

Towards the formulation and inclusion of formalities
for the revocation of wills

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ABSTRACT

The revocation of wills is currently regulated in South Africa by common law principles and judicial decisions. This has resulted in conceptual lacunae. In light of the above legal gap, it can be argued that formalities for the revocation of wills should be introduced in order to, among other things, reduce fraud and create consistency at the various Masters' Offices and in court decisions. The rationale for including strict formalities for the execution and amendment of wills in the *Wills Act 7* of 1953 is to prevent fraud and inconsistencies when determining the validity of such a will. This study advocates for the common law principles that currently regulate the revocation of wills in South Africa to be formalised and codified to include formalities for the revocation of wills. This would create legal uniformity and easy interpretation of the law. In the process of establishing formalities for the revocation of wills, it would be beneficial to understand how other jurisdictions deal with revocation formalities. With reference to its code on *Estates, Powers, and Trusts Law* (EPT Law), the *New York Consolidated Laws and Constitution of the State of New York* in the United States of America provide some useful insights in this regard. Will revocation, including formalities, is codified in the EPT Law. To place this discussion in its proper context, consideration should also be given to the current formalities for the execution and amendment of wills.

KEYWORDS

Revocation, execution, amendment, formalities, codification.

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LIST OF ABBREVIATIONS

| | |
|----------|--------------------------------|
| DLR | Denver Law Review |
| EPT Code | Estates, Powers and Trusts Law |
| KLR | Kent Law Review |
| NDLR | Notre Dame Law Review |
| NY | New York |
| SALJ | South Africa Law Journal |
| VLR | Virginia Law Review |

1 Introduction

1.1 Background to the study

Various provisions in the *Wills Act* 7 of 1953 (hereafter the *Wills Act*) were included to prevent fraud and to ensure that the testator's intention and wishes are correctly reflected.¹ More specifically, section 2(1)(a) and 2(1)(b) provide for strict formalities for the execution and amendment of wills respectively. In contrast (and except for granting the High Court the power to declare a will revoked in terms of section 2A), the *Wills Act* does not prescribe formalities for the revocation of wills.

Revocation of a will occurs when a testator takes some action to reflect that he² no longer wants the provisions of the will to be binding.³ Effective revocation requires the intent of the testator to revoke the will (*animus revocandi*) accompanied by an act of revocation.⁴ Since the revocation of wills is not legislatively regulated, the common law finds application. The common law recognises various acts or methods in which a will can be revoked, including the physical or symbolical destruction of the will (part or in whole), as well as express revocation and implied revocation.⁵ A series of presumptions for the valid revocation of wills are also provided for under common law.⁶

The fact is, however, that "acts" or "methods" of revoking a will do not necessarily translate to "formalities"⁷ for revoking a will. Taking the reason for the inclusion of strict formalities for the execution and amendment of wills into consideration, namely, to prevent fraud, why are there no statutory prescribed formalities when it comes to the revocation of wills? Due to this lack of formalities for the revocation of wills, fraud can become prevalent. For example, the common law act of revocation by means of destruction can in itself be a fraudulent act by someone other than a testator, and with the testator having no knowledge of such prior to his death. An evidentiary burden lies

¹ Pace and Van der Westhuizen *Wills and Trusts* 16.

² Any reference in this study to the masculine gender shall be deemed to include the feminine gender-unless otherwise stipulated.

³ Pace and Van der Westhuizen *Wills and Trusts* 16.

⁴ Pace and Van der Westhuizen *Wills and Trusts* 16.

⁵ Wood-Bodley "Revocation and revival of wills" 90.

⁶ Pace and Van der Westhuizen *Wills and Trusts* 36.

⁷ Formalities relate to the strict observance of conventions or set standards.

with the party that challenges the validity of a will. The application of the various common law presumptions concerning the revocation of wills also contributes to this evidentiary burden. For example, one of the (rebuttable) presumptions is that should it be known that the testator's will was in his possession, but after the testator's death, such will cannot be found amongst his possessions (after a diligent search), then it is presumed that the testator destroyed the will with the intention to revoke it.⁸ The onus then rests on the person that alleges the testator had a will and would need to prove that the testator had no intention to revoke his will. The standard of proof is based on a balance of probabilities, and it may be difficult to meet the requisite proof.

1.2 Motivation

Revocation of wills is currently based on common law principles and judicial decisions, causing a lack of conceptual structure. In light of the aforementioned, it can be argued that formalities for the revocation of wills should be introduced in order to, *inter alia*, curb fraud but also to create uniformity at the various Masters' Offices and the decisions taken by the courts.

The primary aim of this study is to address the following research question, namely: with reference to the rationale for including strict formalities for the execution and amendment of wills in the *Wills Act*, namely to prevent fraud, should the common law principles which currently regulate the revocation of wills in South Africa be formalised and codified to include formalities for the revocation of wills and, if so, what should these formalities be?

In the process of introducing formalities for the revocation of wills, it would be useful to determine how the current formalities for the execution and amendment of wills and New York address formalities regarding the revocation of wills. The *New York Consolidated Laws and Constitution* of the State of New York in the United States of America (USA) may provide valuable insights in this regard with reference to its code on *Estates, Powers and Trusts Law* (hereafter the EPT Code). The revocation of wills, including formalities, has been codified in §3-4.1 of the EPT Code.

⁸ Wood-Bodley 2009 *EJC* 95.

1.3 Research question

With reference to the rationale for including strict formalities for the execution and amendment of wills in the *Wills Act*, namely, to prevent fraud, should the common law principles which currently regulate revocation of wills in South Africa, be formalised and codified to include formalities for revocation of wills and, if so, what should these formalities be?

1.4 Research method

This study is characterised by a literature study. The sources consulted include legislation, decided cases, journal articles, books and electronic sources. The inclusion of legislation and case law from the State of New York is not meant to constitute a full comparative study but rather to follow a functional approach that distils learning points to address the current research question.

1.5 Framework of the study

The current position regarding the revocation of wills in South Africa is discussed in chapter 2 with reference to the common law acts of revocation, the presumptions in respect of revocation and section 2A of the *Wills Act*. In chapter 3, the discussion focuses on formulating formalities for the revocation of wills in SA based on: Current formalities for execution and amendment of wills in South Africa (s 2(1)). The chapter also explores the inclusion of the formalities for revocation of wills in the Act and or Master's Directives. Chapter 4 takes a critical look at the formalities of revocation in the state of New York. Reference is given to the jurisdiction's formalities for the execution of wills as well as the formalities for the revocation of wills as embodied in section 34 of the Decedent Estates Act. In chapter 5 proffers the recommendations on how best South Africa can codify the formalities of revocation of wills in its statutory framework. Chapter 6 concludes the study.

2 Current position regarding the revocation of wills in South Africa

2.1 Introduction

Revocation is an act that changes the legal status of a valid will.⁹ As previously mentioned,¹⁰ "revocation" can be described as the act of revoking, accompanied by the intention to revoke, the provisions of a will.¹¹ Hence there are two elements that apply to the revocation of a will, namely: (a) the intention to revoke (*animus revocandi*); and (b) a legally recognised act by which the intention is manifested. Both these elements need to be satisfied for revocation to take place.¹²

A testator may, at any time after having executed his will but prior to death, revoke such will. The only exceptions are: (a) in the case where a mutual will makes provision for estate massing, and the survivor accepts the benefit of the massing, then the last mentioned cannot alter the testamentary disposition of the massed estate; and (b) testamentary provisions contained in a duly registered ante-nuptial contract cannot be revoked.¹³

The current position of revocation in South Africa is discussed in this chapter, namely with reference to the common law acts of revocation, the presumptions regarding revocation and the application of section 2A of the *Wills Act*.

The objectives of the chapter are accordingly designed to:

- (a) Explore the current legal position on the revocation of wills in South Africa.
- (b) Discuss the common law acts of revocation.
- (c) Discuss the presumptions related to revocation and the application of section 2A of the *Wills Act*.

⁹ Jamneck *et al The Law of Succession in South Africa* 85.

¹⁰ See chapter 1 of this study.

¹¹ Pace and Van der Westhuizen *Wills and Trusts* 36.

¹² Jamneck *et al The Law of Succession in South Africa* 111.

¹³ Jamneck *et al The Law of Succession in South Africa* 85.

2.2 Common law acts of revocation

Except for the revocation condonation provision in section 2A of the *Wills Act*, revocation is currently not statutorily provided for. It has to be noted that this was not the case prior to the enactment of the *Wills Act*. Prior to its removal from the statutory books, section 9 of Law 2 of 1868 (Natal) provided for the formalities to be observed when revoking a validly executed will. Four methods or acts for the revocation of wills are recognised in terms of the South African common law, namely:¹⁴ (a) destruction of the whole will; (b) destruction of part of the will; (c) express revocation (which includes informal revocation); and (d) implied revocation. Each act of revocation will accordingly be discussed.

2.2.1 Destruction of the whole will

Destruction of the whole will may be a physical act, or it may be symbolic.¹⁵ A physical act refers to destroying of the whole will by burning it or tearing it up.¹⁶ The document needs to be destroyed and the testator must have the intention to revoke the will. Therefore, it can be said that a will destroyed in error or destroyed by a third party without the explicit instruction from the testator, lacks intention and is therefore not revoked.¹⁷ Symbolic destruction refers to certain acts of the testator for example writing the word "revoked" or "cancelled" on the will, drawing lines across the will or destroying the signature of the testator or the witnesses on the will.¹⁸ As previously mentioned, these acts are governed by common law and recognised as destruction of a will.¹⁹

2.2.2 Destruction of parts of a will

Destruction of certain parts of the will is referred to as partial revocation. Such would be drawing lines across certain clauses or striking off certain heirs' names in the will.

