternative to colleagues or employees. Although this practice cannot be faulted on principle, it must be borne in mind that section 4A(1) of the Wills Act expressly disqualifies attesting witnesses (and their spouses) from receiving any benefit under the will concerned.¹⁶ It is therefore imperative that a practitioner who opts for this possibility ensures beforehand that such family members or friends are not benefited under the testator's will. If they are so benefited, even by reason of a nomination as executor, trustee or guardian,¹⁷ they must be instructed not to sign as witnesses, as their attestation of the will, will result in disqualification in respect of the benefit concerned.

The one respondent who indicated a possibility other than the two mentioned above, reported that wills are rarely sent out of his office for

¹⁵ 46.

¹⁶ Note the qualifications to this disqualification in s 4A(2).

¹⁷ S 4A(3) of the Wills Act.

execution, but, at times, a will may be sent to the office of the testator's accountant who provided the instruction for its drafting. The will is then executed at the accountant's office with the accountant's colleagues or employees acting as attesting witnesses. This respondent also reported that, in instances where it is not feasible for a will's execution to be overseen by a practitioner or other professional, the will is forwarded to the testator, but is accompanied by a standard office memorandum on the formalities required for the will's execution.

- (d) Section 2(1)(a)(iv) of the Wills Act previously required witnesses to a multiple-paged will to sign all the pages of such will. This requirement no longer applies, as the amended section 2(1)(a)(iv) currently provides that only the testator or amanuensis must sign all the pages of a will.¹⁸ Respondents were requested to indicate whether, in consequence of this legislative change, they now instruct witnesses to sign only the final page of a will or whether, despite this legislative change, they still insist on witnesses signing all the pages of a multiple-paged will. All but one respondent indicated that they insist on witnesses signing all of a will's pages. It therefore appears that, despite the amendment of section 2(1)(a)(iv) of the Wills Act, a rule of practice exists to the effect that witnesses are still required to sign all the pages of a will that consists of more than one page.

Respondents were requested to indicate whether they require attesting witnesses to also print their identity numbers and current addresses for identification purposes. Five respondents reported that they do not insist upon such identification by witnesses. One of these indicated that, by reason of the frequent use of colleagues or employees as witnesses, it is deemed unnecessary to further identify such witnesses by identity numbers and addresses. The other five respondents reported that they do require some form of identification of witnesses. Two respondents from the latter group reported that witnesses are required to indicate their identity numbers and current addresses upon attestation. Another two indicated that only witnesses' names and current addresses are required, but not their identity numbers. One respondent reported that, whereas he did not insist on witness identification in the past, he recently changed his policy in this regard and now requires witnesses to print their names and postal addresses on the final page of wills. It is submitted that the identification of witnesses by means of their current addresses and even identity numbers is a sound practice, as it facilitates the location of witnesses, should there be a need to do so.

Respondents were requested to indicate whether they include an attestation clause, stipulating the location and date of execution as well as all parties involved in execution being in one another's presence, in all wills drafted by themselves. All ten respondents indicated that they regard the utilisation of attestation clauses as standard practice and

¹⁸ S 2(1)(a)(iv) was substituted by s 3(b) of the Law of Succession Amendment Act.

always include such a clause in all wills prepared by them. The inclusion of an attestation clause in a will is, of course, not required for the formal validity of the will,¹⁹ but it may have some evidentiary value, particularly when the date of the will's execution is in question or when a will is contested on the ground that all executing parties were not in one another's presence.

3.3 Amendment and revocation of wills

- (a) A testator who wishes to effect dispositions different from those contained in an existing will can either effect an amendment to the provisions of the existing will (as contemplated under section 2(1)(b) of the Wills Act)²⁰ or revoke the existing will and execute an entirely new will. Respondents were requested to report on the incidence of testators effecting amendments to existing wills, compared with the incidence of testators revoking existing wills and then executing new wills. The results appear as follows:

Modes	Average incidence out of 10
Amendment of existing will	2.5
Revocation of existing will and execution of new will	7.5

One respondent reported that amendments to the provisions of existing wills usually occur when testators effect relatively small or limited changes to testamentary dispositions (such as the deletion of a beneficiary's name or the substitution of one beneficiary with another), whereas the revocation of existing wills and execution of new wills are prevalent when more comprehensive changes are at hand. Most events that occasion high incidence of will-making,²¹ such as the conclusion of a marriage by a testator, the birth of a child to a testator and the divorce of a testator, generally require fairly comprehensive changes to such testator's existing testamentary dispositions. An inevitable correlation therefore exists between, on the one hand, the incidence of the revocation of existing wills and the execution of new wills and, on the other hand, those instances in which testators are most frequently moved to make (new) wills by reason of the need for comprehensive changes to their testamentary dispositions.

