The development of measures to facilitate the execution and amendment of wills during a pandemic where freedom of movement is restricted

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DEDICATION

I dedicate this dissertation to my parents, Antetess Mushure and John Mushure, for laying the foundation that molded my values, stoked my ambition, and set off my love of learning and knowledge. This Master's Degree is in their honour for not giving up on me. They believed in me even when l didn't believe in myself.

The information used and presented in this mini-dissertation was correct and up to date as of 16 November 2024, when the research was concluded. Any later political, social and/or legal developments have not been considered.

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ABSTRACT

The study examines the challenges in executing and amending wills during the COVID-19 pandemic to highlight the implications of the South African government's lack of legislative measures for will signing. The South African experience is compared to the United Kingdom and New Zealand's approaches to facilitating will signing during the pandemic.

The primary objective is to examine how the United Kingdom and New Zealand managed to implement interim measures, and to evaluate the advantages and disadvantages of the interim measures implemented. The focus is on testamentary formalities, specifically the importance of physical presence for the execution and amendment of a will in the three jurisdictions. This analysis is achieved by analysing case law. South Africa can take lessons from the measures implemented by the United Kingdom and New Zealand during the COVID-19 pandemic in anticipation of possible future pandemics where people's freedom of movement is restricted.

The study relied on a desktop-based research method. The method consults existing data, including primary sources such as the Wills Acts of South Africa, the United Kingdom and New Zealand, the *Epidemic Preparedness Order*, the *United Kingdom Order* and case law, as well as secondary sources like internet data, books, and journal articles related to the law of succession. The research extracts lessons and gives recommendations for the execution and amendment of wills during a time where freedom of movement is restricted.

KEYWORDS: COVID-19, execution of wills, amendment of wills, testamentary formalities, restricted freedom of movement, testate succession

LIST OF ABBREVIATIONS

EPA	Epidemic preparedness (Protection of Personal and Property Rights Act 1988—Enduring Powers of Attorney) Immediate Modification Order
NZ WILLS ACT	*New Zealand Wills Act* 36 of 2007
PERJ	Potchefstroom Electronic Journal
SA WILLS ACT	*South African Wills Act* 7 of 1953
SALJ	South African Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
UK ORDER	*The Wills Act* 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020
UK WILLS ACT	*United Kingdom Wills Act* 1837

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Chapter 1: Introduction

1.1 Background: Testamentary formalities in South Africa

According to Hofmeyr and Paleker,[1] a will is a legal document executed by a testator to determine the distribution of the testator's estate after his[2] death. Pace and Van der Westhuizen[3] confirm this definition, when they say that a will voluntarily sets out instructions on how a testator's assets will be distributed upon his demise. The *South African Wills Act* 7 of 1953 (hereafter the *SA Wills Act*) does not define a "will" as such in section 1, but rather indicates what is included in the reference to a will for the purposes of the *SA Wills Act*, namely a codicil and any other testamentary writing.

Testamentary formalities are prescribed for both the execution and amendment of a will, and they are governed by sections 2(1)(a) and 2(1)(b) of the *SA Wills Act* respectively.[4] A will that is not executed or amended as per the formalities prescribed by the *SA Wills Act,* is regarded as invalid. The cases of *Kidwell v The Master,*[5] *Twine v Naidoo,*[6] and *Harpur v Govindamall*[7] all deal with the invalidity of wills due to non-compliance with the formalities prescribed in section 2(1)(a). *Roux v Stemmet*[8] is one of the most recently decided cases dealing with the execution of a will that was meant to amend an original will. The new will, which was meant to amend the original will, was found invalid due to non-compliance with the formalities stipulated in section 2(1)(b). Failure to comply with the requirements of section 2(1)(b) renders the amendment ineffective.[9] One of the testamentary formalities for the execution and amendment of wills requires the signing to be done in the presence of the applicable role players, namely the testator, witnesses, and (if