¹⁴ Jamneck *et al The Law of Succession in South Africa* 111.

¹⁵ Pace and Van der Westhuizen *Wills and Trusts* 7.

¹⁶ Pace and Van der Westhuizen *Wills and Trusts* 7.

¹⁷ Pace and Van der Westhuizen *Wills and Trusts* 7.

¹⁸ Jamneck *et al The Law of Succession in South Africa* 111.

¹⁹ Jamneck *et al The Law of Succession in South Africa* 111.

It would also include cutting out certain parts of the will with scissors.²⁰ However, for such partial revocation to be valid, the formalities for the amendment of a will need to be complied with.²¹

Accordingly, even though the common law provides for the partial revocation of a will, the South African law (in terms of section 2(1)(b) of the *Wills Act*) statutorily regards this form of revocation as an amendment of a will.

2.2.3 Express and implied revocation of a will

The most common method used to revoke a previous will is executing a later one that contains a revocation clause and can be described as an express revocation.²² A will by definition also includes a codicil and any other testamentary writing.²³ A codicil is drafted to amend one or more clauses in a previous will, and therefore revokes the provisions of the original will. Direct reference is made in the codicil to those provisions of the original will that are inconsistent with the provisions of the codicil.²⁴ Codicils were more useful in days when a will was still handwritten. Nowadays, with the advances of technology in the form of computers, it makes it easier to merely draft a new will and have a testator sign it, as opposed to having various codicils attached to a will.²⁵

In the case of express revocation, the intention of the testator is clearly conveyed. The problem, however, arises where revocation is construed by implication.²⁶ For revocation by implication, action is required by the testator that must reflect a clear intention to revoke. Execution of a new will does not automatically revoke the previous will. If there is more than one will be available at the death of the testator, all wills need to be read together.²⁷ However, should the provisions in the recent and previous wills conflict, then

²⁰ Jamneck *et al The Law of Succession in South Africa* 111.

²¹ Jamneck *et al The Law of Succession in South Africa* 113.

²² Pace and Van der Westhuizen *Wills and Trusts* 36-(4).

²³ Section 1 of the *Wills Act*.

²⁴ Pace and Van der Westhuizen *Wills and Trusts* 36-(5).

²⁵ Pace and Van Der Westhuizen *Wills and Trusts* 36-(5).

²⁶ Pace and Van der Westhuizen *Wills and Trusts* 36-(4).

²⁷ Pace and Van Der Westhuizen *Wills and Trusts* 36-(4).

the provisions of the previous will are revoked by implication as it is inconsistent with the terms of the later will. This is referred to as implied or tacit revocation.²⁸

2.3 *Animus revocandi and common law acts of revocation*

As previously mentioned, in terms of the common law, no formalities are required for the revocation of a will. Revocation is regulated by the common law. These common law acts of revocation have been confirmed in the *Wills Act* with the use of the word "deletion" as defined in section 1 of the amended *Wills Act*.²⁹ It is prudent to note that oral revocation is, however, not recognised in terms of the common law.³⁰ It should be noted that the revocation of a will can be conditional or dependent on an assumption. The intention of the testator is important in determining whether the revocation was conditional or unconditional. When a condition is placed in the will that causes a will to be revoked, and that condition is not fulfilled, then the revocation fails.³¹ If the intention is defective, then the destroyed will is not revoked in terms of conditional revocation.³² The above is closely related to the doctrine of dependent relevant revocation, also known as ineffective revocation. This concept renders any revocation of a previous will invalid if the testator did so by validly executing a new will. The newly executed will is thus determined to be invalid.

2.4 *Presumptions*

The law recognises a series of presumptions. Firstly, if the will is destroyed by the testator, it is presumed that he intended to revoke it.³³ Furthermore, if an original will was in the possession of the testator prior to death but then went missing after death, it is presumed that the testator destroyed the will with the intention of revoking the will. This, however, does not apply if the original will was kept with a third party at the time of the testator's death.³⁴ If a duplicate original was in the possession of the testator prior

²⁸ Jamneck *et al The Law of Succession in South Africa* 114.

²⁹ Pace and Van der Westhuizen *Wills and Trusts* 36-(7).

³⁰ Pace and Van der Westhuizen *Wills and Trust* 36-(5).

³¹ Pace and Van der Westhuizen *Wills and Trusts* 40.

³² Jamneck *et al The Law of Succession in South Africa* 118.

³³ Pace and Van der Westhuizen *Wills and Trusts* 36-(7).

³⁴ Pace and Van der Westhuizen *Wills and Trust* 36-(7).

to his death, but was missing at the time of death, it is presumed that the testator intended to revoke his will. These presumptions can be rebutted, for example, where the testator crossed out the wording on a duplicate original or copy while the other duplicate original or original will is still intact in the lawyer's office, the onus of proof rests on the person who claims that the will has not been revoked.³⁵ A duplicate will is an exact copy of the original will that is signed and attested like the original will.

However, if there is an unsigned copy of a will in the possession of the testator, it can be presumed that the testator intended to revoke his previously signed will.³⁶ The informal acts of revocation (as well as the court's power to condone informal acts of revocation in terms of section 2A of the *Wills Act* – as will be discussed in section 2.6 of this study), is best described in the matter of *Marais v The Master*.³⁷ The testator had an unsigned duplicate original in his possession, which duplicate original was missing at the time of his death. The court found on a balance of probabilities that, since the will was missing, the testator intended to revoke the will. The court, in this instance, did not rely on the presumption, but on a balance of probabilities.³⁸ When a court relies on a presumption, it means that the respondent needs to bring evidence to counter the presumption. When the court relies on a balance of probabilities, it means the applicant needs to show that, on a balance of probabilities, the testator intended to revoke his will.³⁹ This is done by providing proof such as witness testimony and documents to support the allegations that are made. There are no set time frames with regard to objections for contesting the validity of a will, as long as it is done within a reasonable time, ideally before an estate is wound up.⁴⁰

In *Sansole NO v Ncube*⁴¹ the first presumption mentioned above was applicable to the disappearance of a copy of the testator's will, which was thought to be the original but the original was actually still in the safe custody of his attorney. The testator had a new

³⁵ Pace and Van der Westhuizen *Wills and Trusts* 36-(7).

³⁶ Pace and Van der Westhuizen *Wills and Trusts* 36-(8).

³⁷ 1984 4 SA 288 (D) para 291.

³⁸ 1984 4 SA 288 (D) para 291.

³⁹ Wood-Bodley "Revocation and Revival of Wills" 90.

⁴⁰ Wood-Bodley "Revocation and Revival of Wills" 90.

will drafted by a third party but failed to sign it before he died. The presumption in the Court's reasoning was that he had revoked his previous will due to his actions.

In *Theart v Scheibert*⁴² a copy of a will was authenticated by one of the witnesses to the original - this was, however, not challenged by the respondents. The second respondent's counsel relied on the presumption that if the original will was with the testator and not found at the time of death, it was then taken as if the testator had destroyed the will with the intention of revoking it. However, for the presumption to apply, the will must have been in the testator's possession at the time of death and does not apply if the will was in the hands of a third party. In this matter, no evidence was produced to indicate who was in possession of the mutual will before the testatrix's death. The presumption therefore failed.

These rebuttable presumptions led to the Master insisting on the original will to be lodged and refusing to accept copies of the will until an order of court was obtained.⁴³ The Master then directed (in terms of section 8(4A) of the *Law of Succession Amendment Act 43 of 1992*) not to take the common law presumptions concerning the revocation of a will into account when making a decision concerning the acceptance of the will.⁴⁴

The Master's office only accepts the last valid will of the deceased. The Master determines the validity of the will on the face value, taking into consideration any revoking clause to determine whether the document is the last will of the deceased.⁴⁵ Prior to the enactment of sections 8(4A) and 8(4(B)) of the *Administrations of Estates Act*, there was no uniform practice followed in the various Master's offices regarding duplicate original wills. Some Masters would accept a signed copy of a will if the original will was missing as long as it was accompanied by an affidavit of the drafter. Other Master's offices requested a court order to accept such a will as being valid.⁴⁶ Section 8(4B) of the *Administration of Estates Act* created a uniform practice in all the Master's offices regarding the lodging of duplicate

⁴² [2012] 4 All SA 278 (SCA).

⁴³ Pace and Van der Westhuizen *Wills and Trusts* 36-(8).

⁴⁴ Section 8(4A) of the *Administration of Estates Act* 66 of 1965.

⁴⁵ Pace and Van der Westhuizen *Wills and Trusts* 36- (9).

⁴⁶ Pace and Van der Westhuizen *Wills and Trusts* 36-(9).

originals.⁴⁷ This section provides that the Master may, for purposes of the *Administration of Estates Act*, accept a duplicate of the original will. In *Ex parte Erasmus NO v In re Erasmus Estate*⁴⁸ it was ordered that the Master could accept a photostat copy of a signed will in terms of section 8(4B).⁴⁹ This could, however, create the opportunity for fraudulent behaviour by a person producing a photostat copy of documents purporting it to be the original signed will when, in fact, that may not be the case.