The concern raised earlier in respect of testators' ignorance with regard to testamentary execution formalities,²² also holds true in respect of the formalities prescribed for the amendment of wills. An amendment

¹⁹ Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* (2001) 57 and 90.

²⁰ For purposes of this discussion the partial revocation of a will is included under the amendment of a will as contemplated under s 2(1)(b) of the Wills Act. See De Waal and Schoeman-Malan 93.

²¹ See 3.1.2.

²² See 3.2.

effected without compliance with the requisite formalities prescribed by section 2(1)(b) of the Wills Act, is invalid.²³ In my experience testators are usually not informed upon the execution of wills that, should they wish to effect small amendments to such wills, they must seek professional advice and assistance to ensure that the amendments are validly effected. In order to negate the danger of invalidity of amendments as a consequence of non-compliance with the prescribed amendment formalities, it is imperative that practitioners dispense this advice to their clients.

- (b) A testator who wishes to revoke an existing will, can generally do so expressly by executing a new will that contains a revocatory clause (*clausula revocatoria*) or by destroying the existing will, be it physically (through, for example, shredding or burning) or symbolically (the document survives, but is defaced through, for example, the drawing of lines through it or the obliteration of the testator's signature on it).²⁴ Alternatively, a testator can tacitly revoke an existing will, either wholly or partially, by executing a new will (without a revocatory clause) containing provisions inconsistent with those in an earlier will.²⁵ Respondents were requested to indicate the incidence of each of the above modes of revocation. The results, in order of high incidence to low incidence of modes, appear as follows:

Order	Modes	Average incidence out of 10 ²⁶
1	New will containing revocatory clause	8.6
2	Destruction (physical or symbolic)	0.8
3	New will without revocatory clause but with provisions inconsistent with those in earlier will	0.7

The above results support a quite informal random test conducted by myself amongst eight laypersons. All of them proclaimed knowledge of the fact that a clause in a will stating, for example, "all previous wills, codicils and testamentary writings are hereby revoked" will in fact have revocatory effect on an earlier will. Six admitted that they had no knowledge of the fact that a will can be revoked by destruction, whereas two opined that, upon reflection, destruction "must surely cause a will to cease". Not one of the eight lay respondents considered the revocation of an earlier will through the execution of a later conflicting will as a possible mode of revocation, because "one would have to be a lawyer to

²³ Such an invalid amendment can also be "rescued" through the High Court's power of condonation under s 2 (3) of the Wills Act, but, as already indicated, obtaining condonation on application to the High Court is an expensive and time-consuming exercise.

²⁴ See also the High Court's power of condonation in respect of certain acts of revocation under s 2A of the Wills Act.

²⁵ Corbett *et al* 95 *et seq*; and De Waal and Schoeman-Malan 85 *et seq*.

²⁶ One respondent failed to answer this particular question.

know that”! It therefore appears that the limited general legal knowledge of the average layperson accounts for the low incidence of revocation of wills through destruction or the execution of later conflicting wills. On the other hand, practitioners who draft wills for clients admit to inserting revocatory clauses in such wills almost as a matter of course (rather than omitting such clauses and, in so doing, allowing for the possibility of revocation of an earlier will through a later conflicting will). This practice explains the high incidence of revocation through wills that contain revocatory clauses.

3 4 The contents of wills

3 4 1 *Typical testamentary institutions or provisions*

In accordance with the principle of freedom of testation, which constitutes one of the cornerstones of testamentary succession under South African law, a testator is permitted to effect testamentary dispositions entirely in accordance with his/her wishes and caprice, provided the exercise of this freedom is not restricted in any given instance by the common law or statute.²⁷ Notwithstanding testators’ freedom to testate in any manner they deem fit, a number of typical testamentary institutions or provisions often find their way into wills. These include testamentary conditions, the *modus*, direct substitution, fideicommissary substitution, the usufruct, the trust, the award of an annuity, accrual and the massing of estates. Respondents were requested to indicate the incidence of inclusion of each of the above institutions or provisions in wills drafted by themselves. The results, in order from high incidence to low incidence, appear as follows:

Order	Institution or provision	Average incidence out of 10
1	Trust	8.2
2	Direct substitution	7.2
3	Usufruct	5.9
4	Conditions	5.3
5	Accrual	4.5
6	Annuity	3.1
7	Massing of estates	2.8
8	Modus	2.6
9	Fideicommissary substitution	1.7

- (a) The popularity of the trust as a multi-purposed and user-friendly legal institution is underlined by the high incidence of trust usage reported by respondents. Respondents were questioned on specific aspects

²⁷ Corbett *et al* 39-40.

pertaining to their utilisation of testamentary trusts, which results are enumerated and analysed below.²⁸

- (b) The high incidence of direct substitution confirms it as the method most widely employed to facilitate the devolution of benefits to alternative beneficiaries in the event of predecease or disqualification of, or repudiation by, instituted beneficiaries. In so doing, the devolution of benefits on intestacy is effectively precluded.²⁹
- (c) The usufruct, delivering income to the usufructuary while vesting the *corpus* of the usufructuary property in another, remains a popular testamentary institution, with above average incidence of utilisation reported. It is to be expected that high incidence of testamentary trust usage necessarily detracts from the general use of the usufruct in wills. The trust can yield much the same results as the usufruct, but provides additional benefits and advantages – it therefore stands to reason that practitioners may well advise clients to consider the trust as a preferred alternative to the usufruct.³⁰ Kernick argues this proposition as follows:³¹

“Leaving something to my children subject to a usufruct in favour of my wife ... or to my wife subject to a *fideicommissum* in favour of my children ... can both be recipes for disasters and complications, not only on my death, but on my wife’s death or on the death of one of my children prior to my wife’s death. Quite apart from the questions of security and complications that poor family relationships might bring, there is the near certainty that, on my wife’s death several years later, there will be great difficulty in tracing what has happened to the various assets, and substituted assets, which were subject to the usufruct or *fideicommissum*. If the testator wishes to create usufructuary or fideicommissary rights, he should do so by means of a trust. There would then be a neat pocket in which all transactions could take place, with annual statements being prepared to reflect the current position. It would cost a bit to run the trust, but it would be money well spent ...”

- (d) Testamentary conditions usually impose some duty or burden upon the affected beneficiaries, whereas bequests *sub modo* are per definition onerous in nature. It therefore stands to reason that the average testator is somewhat loath to encumber or obligate his/her beneficiaries by means of these provisions. The slightly above average incidence of testamentary conditions and the below average incidence of the *modus*, is therefore not unexpected. It is submitted that the results in this regard underscore the operation of the general presumption against onerous testamentary provisions under our law of succession.³² It is, however, interesting to note that the results in respect of testamentary conditions exhibit a broad differentiation-range, more so than any of the other

²⁸ See 3 4 2.

²⁹ However, see, *Harris v Assumed Administrator, Estate MacGregor* 1987 3 SA 563 (A) where intestacy ensued despite extensive provision for direct substitution.

³⁰ Du Toit *South African Trust Law – Principles and Practice* (2002) 163-167.

³¹ *Administration of Estates and Drafting of Wills* (1998) 116.

³² *Corbett et al* 511; and *De Waal and Schoeman-Malan* 215.

institutions or provisions polled. Seven respondents reported an incidence of 5 or lower with regard to conditions, whereas two of the remaining three reported an incidence of 9, with the final respondent reporting an incidence of 10. It therefore appears that some practitioners are instructed by their clients to utilise testamentary conditions far more frequently than others, or, alternatively, these practitioners advise their clients to employ this particular type of bequest more so than others. A word of caution must however be sounded on the utilisation of testamentary conditions: it is imperative that testators comprehend fully the consequences of the non-fulfilment of suspensive conditions (no vesting of a right to the benefit concerned) and the fulfilment of resolutive conditions (the forfeiture of a right to the benefit concerned), as confusion or uncertainty on these matters may result in outcomes not intended or contemplated by testators. Practitioners must therefore inform clients fully and take instructions for the preparation of wills only once satisfied of clients' proper understanding of the utilisation of conditional bequests. It stands to reason that practitioners themselves must be *au fait* with the law in this regard.³³