2.5 Case law

In the matter of *Marais v The Master*⁵⁰ the court held that the acts carried out on the copy of the will that was in the testator's possession qualified as revocation.⁵¹ The same decision was taken in the matter of *Senekal v Meyer*⁵² where the court held that the acts of destruction taken out on a duplicate original by the testator qualified as revocation of the will even though the original will was held at the offices of the attorney.⁵³ A duplicate original is a second printout of the original or same will where all the formalities in terms of execution are carried out like that of the original or first printed will.⁵⁴

In *Pienaar v The Master*⁵⁵ the testator divorced and remarried. The testator then divorced his second wife and executed a will in 2006 after his divorce from the second marriage and then he executed another will in 2007. The question that was to be addressed was whether the latter will revoked the earlier will.⁵⁶ The earlier will was found to be inconsistent with the latter will. The Supreme Court of Appeal held that, should there be more than one testamentary disposition when a testator dies, the wills must be read

⁴⁷ Pace and Van der Westhuizen *Wills and Trusts* 36-(10).

⁴⁸ 1994 2 SA 751 (C).

⁴⁹ Pace and Van der Westhuizen *Wills and Trusts* 36-(9).

⁵⁰ *Marais v The Master* 1984 4 SA 288 (D).

⁵¹ Jamneck *et al The Law of Succession in South Africa* 111.

⁵² *Senekal v Meyer NO* 1975 3 SA 372 (T).

⁵³ Jamneck *et al The Law of Succession in South Africa* 111.

⁵⁴ Jamneck *et al The Law of Succession in South Africa* 111.

⁵⁵ *Pienaar and Another v Master of the Free State High Court, Bloemfontein and Others* 2011 6 SA 338 (SCA).

⁵⁶ *Pienaar and Another v Master of the Free State High Court, Bloemfontein and Others* 2011 6 SA 338 (SCA).

together and the earlier wills are deemed to be revoked as far as they are inconsistent with the latter wills.⁵⁷

In *Frams v Fram's Executrix*,⁵⁸ the will was found after the death of the testator among his possessions with his signature cut off from the paper. The court presumed that the will was revoked by destruction.⁵⁹ In *Le Roux v Le Roux*⁶⁰ the will was presumed to have been revoked because the will executed by the testator in January 1990, which was seen on his desk earlier that year, was not found when the testator had died.⁶¹

*Van Wetten v Bosch*⁶² deals with the intention of the testator at the time of making the contested will. The sister of the deceased requested the court to declare a document written by the deceased to be a valid will. The deceased had a joint will in which his spouse and himself had nominated each other to be the sole heirs of their respective estates. Shortly after the birth of their second child, the deceased wrote notes on the infidelity of his wife and in one of the notes he stated that his oldest son was to be the sole heir of his estate. The court declared the note to be the valid will of the deceased and that the deceased intended to disinherit his spouse. This case was in terms of a section 2(3) application for the condonation of the letter as the last will. The court condoned the letter as a will and accordingly the letter revoked the testator's part in the joint will.⁶³ Section 2(3) allows a court to order a defectively executed will to be treated as valid. Section 2(A) empowers the court to complete the attempt of the testator to revoke his will.

2.6 Section 2A of the Wills Act of 1953

The purpose of section 2A of the *Wills Act* was to give the court power to condone the testator's attempt to revoke a will that was defective. The incorporation of section 2A was

⁵⁷ *Pienaar and Another v Master of the Free State High Court, Bloemfontein and Others* 2011 6 SA 338 (SCA) par 11.

⁵⁸ 1947 1 SA 787 (W).

⁵⁹ *Jamneck et al The Law of Succession in South Africa* 114.

⁶⁰ *Le Roux v Le Roux and others* CPD Hall AJ 1963.

⁶¹ *Jamneck et al The Law of Succession in South Africa* 114.

⁶² *Van Wetten v Bosch* 2004 1 SA 348 (SCA) par 21.

to prevent any injustices. In terms of section 2A the High Court is authorised to declare a will or part thereof revoked even if the document from which the revocation appears does not comply with the common law acts of revocation. Section 2A reads as follows:⁶⁵

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.⁶⁶

Section 2A empowers the court to declare a will or any part thereof to be revoked if the document purporting to be a will was drafted by the testator, or by someone acting on the instructions of the testator before his death. For a court to grant an order in terms of section 2A, the court must be convinced, on a balance of probabilities, that the testator intended to revoke his will or any part thereof. The testator, or someone acting on behalf of the testator, must have performed one of the actions in section 2A for the purpose of revoking his will.⁶⁷ When one compares section 2A and 2(3) of the *Wills Act*, it can be seen that, in terms of the condoning powers of the courts in terms of section 2(3), if we refer to an unsigned will then only the testator could draft the will himself, whereas in terms of section 2A(c) the document referred to could be drafted by someone else.⁶⁸ Section 2A makes it possible for the court to rule on certain aspects of revocation.

From case law, it can be seen that there are inconsistencies in the manner in which the various courts have interpreted this section. Further, the many court decisions reflect inconsistencies in the interaction between sections 2(3) and 2(A). In *Henwick v The Master*,⁶⁹ an application was brought to declare a joint will revoked in terms of section 2A(c). The facts of this case are that the testator's wife made an application to court to declare the testator's will (drafted in October 1972) to be revoked. The testator had a new joint will drafted by the bank in 1994, two days after he remarried. The testator, however, died 6 months later before signing the joint will. The court argued that the document did not indicate that the testator agreed with the contents of the will. The

⁶⁵ Jamneck *et al The Law of Succession in South Africa* 93.

⁶⁶ Jamneck *et al The Law of Succession in South Africa* 93.

⁶⁷ Jamneck *et al The Law of Succession in South Africa* 121.

⁶⁸ Pace and Van der Westhuizen *Wills and Trusts* 37.

⁶⁹ *Henwick v The Master* 1997 2 SA 326 (C).

legislature had to determine the testator's intention and thereby applied sections 2A and 2(3). It was determined that in terms of the strict interpretation of section 2A(c), there was not sufficient proof or evidence to show that the testator had performed an act that reflected his intention to revoke his previous joint will drafted with his ex-spouse to whom he was married in community of property. The court, therefore, dismissed the application.⁷⁰

In *Mdlulu v Delarey*⁷¹ an application was brought by the plaintiff to have the will of her deceased mother declared invalid. She based the application on the facts that the deceased had acted under duress; and that the will was revoked by the testatrix herself. The court held that section 2A should be applied with caution. There was no document available to the court indicating that the testatrix had intended to revoke her will.⁷² In terms of the common law, a will cannot be revoked orally and section 2A is silent in this regard. Section 2A(c) makes provisions for another document drafted by the testatrix to be taken into account. The court concluded that the document reflecting the intention to revoke the will was required and since no document was produced, the court concluded that the testatrix had not revoked her will.⁷³

In *Webster v The Master*,⁷⁴ an application to revoke a joint will was made prior to divorce by the deceased and his former wife. The deceased had removed the ex-spouse's name and the way they were married as well as the clause that related to the last surviving being the sole heir in the joint estate. The deceased furthermore instructed his attorney to draft a new will but died before he could sign it. The applicant argued that the deceased actions showed the deceased's intention to revoke the joint will and that section 2A(b) and (c) were applicable. The court concluded that the will could not be revoked in terms of section 2A(a) because the parts deleted by the deceased was done on the copy of the

⁷⁰ Wood-Bodley 1998 SALJ 205-206.

⁷¹ *Mdlulu v Delarey* 1998 1 All SA 434 (W).

⁷² *Mdlulu v Delarey* 1998 1 All SA 434 (W).

⁷³ *Mdlulu v Delarey* 1998 1 All SA 434 (W).

⁷⁴ *Webster v The Master* 1996 1 SA 34 (D).

will and not the original will. The court did, however, conclude that the will could be revoked in terms of section 2A(b).⁷⁵

In *De Reszke v Maras*,⁷⁶ the court had to decide on whether the written instruction to an attorney to draft a will qualified as the last will and testament of the testator in terms of section 2(3), or whether in terms of section 2A the document revoked the previous executed valid will. The court, after many deliberations, came to the conclusion that the document remained an instruction to the attorney and could not be validated in terms of section 2(3). However, in terms of section 2A the court concluded that the deceased intended to revoke the previous will on condition that the document drafted by the attorney be declared a valid will.⁷⁷ Furthermore, in this case Moosa J, warns that section 2A does not deal with revocation of wills and that the testator can revoke his will only in terms of common law.⁷⁸ Section 2A gives the court power to condone the revocation in instances when the common law revocation is not effective. The judgment in the court *a quo* was confirmed by the Supreme Court of Appeal.⁷⁹ The real question, even in terms of section 2A, is to determine the testator's intention from his actions.

Section 2A does not constitute formalities for revocation; it is applied only where there is uncertainty as to whether the will was revoked. Section 2A is problematic as it can be seen with case law and the different approaches the courts use to interpret section 2A. Also, from case law, it can be seen that most of the cases that deal with section 2A also deal with section 2(3). Thus it is evident that there is an interaction between the two sections. Section 2A is brought to declare a document purporting to be a will or a will valid and if such a ruling is made by the court then section 2(3) is necessary to have the

⁷⁵ *Webster v The Master* 1996 1 SA 34 (D).

⁷⁶ *De Reszke v Maras* 2003 6 SA 676 (C).

⁷⁷ Pace and Van der Westhuizen *Wills and Trusts* 38.

⁷⁸ *De Reszke v Maras* 2003 6 SA 676 (C) 5, 39, 48, 57.

⁷⁹ Pace and Van der Westhuizen *Wills and Trusts* 38.

new document declared the last will of the deceased. And the opposite of that is that if a section 2(3) application succeeds, then a section 2A application is unnecessary.

2.7 Conclusion

From the above it is clear that there is no definite interpretation of section 2A and that the various courts interpret it differently. In some cases the courts have used a strict approach and in others a more liberal one. The courts have shown that the intention of the deceased to revoke his will is critical, the lack of intention by the deceased will not enable the courts to revoke a document purporting to be a will or the will itself.

The statutory formalities for the execution and amendment of wills are discussed in the next chapter. The reasoning behind the next chapter is to illustrate the rationale for strict formalities for the amendment and execution of wills.

3 Statutory formalities for the execution and amendment of wills

3.1 Introduction

As previously mentioned, the existence of formalities for the execution and amendment of a will is to curtail opportunities for fraud and to ensure the will reflects the voluntary disposition of the testator. The acts of execution and amendment relate to the validity of a will. The acts of execution are carried out by the witnesses, the testator and, in some instances, by a commissioner of oaths. These acts of execution contribute to the formal validity of a will.⁸⁰ A will is validly executed if all the required formalities in section 2(1)(a) have been satisfied. A will operates immediately after execution, even though it is only effective at death, in order for revocation to be effective at any point during the lifetime of the testator.

The objectives of this chapter are set to:

- (a) provide an outline of the formalities for the execution and amendment of a will as prescribed in section 2(1)(a)-(b) of the *Wills Act*;
- (b) illustrate the Master's or the court's rigid application of the said formalities with reference to case law;
- (c) provide the rationale for the inclusion of strict formalities for the execution and amendments of wills in the *Wills Act* with reference to case law.
- (d) find a system that will, as far as possible, facilitate an approach that can be adapted to create, at the least, uniformity amongst the courts and the various Master's office with regard to the revocation of wills.

3.2 Section 2(1)(a) of the Wills Act

The *Wills Act* (in section 2(1)(a)) prescribes formalities for the execution of a valid will, namely:⁸¹

⁸⁰ Faber 1996 *SALJ* 512.

⁸¹ Pace and Van der Westhuizen *Wills and Trust* 36-(6).

- (i) The will must be signed at the end by the testator or by some other person in the testator's presence and by his instruction (hereafter referred to as an/the amanuensis).⁸²
- (ii) The testator (or if applicable, the amanuensis) must make the signature in the presence of two or more competent witnesses present at the same time.⁸³
- (iii) The witnesses must attest and sign the will in the presence of the testator (and, if applicable, the amanuensis) and in the presence of each other.⁸⁴
- (iv) If the will consists of more than one page, each page needs to be signed by the testator (or, if applicable, the amanuensis) - anywhere on the page.⁸⁵

If the testator signs the will by making a mark or where an amanuensis signs the will, a commissioner of oaths must certify that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator. The commissioner of oaths must also sign each page of the will, excluding the page on which his certificate appears.⁸⁶ Although it is not a formal requirement that the will should be dated on the last page, it is important to avoid confusion as to which is the most recent one, if more than one will was executed. In terms of the *Wills Amendment Act*,⁸⁷ it is no longer necessary for both the deletion and substitution of provisions of a section of the will to be attested separately by the signatures of the testator and the witnesses. The deletion and substitution of a provision in a will need only be attested once with the required signatures.

The requirement that the testator must sign at the end of the will raises issues regarding where the "end" is.⁸⁸ It has been held that the will ends at the end of the last paragraph of the writing.⁸⁹ Therefore, the testator must sign as close as possible to the last words of the said will to avoid the will's invalidation. The purpose is to avoid the fraudulent

⁸² Section 2(1)(a)(i) of the *Wills Act*.

⁸³ Section 2(1)(a)(ii) of the *Wills Act*.

⁸⁴ Section 2(1)(a)(iii) of the *Wills Act*.

⁸⁵ Section 2(1)(a)(iv) of the *Wills Act*.

⁸⁶ Section 2(1)(a)(v) of the *Wills Act*.

⁸⁷ 43 of 1992.

⁸⁸ Pace and Van der Westhuizen *Wills and Trust* 16-(10).

⁸⁹ Jamneck *et al The Law of Succession in South Africa* 92.

insertion of words after the testator's signature.⁹⁰ In the matter of *Kidwell v The Master*,⁹¹ the testator signed the second page of his two-page will some 13 centimetres below the signature of the second witness and some 17 centimetres below the attestation clause. He had signed the first page some nine centimetres 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.⁹² The court held that the will was invalid. Since 1992, and with reference to section 2(3) of the *Wills Act*,⁹³ the High Court has the power to order the Master of the High Court to accept a formally invalid will irrespective of the non-compliance of the formalities.⁹⁴

As mentioned in point (iv) above, if a will consists of more than one page, the testator should sign on each page. The signature of the testator can be anywhere on each page of the will except for the page where the will ends, the signature of the testator needs to be at the end of the page.⁹⁵

In *Oosthuizen v Sharp*⁹⁶ the validity of a mutual will was questioned under circumstances where an amanuensis was used. The signature of the testatrix (Mrs Oosthuizen) was made by the testatrix's sister (Mrs Sharp) in her presence and by her direction and in the presence of two witnesses. The two witnesses were husband and wife (Mr and Mrs Naude). The testatrix's sister later that day struck out the name of one of the witnesses and obtained the signature of another as the second witness. The will's validity was questioned on the following facts; firstly, it was not the signature of the testatrix (the deceased), and secondly, the signature of the second witness was not made in the presence of the other witness but some time afterwards.⁹⁷ The next question was whether the signature of Mrs Sharp (made at the direction of the testatrix) complied with the law.

⁹⁰ Jamneck *et al The Law of Succession in South Africa* 92.

⁹¹ Pace and Van der Westhuizen *Wills and Trust* 16-(10).

⁹² Banda *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* 8.

⁹³ Section 2(3) was added in 1992 to the *Wills Act* after the *Kidwell* case was decided.

⁹⁴ Section 2(3) of the *Wills Act*.

⁹⁵ Jamneck *et al The Law of Succession in South Africa* 92.

⁹⁶ *Oosthuizen v Sharp* 1934 WLD 22.

⁹⁷ *Oosthuizen v Sharp* 1934 WLD 23.

The reasons why Mrs Sharp had signed on behalf of and by the direction of the testatrix were questioned. The judge ruled that the will was valid because the "will was signed by Mrs Sharp for Mrs Oosthuizen at her direction and in her presence and in the presence of two competent witnesses who signed in each other's presence".⁹⁸ In the matter of *Logue v The Master*,⁹⁹ a document left by the deceased did not meet the requirements in terms of section 2(1). It was then left to the court to condone the document as a valid will. The will was executed by the deceased in 1986, which was compliant in terms of section 2(1) of the *Wills Act*. However, when the deceased died, a document was found that was handwritten by the deceased and signed and dated. The court had to decide on the validity of this document. The court accepted this document and said it was satisfied that the document was drafted by the deceased and ordered the Master to accept it.¹⁰⁰

3.3 Case law on the rationale for the inclusion of strict formalities for the execution and amendment of wills

When it comes to the falsification of a will, the purpose of formalities for the execution and amendment of wills is fundamental. The legislative formalities outlined in the preceding paragraphs are prescribed for the execution and amendment of a valid will. Non-compliance with the formalities can invalidate a will even if there are no acts of fraud or forgery. In recent years there has been an increase in litigation regarding the execution of wills with regard to fraud and forgery.¹⁰¹ The courts have reiterated the importance of formalities with regard to the execution and amendment of a will.

The foundation of an executed will are the formalities as they serve as a protective measure to ensure the authenticity of the document purporting to contain the last wishes of the testator.¹⁰² The rationale for the strict formalities for the execution and amendment

⁹⁸ *Oosthuizen v Sharp* 1934 WLD 24.

⁹⁹ *Logue v The Master* 1995 1 SA 199 (N).

¹⁰⁰ *Logue v The Master* 1995 1 SA 199 (N).

¹⁰¹ Schoeman-Malan 2007 *PER* 126.

¹⁰² Schoeman-Malan 2007 *PER* 127.

of wills can best be explained with reference to relevant case law, namely *Thompson v The Master and Others*¹⁰³ and *Froud NO v Lewitt and Others*.¹⁰⁴

3.3.1 *Thompson v The Master and Others*

The applicant in the *Thompson* case sought the following relief, namely that: (a) a will dated 31 August 2007 of the deceased be declared invalid and be revoked; (b) that the appointment of the executor of the disputed will (the second respondent) be set aside and removed as executor of the estate of the deceased; and (c) that the second respondent return the letters of executorship issued by the Master and not be entitled to receive any fees for his services for the period he acted as the executor. The relief sought was that the "Codicil to Will" dated 28 September 2008 be accepted as the last will of the deceased and be accepted for purposes of the *Administration of the Estates Act* 66 of 1965.¹⁰⁵ Judge Yekiso heard oral evidence regarding the circumstances surrounding the signature and/or execution of the disputed will.¹⁰⁶ The materiality of this evidence was solely on the circumstances surrounding the will executed by way of a mark. Prior to the hearing of evidence, the parties came to a settlement agreement, and the judge was accordingly required to only determine whether the document titled "Codicil to Will" was drafted by the deceased, whether the deceased intended the codicil to be her last will in terms of section 2(3) of the *Wills Act*, and most importantly, whether the courts can condone non-compliance with the formalities set out in section 2(1)(a)(v) of the *Wills Act* in respect of the "Codicil to the Will".¹⁰⁷

In terms of the evidence led it was shown that the deceased was of ill health at the time the codicil was drafted and had to be assisted in having her finger placed on the document to make a mark (thumbprint) as she was unable to sign.¹⁰⁸ Section 2(1)(a)(v) of the *Wills Act* requires that "a will signed by the testator by the making of a mark should be signed before a commissioner of oaths; that the commissioner of oaths should satisfy himself as

¹⁰³ *Thompson v Master* (13779A/2012) [2015] ZAWCHC (hereafter the Thompson case).