- (e) The right of accrual (*ius accrescendi*) allows testamentary beneficiaries to succeed proportionally to the benefit of a predeceased, disqualified or repudiating co-beneficiary.³⁴ As with direct substitution, the operation of accrual precludes devolution of benefits on intestacy by facilitating the distribution of such benefits amongst other beneficiaries. Ironically, the slightly below average incidence of accrual reported by respondents, is ostensibly to be explained by the high incidence of direct substitution, as these are mutually exclusive: accrual will not operate if provision has been made for beneficiaries to substitute predeceased, disqualified or repudiating instituted beneficiaries.³⁵ The prevalence of direct substitution therefore occasions below average general usage of accrual.
- (f) Corbett, Hofmeyr and Kahn describe an annuity as a series of recurring legacies, the first one vesting immediately upon the testator's death, while each subsequent payment is conditional upon the legatee's being alive on the due date.³⁶ An annuity is usually bequeathed in order to ensure the annuitant of periodical income payments on the annuity's due date. Payment under an annuity (by, *eg*, the executor of the testator's deceased estate) is therefore analogous to the periodical payment of trust income by a trustee or the periodical drawing of income by a usufructuary under a usufruct. The higher incidence of trust and usufruct usage reported by respondents may therefore serve to explain the below

³³ See, *eg*, the interpretation of a testator's will in *Webb v Davis NO 1998 2 SA 975 (SCA)*, in particular counsel for the appellant's erroneous submission that a resolutive condition has a postponing effect on vesting (983C-D). See also generally *Wessels v DA Wessels en Seuns (Edms) Bpk 1987 3 SA 530 (T)*.

³⁴ De Waal and Schoeman-Malan 188.

³⁵ Corbett *et al* 244; and De Waal and Schoeman-Malan 188.

³⁶ 227.

average incidence of utilisation of annuities. Moreover, one respondent reported that annuities are usually a feature of smaller estates where the creation of trusts or the establishment of usufructs is not economically feasible, but added that, in his particular practice, such small estates are few and far between.

- (g) Massing of estates, or the consolidation of estates for the purpose of joint disposition, is an extremely onerous arrangement, as it, if effected through adiation by a surviving testator, occasions such testator to relinquish the assets s/he contributed to the consolidated estate. It moreover precludes such testator from amending or revoking the mutual will under which massing was constituted.³⁷ The onerous nature of this arrangement ostensibly contributes much to its fairly low incidence in wills drafted by respondents. As with testamentary conditions and the *modus* discussed earlier, it is submitted that the results in this regard underscore the operation of the general presumption against onerous testamentary provisions under our law of succession, as well as the specific presumption against the massing of estates.³⁸ The latter presumption prompts Corbett, Hofmeyr and Kahn to advise practitioners as follows:³⁹

“There is a strong presumption against massing, and, to avoid doubt, where massing is intended the drafter of a will should be forthright and use the word ‘mass’. The use of words such as ‘after our death’, ‘al ons natelatene goederen’, ‘the whole of our joint estate’ provides some indication that massing is intended, but is not conclusive.”

One respondent alluded to the adverse donations tax consequences to which massing may expose the surviving testator as a further reason why massing is regarded with circumspection by many legal practitioners and estate planners.⁴⁰ Another respondent reported a high incidence of massing (8 out of 10) in the wills of spouses married in community of property. As many modern spouses-to-be rather opt for the accrual system as their matrimonial property regime of choice, the decline in marriages concluded in community of property may also contribute to the low incidence of massing of estates.

- (h) Very low incidence of utilisation of the testamentary *fideicommissum* was reported. This result is not unexpected, because, as pointed out by Kernick above, the testamentary trust provides a preferred alternative to the long-term bequest of property to successive beneficiaries that typifies the *fideicommissum*. The traditional application of fideicommissary substitution is moreover with regard to land, particularly agricultural land, whereas the current research was conducted amongst urban practitioners who do not regularly draft wills

³⁷ De Waal and Schoeman-Malan 186.

³⁸ Corbett *et al* 438; and De Waal and Schoeman-Malan 216.

³⁹ 438.

⁴⁰ See generally Lourens “Boedelsamesmelting as Instrument by Boedelbeplanning” 2000 *THRHR* 417.

in which fideicommissary bequests over such land are at hand. Nevertheless, it is submitted that the very low incidence of utilisation of the *fideicommissum* is indicative of the unpopularity of this institution in modern testamentary succession.