¹⁰⁴ *Froud NO v Lewitt and Others* (18987/2005) [2009] ZAGPPHC 272 (hereafter the Froud case).

¹⁰⁵ *Thompson* case para 1.1.

¹⁰⁶ *Thompson* case para 3.1.

¹⁰⁷ *Thompson* case para 5.

¹⁰⁸ *Thompson* case para 11.

to the identity of the deceased; and that the will so signed is the will of the deceased."¹⁰⁹ It is common cause that the codicil was not executed before a Commissioner of Oaths and, as such, does not comply with the statutory formality set out in section 2(1)(a)(v) of the *Wills Act*, in that, at the time the document was executed, the identity of the deceased was not confirmed by a Commissioner of Oaths nor did a Commissioner of Oaths satisfy himself that the document so signed was the will of the deceased.¹¹⁰

The codicil did not comply with the formalities in terms of section 2(1)(a)(v). The court, however, has the power to condone failure to comply with the formalities set out in section 2(1) of the *Wills Act*.¹¹¹ The court followed the strict approach adopted by the court in *Webster v the Master & Others*, and concluded that the codicil did not satisfy the requirements of section 2(3) of the *Wills Act*.¹¹² The court dismissed the application in terms of the relief sought for the codicil and declared that the estate should be devolved in terms of the intestate rules of succession.¹¹³ The rationale behind this is that the Court followed the strict and the literal approach in interpreting the provisions of section 2(3), holding that for the deceased to have drafted the document which the applicant seeks to have accepted as the deceased's will, the deceased personally ought to have drafted the document in question. It held that such an interpretation does not result in an absurdity, since section 2(3) of the *Wills Act* contemplates that the deceased should personally have drafted the document.

3.3.2 Froud case

In the *Froud* case the plaintiff claimed that the will was invalid in terms of the requirements of section 2(1)(a)(ii) and (iii) of the *Wills Act*.¹¹⁴

It was found that whether the will was valid or not was based on lack of formalities was dependent on whether the signature was authentic or not. The court held that if the authenticity is not proved, it follows that the formalities which were not met in terms of

¹⁰⁹ *Thompson* case para 13.

¹¹⁰ *Thompson* case para 13.

¹¹¹ *Thompson* case para 14.

¹¹² *Thompson* case para 20.

¹¹³ *Thompson* case para 24.

¹¹⁴ *Froud* case para 1.

section 2(1)(a)(ii) and (iii) cannot be condoned. The first defendant admitted that the will was not signed in the presence of the two witnesses, and therefore, the formalities for the execution of wills were not complied with. Further, the first defendant conceded that the attestation statement appearing above the signatures of the testator and the testatrix was not a true reflection of what had happened. The statement reads as follows: "Attestation and witness: Signed by the testator in the presence of both of us being present at the same time and attested by us, in the presence of her and each other."¹¹⁵ The rationale from the court was that the invalidity of the will due to a lack of formalities is dependent on the authenticity of the signature. If the authenticity is not proven, it follows that the formalities which were not met in terms of section 2(1)(a)(ii) and (iii) cannot be condoned.

3.4 Conclusion

The chapter has explored the necessary formalities in the execution and amendment of wills. The existence of formalities for the execution and amendment of a will is to curtail opportunities for fraud and to ensure that the will reflects the voluntary disposition of the testator. The acts of execution and amendment relate to the validity of a will. The will must be signed at the end thereof by the testator himself or herself or an amanuensis – someone who signs the will on behalf of the testator. If the will comprises more than one page, every page other than the last must be signed anywhere on the page by the testator or the amanuensis. The last page of the will must always be signed at the end thereof by the testator or amanuensis. The signature of the testator or the amanuensis must be made (or acknowledged) in the presence of two or more competent witnesses. Such witnesses must attest and sign the will in the presence of the testator and each other, and of the amanuensis. Where the testator signs with a mark, or an amanuensis signs for the testator, a commissioner of oaths must be present and certification formalities apply. A will is only validly executed when these requirements are met.

¹¹⁵ *Froud* case para 20.

4 Formalities of revocation in the State of New York

4.1 Introduction

In New York State, the revocation of wills is regulated by the common law and the provisions of the *New York Wills Act* (hereinafter NY Wills Act). This chapter explores the merits set by the New York State regarding the codification of revocation formalities. In this discussion, background reference is given to the general formalities for the execution of wills in New York state.¹¹⁶ Further reference is given to written revocation, physical revocation and accidental revocation.¹¹⁷ The formalities involved in these forms of revocation will be illustrated. Reference is also made to the jurisdiction's best practices and gaps with regard to the formalities involved in the revocation of wills.¹¹⁸ The general formalities of wills include that the will must be written and signed by the "testator" at the end. The testator must sign the will in the presence of at least two witnesses who will not benefit from the will. The testator must inform the witnesses that the testator is signing the will at the time it is signed. At the close of the will, the witnesses are to confirm the testator's signature and sign their names and write their addresses. The objectives of this chapter are:

- (a) to explore the merits set by the New York State regarding formalities when revoking a will.
- (b) to determine the New York State's best practices and gaps with regard to the formalities involved in the revocation of wills

4.2 Formalities for the execution of wills in New York State

To put this discussion into its proper context, it is prudent to give a brief exposition of the execution of wills in New York State.

¹¹⁶ See para 4.2 of this study.

¹¹⁷ See para 4.2 of this study.

¹¹⁸ See para 4.3 of this study.

In terms of the laws of New York, a will can only be executed when it complies with sections 3-2.1 of the *New York Estate, Powers, and Trusts Laws* (EPTL). A properly executed will has to comply with the following elements, namely:

(i) The testator's signature

This signature must be included where the will ends, above the witness attestation clause.¹¹⁹

(ii) Presence of witnesses

The testator must sign the final will in the presence of two witnesses, or alternatively, the testator's signature has to be acknowledged *ex post facto* by each witness as the testator's own signature.¹²⁰

(iii) Declaration by the testator

The testator has to let the witnesses know that the document being witnessed is actually the testator's will.¹²¹

(iv) Two witnesses

A will must be witnessed by two witnesses, and the testator has to ask each witness to sign.¹²² Again, the witnesses have to sign the will not more than 30 days after the other.¹²³

In terms of the laws of New York, an attorney is supposed to supervise the execution of a will, and this automatically becomes an assumption that the will has been executed in compliance with all the applicable formalities.¹²⁴

In addition to the above formalities, the one claiming to benefit from the will bears the onus of proving that the testator had the required mental capacity to execute a valid

¹¹⁹ See para 2.3 of this study.

¹²⁰ See para 2.3 of this study.

¹²¹ See para 2.3 of this study.

¹²² Gordon 1922 *VLR* 99.

¹²³ Gordon 1922 *VLR* 99.

¹²⁴ Gordon 1922 *VLR* 99.

will.¹²⁵ This is quite important because in South African law it is the other way around, namely it is presumed that the testator (at the time of the execution of the will) had the necessary mental capacity to execute such unless proven otherwise. One can apply to court and prove (on a balance of probabilities) that the testator did not have the capacity to execute a will. Here, it seems that the one presenting the will after the death of the testator has the onus of proving that the testator had the required mental capacity to execute the will. So, if one presents the will, he must prove that the testator had the capacity to execute the will. This is with reference to the probate system.

4.3 Formalities of the revocation of wills

4.3.1 Assumptions

There are two common law presumptions with regard to the revocation of wills in New York Law. A presumption is that the court accepts the facts as true unless proven otherwise. The first presumption is that if the will that was last seen in the possession of the deceased prior to death is not found at his death, then it is assumed that the testator revoked the will with intent.¹²⁶ The second presumption applies when the will was last seen in the possession of the testator, but on the death of the testator, it is found in a damaged condition. The presumption here is that the testator revoked the will by a physical act of intent.¹²⁷

4.3.2 Court approval

Further, in terms of court procedures in the United States, a Judge may approve a self-proved will, codicil or revocation if it is uncontested with or without the testimony of the attesting witness.¹²⁸ These procedures refer to the probate system. The probate system has been defined as "...the formal legal process that gives recognition to a will and

¹²⁵ Gordon 1922 *VLR* 99.

¹²⁶ Gordon 1922 *VLR* 99.

¹²⁷ ULIS LAW PC 2019 <https://ulislaw.com/2019/02/10/how-to-properly-revoke-a-will-in-new-york>.

¹²⁸ Gordon 1922 *VLR* 99.

appoints the executor or personal representative who will administer the estate and distribute assets to the intended beneficiaries."¹²⁹

The revocation formalities are to be found in section 34 of the *Decedent Estate Law*. This law can be construed as typical of the laws of the different States.¹³⁰ The particular section reads as follows:

No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator; and the fact of such injury or destruction, shall be proved by at least two witnesses.¹³¹

It is prudent to note that this law regulates all the methods of revocation to be mentioned in this discussion. The methods are grouped as written revocation, physical revocation and accidental revocation. The testator must write admitting that he wish to revoke the will. The testator must follow the required formalities in New York law. The writing has to be done by the testator in person and submitted to the court. The will has to be revoked when the testator is of sound mind and ensure that they make a valid reason.

4.3.3 Written revocation

4.3.3.1 Revocation by writing a new will

There are numerous ways to revoke an old will and doing so is always a good idea if one has drafted a new one. The simplest and most common way to revoke a will is to draft a new one with a clear and specific clause that revokes all previous wills and codicils. The revocation will be successful since the new will is later than the prior will(s).

¹²⁹ ABU Groups date unknown https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/glossary/#Will.

¹³⁰ Gordon 1922 *VLR* 99.

¹³¹ Section 34 of the Decedent Estate Law.

4.3.3.2 Revocation by writing across the face of the will

In one instance, the Surrogate's Court of Westchester County, New York, had to determine whether a will written across was indeed revoked. In the Matter of George W. Parsons, Parsons left a holographic will¹³² dated March 1st, 1873. The Court agreed that indeed the will had been executed with all the formalities as per the dictates of the law. Across the face of the will were the words "Will revoked, Geo. W. Parsons" and the signature attached. The Court was of the opinion that the will had not been revoked and entered a decree admitting the will to be valid.¹³³ The Court held that the words of revocation were not to be construed as an independent instrument of revocation.¹³⁴ This is because "they were not executed with the same formalities with which the will itself was required by law to be executed."¹³⁵ It was further held that "the writing of these words across the face of the will was neither a cancellation nor an obliteration such as would revoke the instrument."¹³⁶ On appeal, the Appeal Court came to a conclusion diametrically opposite to that which had been expressed by the court *a quo*. The Appeal Court was of the opinion that the words written across the face of the will constituted a cancellation or an obliteration within the meaning of Section 34 of the *Decedent Estate Law of New York* and therefore that the will had been revoked.

It has been submitted that "the revocatory method of 'cancellation' has also proven to be problematic."¹³⁷ This is because revocation by cancellation can take two forms: through drawing lines across the face of the will without any words or by inserting the words "void". On one extreme end, words of cancellation might be an attempt to revoke the will by defacing it. If this is to be considered, writing something like "I revoke" should actually revoke the will, just the same as burning it, tearing it, or drawing a large "X" would.¹³⁸

¹³² Various States (including New York) recognise holographic wills, of which do not need witnesses but must be in the testator's handwriting and signed by him or her.

¹³³ Zacharius 1947 *KLR* 200 37-38.

¹³⁴ Gordon 1922 *VLR* 99.

¹³⁵ Horton 1929 *VLR* 592.

¹³⁶ Gordon 1922 *VLR* 100.

¹³⁷ Horton 1929 *VLR* 592.

¹³⁸ Horton 1929 *VLR* 592.

The jurisdiction of New York distinguishes between these options by questioning whether the words of cancellation are in sync with the general language of the will.¹³⁹ Horton further submits that if ever the writing is in sync with the will's text, courts will construe it as a revocation by the act of cancellation. As the New York Supreme Court explained in 1902, "if any material part of the will is obliterated or marked, or words indicating an intention to revoke written across the same, ...the instrument will be said to have been revoked."¹⁴⁰ In the alternative, where the words of cancellation occupy a blank part of the will, the court treats this as an attempt to revoke by anti-will.¹⁴¹ In turn, this move is usually deadly to the testator's intent. This is because words of cancellation are usually not signed by witnesses.¹⁴²

4.3.4 Physical revocation

In terms of physical revocation, the paramount formality is the question "What was the intent of the testator".¹⁴³ The intent of the testator must manifest itself on the face of the will itself. Again, the intent must be shown by one capable at that time of performing a legal act or as the cases say, "An act by one having capacity to make a will." For instance, the act of an insane man cannot revoke a will. The above was given in the case of *In re Goldsticker*.¹⁴⁴ A person suffering from *delirium tremens*, or one who is drunk, may also not execute a valid will. It has to be noted that for these methods of revocation, no express formalities are required. It also has to be noted that this form of revocation is regulated by the common law. The following part of this discussion is on physical destruction.

4.3.4.1 Tearing up the document

Tearing the paper on which the will is written, with intention of revoking the will, can be construed as a revocation.¹⁴⁵ In the case of *Burton vs Wylie*,¹⁴⁶ the court held that tearing

¹³⁹ Horton 1929 VLR 593.

¹⁴⁰ *Howard v Hunter*, 41 S.E. 638, 638 (Ga. 1902).

¹⁴¹ *Dowling v Gilliland*, 122 N.E. 70, 72 (Ill. 1919).

¹⁴² *Dowling v Gilliland*, 122 N.E. 70, 72 (Ill. 1919).

¹⁴³ Warner 1929 VLR 9.

¹⁴⁴ *In re Goldsticker* 192 N. Y. 35; 18 L. R. A. N. S. 99; 84 N. E. 581.

¹⁴⁵ Horton 1929 VLR 592

¹⁴⁶ Horton 1929 VLR 592

includes cutting.¹⁴⁷ The degree of tearing or the portion of the will that is torn is non-material in proving revocation.¹⁴⁸ A small tearing, if done with the intention of revoking the will, is enough. The most frequently used method is tearing off the signature of the testator or by tearing off the attestation clause.¹⁴⁹

4.3.4.2 Burning the document

Where intent has been construed, the act of burning must go so far that a portion of the paper upon which the will is written is burned.¹⁵⁰ The burning must be clearly visible.¹⁵¹ According to the case of *White vs Casten*,¹⁵² it is unnecessary that any part of the writing is burned or rendered unreadable. In the case where the envelope in which the will is contained is burned but the will itself remains untouched, this is not burning the will in compliance with the statute.¹⁵³ The above conclusion was reached in the case of *In re Silva's Estate*.¹⁵⁴

4.3.5 Accidental revocation

Accidental revocation takes place when, at the time of the testator's death, the will cannot be located.¹⁵⁵ In terms of the Surrogate's Court Procedure Act, section 1407, a misplaced or lost will means that the testator's assets will be distributed in terms of intestacy laws, despite the fact that a will had been executed.

However, in terms of South African law, accidental destruction or loss does not revoke it. That is the will is absent because the intention to revoke is absent. Despite the loss or the will's physical destruction, effect can be accorded to the provisions of the destroyed will. This is done by evidence being led that would point to the contents of the will. Such

¹⁴⁷ *Burton vs Wylie*, 261 Ill. 397; 103 N. E. 976.

¹⁴⁸ Horton 1929 *VLR* 592.

¹⁴⁹ *White v Will*, 25 N. J. Eq. 501).

¹⁵⁰ Horton 1989 *VLR* 592.

¹⁵¹ Horton 1989 *VLR* 592.

¹⁵² *White v Casten* 46 N. C. 197; 59 Am. Dec. 585.

¹⁵³ Horton 1989 *VLR* 592.

¹⁵⁴ *In re Silva's Estate* 169 Cal. 116; 145 Pac. 1015.

¹⁵⁵ Horton 1989 *VLR* 592.

evidence can be given by the persons who might have read the will or from the attorney who might have prepared the will.¹⁵⁶

4.4 New York State's best practices on the revocation of wills

4.4.1 The advantages of the copy rule

The copy rule refers to the allowance of a copy of the will to be admitted to probate on the testimony of the attorney that drafted the will, a secretary who typed the will, or a trust officer nominated as a fiduciary in the will who can identify a copy or draft of the will and recall its provisions.¹⁵⁷ It has been argued that the copy rule complements the functions of formalities.¹⁵⁸ Firstly, the copy rules play an evidentiary role. Reproduction of wills has been considered pervasive.¹⁵⁹ A New York probate judge submitted that, indeed, "a testator may make several photocopies of his or her will, perhaps to send to relatives or other beneficiaries, or to retain for the purpose of drafting possible changes."¹⁶⁰ The judge in this case treated copies of a will as potentially revocable and would sow confusion about the testator's true intention. The Court further submitted that:

In cases where the executed original, but not all the photocopies, can be found after decedent's death, it might be contended that one or more of the photocopies had been destroyed by decedent with the intention to revoke the will. Of course, in all these cases, the party whose testamentary intentions are at stake and whose acts are in question is the maker of the will whose lips have been sealed for eternity.¹⁶¹

Secondly, the copy rule is consistent with the ritual function.¹⁶² The cautionary or ritual purpose of writing is intended to impress upon individuals the significance of the act of writing a will. This document, in other words, defines who obtains what assets from an estate. Thirdly, the copy rule is justified on protective grounds.¹⁶³ Because people usually keep the original will in a safe place, it is easier for someone else to obtain a copy and

¹⁵⁶ Zacharius 1947 *KLR* 2005 37.

¹⁵⁷ Antonelli date unknown <https://www.antonelli-legal.com/faqs/faq-can-a-copy-of-a-will-be-admitted-to-probate-nyc-probate-attorneys.cfm#:~:text=In%20order%20to%20probate%20a,for%20an%20existing%20will%3B%20and>.

¹⁵⁸ Horton *VLR* 2022 596.

¹⁵⁹ Zacharius 2005 *KLR* 32.

¹⁶⁰ *Lauermann v Superior Ct.*, 26 Cal. Rptr. 3d 258, 261–62 (Cal. Ct. App. 2005).

¹⁶¹ *In re Estate of Charitou*, 595 N.Y.S.2d 308, 311 (Sur. Ct. 1993).

¹⁶² Zacharius 2005 *KLR* 37.