3 4 2 *The testamentary trust*

As indicated above,⁴¹ the incidence of trust usage reported by respondents far exceeds that of any other typical testamentary provision or institution. This result bears testimony to the usefulness of the trust as a tool in the hands of the legal practitioner or estate or financial planner. In order to determine the prevalence of some typical applications to which trusts are put, respondents were requested to indicate the incidence of some such applications in wills drafted by themselves. The results, in order from high incidence to low incidence of application, appear as follows:

Order	Application	Average incidence out of 10
1	To provide for descendants in the event of the simultaneous death of parents	8.6
2	To provide for an income benefit to a surviving spouse and a capital benefit to descendants	7.2
3	To provide for an income benefit to descendants	5.4
4	For charitable purposes	2.8
5	To effect long-term dispositions (trust to remain operational for 50 years or longer)	2.4
6	To set up a business	1.0

- (a) High incidence of trust usage to provide for descendants (particularly children) in the event of the simultaneous death of parents is to be expected, as the utilisation of the testamentary trust in this regard is generally acknowledged as one of its principal applications.⁴² It is of particular importance that parents avoid out-and-out testamentary bequests to minor descendants, even more so in the event of such parents' simultaneous death. Section 43 of the Administration of Estates Act⁴³ determines that cash payable to a minor from a deceased estate will not be paid directly to the minor, but may be paid to such minor's guardian. The latter is, however, required to first furnish security to the satisfaction of the Master of the High Court. The Master usually insists upon a bond of security from an insurance company, but the expense of obtaining such a bond is frequently too excessive for a guardian to bear. Guardians are therefore often either unable or unwilling to obtain the required security and hence readily decline to accept payment of cash for and on behalf of a minor. Should a minor's guardian indeed so

⁴¹ See 3 4 1.

⁴² Du Toit 167-168.

⁴³ 66 of 1965.

decline to receive cash, or should the minor not have a guardian, cash payable to the minor from a deceased estate is normally paid into the Guardian's Fund where it remains until the minor comes of age. The Guardian's Fund pays interest on money deposited therewith, but the rate is usually well below normal market rates and is credited only annually, resulting in an unfavourable return on money deposited with the Fund. Movable property that constitute part of a minor's inheritance is also handed to the minor's guardian for and on behalf of the minor, but the Master may again insist on security, which is, as explained above, not always easy to procure. Immovable property that constitutes part of a minor's inheritance is registered in the name of the minor in the Deeds Registry, but also becomes the responsibility of the minor's guardian for and on behalf of the minor. However, guardians frequently lack the skill and expertise to properly manage immovable property in the best interest of a minor.⁴⁴ These difficulties are circumvented if trustees hold and manage all property for minors until they attain majority or reach an even more mature age, while providing for the minors' maintenance from the trust income – hence the prevalence of this particular application of the testamentary trust.

- (b) The utilisation of the trust either to provide income to a surviving spouse, while reserving the *corpus* of the trust for the testator's descendants, or to provide a testator's descendants with a right to trust income, constitute two further popular applications of the testamentary trust. Above average incidence of utilisation of the trust in both respects is therefore to be expected. In the former instance, the testator not only ensures that the maintenance needs of his/her surviving spouse are adequately catered for, but also obviates the danger of the creation of too big an estate (with adverse estate duty consequences) on the death of the surviving spouse. In the latter instance the maintenance needs of a testator's descendants are met, while the trust's trustees conserve the trust's capital, either for future distribution to such descendants or to achieve some other goal stipulated by the testator.⁴⁵ I anticipated that the discretionary trust would be employed readily to effect the dispositions under discussion. Respondents were therefore requested to indicate the incidence of the bestowal of a power of appointment upon trustees of testamentary trusts to determine whether and/or to whom trust benefits are to be distributed. An average incidence of 7.3 out of 10 was reported in this regard, confirming the importance of the discretionary trust as an estate planning tool: the discretionary trust not only allows for great flexibility in the distribution of trust benefits, but can also yield favourable income tax consequences for trust beneficiaries in that such beneficiaries are taxed only on the income that in fact accrues to them and not on all the income generated in the hands of the trust's trustees.⁴⁶

⁴⁴ Kernick 70-72.

⁴⁵ Du Toit 168.

⁴⁶ S 25B of the Income Tax Act 58 of 1962.

- (c) Testators appear loath to effect long-term dispositions under a trust, with below average incidence of trust usage reported in this regard. This may well be because long-term dispositions, even when effected through a trust, hold inherent risks. Du Toit explains as follows:⁴⁷

“No man has the ability to anticipate what the future holds and a trust designed to operate for a considerable period may therefore become undesirable as the years go by. South African case law abounds with examples of judicial intervention in order to amend long-term trusts so as to combat the negative economic effects or unrealistic economic consequences brought about by changing circumstances over time.”