¹⁶³ Zacharius 2005 *KLR* 37.

by making these stray documents irrelevant, the copy rule limits the possibilities of fraud.¹⁶⁴ Lastly, the copy rule has a "channelling dimension."¹⁶⁵ Horton¹⁶⁶ is of the opinion that the copy rule "conserves judicial resources by making revocation cases pivot on the clear-cut issue of the physical appearance of a single document."

4.4.2 The requirement of "presence" as a good practice

The requirement of "presence" has been one of the most divisive concepts of the Wills Act.¹⁶⁷ In New York State, the testator must sign or acknowledge the will before two witnesses who are present at once.¹⁶⁸ New York courts have argued that there must be the presence of witnesses when revoking the will. It has been argued that this requirement is important because it plays the same evidentiary role as the presence formality of the Wills Act.¹⁶⁹ It has been further submitted that presence deters unintentional or counterfeit revocations.¹⁷⁰ In the case of *In re Mitchell's Estate*,¹⁷¹ it was decided that "all the authorities declare that the object of the law is to prevent fraud and imposition upon the testator or the substitution of a surreptitious will" ¹⁷² However, a distinction should be drawn between the presence of witnesses and the presence of the testator. The law in New York is clear as it posits that revocation can only take place in the presence of the testator and at his direction.¹⁷³ Again, in *Estate of Haugk*, the New York Supreme Court refused to recognise a revocation done outside of the testator's presence.¹⁷⁴ The facts of the matter are that Marie Haugk, married to Horst Haugk,¹⁷⁵ hired an attorney to update her will. Along the way, before signing the new will, she asked Horst to burn her old will.¹⁷⁶ The court was of the opinion that the revocation was

¹⁶⁴ *Goodwin v Goodwin (In re Estate of Goodwin)*, 18 P.3d 373, 376 n.3 (Okla. Civ. App. 2000).

¹⁶⁵ Horton 2022 *VLR* 597.

¹⁶⁶ Horton 2022 *VLR* 597.

¹⁶⁷ Horton 2022 *VLR* 597.

¹⁶⁸ Zacharius 2005 *KLR* 22.

¹⁶⁹ Zacharius 2005 *KLR* 37.

¹⁷⁰ Zacharius 2005 *KLR* 23.

¹⁷¹ *In re Mitchell's Estate* 27 N.E.2d 609.

¹⁷² *In re Mitchell's Estate* 27 N.E.2d 609.

¹⁷³ Scalise "Testamentary Formalities in the United States of America" 357–380.

¹⁷⁴ Lutheran Child's Friend Soc'y. Haugk (*In re Estate of Haugk*), 280 N.W.2d 684, 690–91 (Wis. 1979).

¹⁷⁵ Zacharius 2005 *KLR* 37.

¹⁷⁶ Zacharius 2005 *KLR* 38.

not valid since Marie as the testator had not been present when the original will was destroyed.

4.4.3 The advantages of the equal dignity principle

New York State's equal dignity principle makes legal sense. The equal dignity principle provides that if a testator observes the formalities to execute a will, then he needs to do the same to revoke a will. This principle ensures that a revocation meets all the dictates of the Wills Act. The principle preserves the testator's intent in writing and creates witnesses who can testify about the will should a dispute arise.¹⁷⁷ Even with holographic wills, insisting that the revocation of the will has to be in the decedent's handwriting gives valuable proof of authenticity.¹⁷⁸

4.5 Conclusion

As a recap, this chapter's objectives were two-fold:

(a) to explore the merits set by the New York State regarding formalities when revoking a will.

(b) to determine the New York State's best practices and gaps with regard to the formalities involved in the revocation of wills.

An interesting aspect of a revocation is that the Estate Powers and Trusts Law Section¹⁷⁹ provides that when a will is revoked, all codicils to the will are also deemed revoked. It is important to bear this in mind since a testator may incorrectly assume a codicil remains in effect. Another important aspect of revocation involves a lost will.¹⁸⁰ Very often, after death, the deceased's original will cannot be found and the only document available is a copy. Probating a lost will can be quite difficult. There is a rebuttable presumption that a testator revoked his will if the will was in the custody of the testator, and it could not be located at his death. Section 1407 of the Surrogate's Court Procedure Act entitled

¹⁷⁷ *In re McGill's Will* 128 N.E. 194, 196 (N.Y. 1920).

¹⁷⁸ Zacharius 2005 *KLR* 50.

¹⁷⁹ Zacharius 2005 *KLR* 50.

¹⁸⁰ Estate Powers and Trusts Law Section 3.1.4.

“Proof of a lost or destroyed will” describes the requirements to probate a lost or destroyed will. It should be noted that a will can be revoked in other instances, as well. For example, EPTL 5-1.4 provides that a divorce revokes dispositions and fiduciary appointments to a former spouse made by a will.

In New York state, revocation of wills is regulated by the common law and the provisions of the Wills Act. This chapter explored New York state's formalities when revoking a will. In this discussion, reference was given to the general formalities for the execution of wills in New York state. Further reference was given to written revocation, physical revocation and accidental revocation. The formalities involved in these forms of revocation have been illustrated. A critique of these formalities was provided by looking at both the state's good practices and gaps in the regulation of the formalities for the revocation of wills. The following chapter provides recommendations on the necessity of a statutory approach to the formulation of revocation formalities that depart from the common law principles currently in use.

5 Recommendations on the statutory inclusion of revocation formalities

5.1 Introduction

It has been submitted that formalities for revocation to protect the parties against any fraud, deception, hoax that may result from someone unlawfully benefiting from the will. Revocation formalities are there to serve as a guide to the parties against any unforeseen circumstances that may lead to litigation. It is important to provide some recommendations with regard to these formalities. The overall objective of this chapter is accordingly to provide some guidelines that the South African legislature may adopt to introduce statutory revocation formalities. The author first considers whether the statutory formalities required to execute and amend wills should also be extended to those for revocation. Thereafter, the author considers the revocation formalities as codified in section 34 of the New York State *Decedent Estate Law* in recommending statutory revocation formalities for the South African context.

5.2 Recommendations based on the formalities for the execution and amendment of a will

It has been submitted that formalities for revocation protect the parties against any fraud, deception, hoax that may result from someone unlawfully benefiting from the will. Revocation formalities are there to serve as a guide to the parties against any unforeseen circumstances that may lead to litigation. It is prudent to remember that a will is ambulatory by nature.¹⁸¹ This means that a competent testator may revoke or amend his will at any time before his demise.¹⁸² Revocation occurs when the testator takes some action to show that he no longer wants the will's provisions to be binding. This act of revocation must accordingly be accompanied by the testator's intention to revoke (*animus revocandi*).¹⁸³ A testator who wishes to revoke a will may make use of a codicil. This is a document that revokes or amends part or all of an executed will. Revocation takes place

¹⁸¹ Corbett *et al The Law of Succession in South Africa* 58.

¹⁸² Jamneck *et al The Law of Succession in South Africa* 111.

¹⁸³ Jamneck *et al The Law of Succession in South Africa* 111.

when the will is destroyed. Destruction of the will document may take the form of burning, tearing, shredding, or cancellation.¹⁸⁴

5.2.1 Execution of wills

As previously mentioned, South Africa has certain formalities that are to be observed when executing a valid will. These formality requirements relate to the writing, signing, witnessing, or attestation of the will and also testamentary capacity, *animus testandi*, and volition. These legislative safeguards contained in the *Wills Act* are meant to prevent fraud or coercion of the testator.¹⁸⁵ Section 1 of the *Wills Act* provides that "will" includes a codicil and any other testamentary writing. This simply means that a will should be reduced to paper. Oral wills are not applicable. If a will is on paper, then it is easy to revoke it by adopting the various methods of revocation. Because wills have to be written on paper, then oral revocations are equally not applicable.

5.2.1.1 The signature formality

(a) As required for the execution of a will

In terms of section 2(1)(a)(i) of the *Wills Act*, the will must be signed by the testator. Any mark, for example, an *X* or any other name intended by the testator to be his signature to authenticate the will, is a valid signing. The *Wills Act* makes provision for an amanuensis to sign the will on behalf of the testator as per the testator's instructions.

(b) Recommendations for the revocation of a will

The signature formality can be easily followed when the testator decides to revoke the will. Where the testator himself signs the will, he still can sign to the same effect when revoking the will. In the event of an amanuensis signing on behalf of the testator, the amanuensis may simply be called to sign on behalf of the testator. This formality would prove that indeed the testator had the true intention of revoking his will.¹⁸⁶ There should

¹⁸⁴ Jamneck *et al* *The Law of Succession in South Africa* 112.

¹⁸⁵ Corbett, Hofmeyr and Kahn *The Law of Succession in South Africa* 66.

¹⁸⁶ Wood-Bodley 1998 *SALJ* 202.

be a clause added stating that the will has been revoked by "cancelling" it and then it would make more sense to sign at the writing of the word as with an amendment.

The "end" requirement has already been dealt with by our courts. This requirement raises issues regarding where the "end" is.¹⁸⁷ It has been held that the will ends at the end of the last paragraph of the writing.¹⁸⁸ Therefore, the testator must sign as close as possible to the last words of the said will to avoid any doubt in acknowledgement of the revocation. The purpose is to avoid the fraudulent insertion of words after the testator's signature.¹⁸⁹ If this formality is not carried out, then the entire will may be invalidated. The testator should sign the will before the witnesses sign and the witnesses are to attach their signatures also. Where the testator decides to revoke the will by writing "cancelled" across the face of the will.

5.2.1.2 *The witness formality*

(a) As required for the execution of a will

As previously mentioned section 2(1)(a)(ii)-(iii) of the *Wills Act* requires that the testator's signature (or amanuensis) is to be made in the presence of at least two competent witnesses, which witnesses must also sign the will in the presence of the testator (and the amanuensis if applicable) and each other.

(b) Recommendations for the revocation of a will

Where the testator writes "cancelled" across the face of the will, the witnesses should equally attach their signatures as if the testator was executing a will.

It is also prudent to note that the testator can have a third party revoke the will by destruction if it is done at the testator's direction and in his presence.¹⁹⁰ It is recommended that where the testator directs another person to revoke the will, the witness formality should also be met.¹⁹¹ Where revocation is done by shredding or burning of the will, two or more witnesses should be available. They should then sign an affidavit, confirming that they witnessed the destruction of the will and that the testator was not

¹⁸⁷ Pace and Van der Westhuizen *Wills and Trust* 16-(10).

¹⁸⁸ Jamneck *et al The Law of Succession in South Africa* 92.

¹⁸⁹ Jamneck *et al The Law of Succession in South Africa* 92.

¹⁹⁰ Wood-Bodley 1998 *SALJ* 202.

¹⁹¹ Wood-Bodley 1998 *SALJ* 202.

coerced into doing so. The affidavit can be admissible evidence if ever the revocation is challenged. The point is made that his act needs to clearly indicate that the formalities apply in both cases, regardless of the intention as previously decided.

Before one revoke their will, it is imperative to first decide if it is going to be a partial or total revocation. Where one decides to cut off or remove some of the clauses of the will, this should be construed as partial revocation. Complete revocation takes place where the testator invalidates (in totality) an existing will and any codicils which may have been attached.

When the will is being revoked, the testator must be present when the witnesses signs the will. In the event of the will being signed by an amanuensis, it should be mandatory for the witnesses to sign in the presence of the amanuensis and the testator.

5.2.1.3 The signing of each page formality

(a) As required for the execution of a will

In terms of section 2(1)(a)(iv) of the *Wills Act*, where the will consists of more than one page, the testator (or the amanuensis) and the witnesses must sign each page as recommended in practice.

(b) Recommendation for revocation

This formality should also be followed strictly in the event of a revocation.

5.2.1.4 The marking formality

(a) As required for the execution of a will

In terms of section 2(1)(a)(vi) of the *Wills Act*, where the will is signed by the testator by marking it or by some other person in the presence and by direction of the testator, it is required that a Commissioner of Oaths certify at the end of the will. It should be certified that the testator is known to the Commissioner of Oaths and that the person is satisfied that the signed will is in fact the will of the testator. Where the will consists of more than one page, each page is to be signed accordingly by whoever is certifying.

5.3 New York State

5.3.1 Adoption of the approach adopted in Parsons v Parsons

This question on the formalities for revocation of wills in the New York State was settled in the case of *Parsons v Parsons*, as referred to in chapter 4.¹⁹² The court in this case was of the opinion that certain formalities must be followed in order to reduce the possibility of fraud or invalidity. These steps are intended to ensure the capacity, intent, and authenticity of the purported will. A will can be revoked physically or through a subsequent will, but the latter is a much better strategy and the only one that can be used to revoke an element or provision within a will. It is highly recommended that South Africa adopt this approach.

5.3.2 South Africa must follow the formulation of section 34 of the Decedent Estate Law

As previously mentioned, the New York laws on the subject of the revocation of wills is to be found in section 34 of the Decedent Estate Law. The section provides that:

No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator; and the fact of such injury or destruction, shall be proved by at least two witnesses.¹⁹³

Section 34 gives reference to what is known as the equal dignity principle. This principle provides that if a testator observes the formalities to execute a will, then he needs to do the same to revoke a will. This principle ensures that revocation meets all the dictates of the Wills Act. The principle preserves the testator's intent in writing and creates witnesses who can testify about the will should a dispute arise.¹⁹⁴ Even with holographic wills, insisting that the revocation of the will has to be in the decedent's handwriting gives

¹⁹² *Parsons v Parsons* 9 N.H. 309.

¹⁹³ Section 34 of the Decedent Estate Law.

¹⁹⁴ *In re McGill's Will* 128 N.E. 194, 196 (N.Y. 1920).

valuable proof of authenticity.¹⁹⁵ It can thus be submitted that New York state's laws imposing the same formalities on execution and revocation give the law a tidy balance.

New York State has formalities for the revocation and execution of a will. They also include in their legislation, namely section 34, the means for the destruction of a will which we use the common law. It is written up in their legislation, which is not the case in South Africa. New York State has made specific provisions for formalities for the revocation of wills and these must be the same as the execution of wills. They also included in their legislation what we regard as our common law revocation.

It is, however, clear that although formalities for revocation are included in legislation, it is not without problems. South Africa can qualify and can include everything in its Wills Act, but this is not to say that it will clear out any uncertainties related to revocation of wills. It is clear that although the New York State has codified these revocation formalities there still are uncertainties. For example, in an extraordinary case, the Surrogate's Court of Westchester County, New York, had to determine whether a will written across was indeed revoked.

One must keep in mind that the law is still open for interpretation even if it is codified.

5.4 Conclusion

After making a case on the need for formalities for the revocation of wills, it was important to suggest some recommendations. The overall objective of this chapter was to provide some guidelines that South African lawmakers may adopt in order to introduce a statutory inclusion of formalities for revocation. The study recommends that the formalities required in the execution and amendment of wills should also be extended to those for revocation. The second set of recommendations comes from the New York State jurisdiction. It is recommended that South Africa must adopt section 34 of the Decedent Estate Law that has seen the codification of the formalities for revocation.

¹⁹⁵ Zacharius 1947 *KLR* 203.

6 Conclusion

The primary aim of the proposed study was to address the following research question, namely: with reference to the rationale for including strict formalities for the execution and amendment of wills in the *Wills Act*, namely, to prevent fraud, should the common law principles which currently regulate the revocation of wills in South Africa be formalised and codified in order to include formalities for the revocation of wills and, if so, what should these formalities be?

The common law "methods" or "acts" of revocation do not necessarily translate to "formalities" for revoking a will. The act of revocation in terms of common law by destruction of a will, for example, can in itself be a fraudulent act by someone other than a testator, and with the testator having no knowledge of such prior to his death. For example, one of the rebuttable presumptions is that, should it be known that the testator's will was in his possession, but after the testator's death such will cannot be found amongst his possessions (after a diligent search), then it is presumed that the testator destroyed the will with the intention to revoke it.¹⁹⁶ The onus then rests on the person that alleges the testator had a will and would need to prove that the testator had no intention to revoke his will. The standard of proof is based on a balance of probabilities and it may be difficult to meet the requisite proof.

From the discussion in chapter 2, it is clear that there is no definite interpretation of section 2A and that the various courts interpret it differently. In some cases the courts have applied a stricter approach and in others a more liberal approach. The courts have shown that the intention of the deceased to revoke his will is critical; the lack of intention by the deceased will not enable the courts to revoke a document purporting to be a will or the will itself.

In chapter 3, it was illustrated that the existence of formalities for the execution and amendment of a will is to curtail opportunities of fraud and to ensure the will reflects the voluntary disposition of the testator. The acts of execution and amendment relate to the validity of a will. The acts of execution are carried out by the witnesses, the testator and in some instances by the commissioner of oaths and these contribute to the formal validity

¹⁹⁶ Wood-Bodley 1998 *SALJ* 95.

of a will.¹⁹⁷ A will is validly executed if all the required formalities in section 2(1)(a) of the *Wills Act* have been satisfied. A will operates immediately after execution even though it is only effective at death, in order for revocation to be effective at any point during the lifetime of the testator. Chapter 3 clearly outlined the formalities for the execution and amendment of a will as prescribed in section 2(1)(a)-(b) of the *Wills Act*. This part of the discussion further illustrated the Master's and the court's rigid application of the said formalities with reference to case law. The rationale for the inclusion of strict formalities for the execution and amendments of wills in the *Wills Act* with reference to case law was discussed.

Chapter 4 explored the laws set by the New York State regarding formalities when revoking a will. Secondly, reference was also made to the New York State's best practices and gaps with regard to the formalities involved in the revocation of wills in terms of section 34 of the Decedent Estate Law. In New York State, revocation of wills is regulated by the common law and the provisions of the Decedent Estate Law Act. This chapter explored New York State's formalities when revoking a will. In this discussion, reference was given to the general formalities for the execution of wills in New York State. Further reference was given to written revocation, physical revocation and accidental revocation. The formalities involved in these forms of revocation were illustrated.

Chapter 5 provided some recommendations. It is recommended that the South African policy and lawmakers are urged to follow the formulation of section 34 of the Decedent Estate Law. New York State has formalities for revocation and execution of a will. They also include in their legislation the means for destruction of a will for which we use the common law. It is included in their legislation, unlike in South Africa. New York State has made specific provisions for revocation formalities for the revocation of wills and must be the same as the execution of wills. They also included in their legislation what South Africa regards as common law revocation. It is thus recommended that South Africa adopt the following as a possible formulation of a revocation clause for the *Wills Act*: "A will shall only be deemed to be revoked in writing, except in the cases hereinafter mentioned,¹⁹⁸ nor any part thereof, shall be revoked, or altered, other than by some other

¹⁹⁸ Listing (and accordingly codifying) the South African common law acts or methods of revocation.

will in writing, or some other writing of the testator, declaring such revocation or alteration, without the same formalities with which the will itself came into being."

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