- (d) The below average incidence of the charitable testamentary trust and the very low incidence of the testamentary business trust is possibly to be ascribed to the fact that these trusts are more often than not created *inter vivos* and are therefore not a regular feature of testamentary disposition.

3 4 3 *The choice of trustees*

Respondents had to indicate whether testators generally nominate, firstly, professional trustees to administer their testamentary trusts or, secondly, whether only family members or close friends are usually nominated to conduct such administration or, thirdly, whether both professional trustees as well as family members or close friends are so nominated. The number of respondents (out of ten) that selected each option is indicated below:

Professional trustees	4
Only family members or close friends as trustees	1
Professional trustees as well as family members or close friends as trustees	4

The utilisation of professional trustees appears to be the norm, with the nomination of only family members and friends as trustees the exception to the rule. One respondent indicated that the nomination of only family members and friends as trustees is usually a feature of trusts created in respect of small estates or over limited trust property, whereas larger estates or more complex trust administration usually occasion the nomination of professional trustees or a combined nomination of professional and lay trustees. This submission is supported by the information provided by the one respondent who did not select the appropriate option in respect of the item under discussion, but rather enumerated the incidence out of ten of each of the possible options. His results appear as follows:

Option	Incidence out of 10
Professional trustees	6
Only family members or close friends as trustees	1
Professional trustees as well as family members or close friends as trustees	3

⁴⁷ 129-130.

The use of professional trustees holds obvious advantages in respect of their experience and expertise with regard to trust administration. Moreover, should a testator instruct professional trustees to draft his/her will, which will provides for the creation of a testamentary trust, it is general practice for such professionals to insist upon nomination as trustees of the particular trust. However, in my experience such professional trustees are never averse to a testator also nominating others, such as family members or close friends as co-trustee(s), hence allowing the testator to secure a “personal interest” in the administration of the trust.

3 5 Adiation and repudiation

In *Crookes NO v Watson*⁴⁸ Van Heerden JA remarked:⁴⁹

“The oft-repeated saying that a legatee does not acquire a legacy unless he accepts it, misplaces the stress: it would be more correct to say that he acquires a right to the subject-matter of the bequest unless he repudiates it.”

In view of the above statement, Corbett, Hofmeyr and Kahn opine:⁵⁰

“Since adiation ... no longer carries any risk, the modern tendency is to assume that the beneficiary has adiated unless he or she repudiates.”

In order to test the incidence of the tendency referred to by Corbett, Hofmeyr and Kahn above, respondents were requested to indicate whether they require express adiation from testamentary beneficiaries in respect of all testamentary bequests, or, alternatively, whether they assume adiation in the absence of express repudiation. The number of respondents (out of nine – one failed to select an option) that selected each option is indicated below:

Require express adiation	2
Assume adiation in the absence of express repudiation	7

It appears that the views referred to above are indeed reflected in current practice. One respondent remarked that, whereas he normally does not insist upon express adiation, he indeed requires it in instances of massing of estates. This is in complete accordance with the practice that written adiation is required in cases where a testator has imposed an obligation on a beneficiary or has disposed of a beneficiary’s assets.⁵¹ Another respondent from a financial institution reported that it is his company’s policy to refer beneficiaries to an attorney, who will then explain the consequences of adiation and repudiation to the client. Such attorney is then required to record the beneficiary’s decision and certify to the procedure and decision.

⁴⁸ 1956 1 SA 277 (A).

⁴⁹ 298A.

⁵⁰ 18.

⁵¹ De Waal and Schoeman-Malan 182.

3 6 Antenuptial contracts

The inclusion of testamentary provisions in antenuptial contracts constitutes one of the exceptions to the rule that a *pactum successorium* is invalid under South African law.⁵² Respondents were requested to indicate the average incidence of the inclusion of testamentary provisions in antenuptial contracts. A very low incidence of 1.1 out of 10 was reported in this regard. One respondent noted that the inclusion of testamentary provisions in antenuptial contracts is more prevalent in the event of testators' second marriages than their first. Nevertheless, it appears that the will remains the preferred mode of testamentary disposition of the modern testator.

4 CONCLUSION

The research results enumerated in this contribution show the extent to which many of the rules of testamentary succession translate into legal practice, providing the legal theorist as well as the legal practitioner, operating in the fields of succession, trust and estate law, with valuable insights into current trends in testamentary succession.

⁵² De Waal and Schoeman-Malan 205.