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1 Hofmeyr and Paleker the Law of Succession in South Africa 55.
2 Any reference in this study to the male gender shall be deemed to include the female gender unless otherwise stipulated.
3 Pace and Van der Westhuizen *Wills and Trusts* 1.
4 Section 2(1)(a)(i) of the *SA Wills Act.*
5 *Kidwell v The Master* 1983 1 SA509 (E) at 513G.
6 *Twine v Naidoo* [2018] 1 All SA 297 (GJ) (16 October 2017).
7 *Harpur v Govindamall* 1993 4 SA751 (A).
8 *Roux v Stemmet* (17064/2022) [2023] ZAWCHC 222 (23 August 2023).
9 Section2(1)(b) of the *SA Wills Act.*

applicable) an amanuensis[10] and a Commissioner of Oaths.[11] Section 2(1)(a)(iii) focuses on physical presence for the execution of a will, and section 2(1)(b)(i) requires physical presence in situations of deletion, addition, alteration, or interlineation of the will.[12]

1.2 The challenges that emerged during the COVID-19 pandemic

The physical presence of the above-mentioned role players became challenged during the period of COVID-19 lockdown restrictions in South Africa.[13] The world changed dramatically with the outbreak of COVID-19. On 15 March 2020, the President of the Republic of South Africa declared a national state of disaster, and freedom of movement was accordingly restricted by a nation-wide lockdown.[14] The restrictions included social distancing measures.[15] These measures remained in place for more than a year due to the threat the virus posed to public health and safety.[16] The COVID-19 pandemic profoundly affected every facet of life, including the execution and amendment of wills.[17] Despite the precautions and movement restrictions imposed on individuals, many practitioners effectively leveraged technology to facilitate the exchange of instructions or to prepare and draft wills during the pandemic.[18] However, the pandemic presented various challenges in jurisdictions where the physical presence of parties to the execution (or amendment) of a will is statutorily prescribed. This was also true for South Africa due to strict social distancing measures (as severe security precautions) that were implemented.[19] According to Gildenhuys,[20] the South African government failed to

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10 An amanuensis is a person who writes on behalf another person under the other persons instruction.

11 Section 2(1)(a)(i)-(iii) of the *SA Wills Act*.

12 Section 2(1)(a)(iii) and 2(1)(b)(i) of the *SA Wills Act*.

13 COVID-19 is a contagious disease caused by the SARS-CoV-2 virus. Anon 2024 https://www.who.int/health-topics/coronavirus#tab=tab_1.

14 Regulations 3-4, and 7 in GN R318 in *GG* 43107 of 18 March 2006.

15 Section 11B(1)(a) and section 27(2) of the *Disaster Management Act* 57 of 2002.

16 Reg 3 in GN R86 in GG 44150 of 11 February 2021.

17 Anon 2020 https://www.fanews.co.za/article/covid-19-coronavirus-disease/1425/life/1427/a-covid-19-health-check-for-the-wills-act/29459.

18 Anon 2020 https://www.fanews.co.za/article/covid-19-coronavirus-disease/1425/life/1427/a-covid-19-health-check-for-the-wills-act/29459.

19 Anon 2020 https://www.fanews.co.za/article/covid-19-coronavirus-disease/1425/life/1427/a-covid-19-health-check-for-the-wills-act/29459.

20 Gildenhuys *Electronic execution of wills* (in the time of COVID-19) 19.

take decisive steps to address the requirement of the physical presence of applicable parties when executing or amending a will, despite some jurisdictions implementing interim legislation and concessions to address this issue. The provisions in section 4A of the *SA Wills Act* further complicated the execution and amendment of wills in South Africa during the pandemic. Section 4A(1) and (3) statutorily disqualifies any person who is involved in the execution of a will (including such a person's spouse at the time of execution) to benefit in terms of the will.[21] Amid lockdown measures, prospective testators also encountered challenges in securing the presence of external persons (persons who will not benefit in terms of the will) to attest to the execution or amendment of wills.[22]

A recent legal precedent, namely *Roux v Stemmet*,[23] underscores the challenges that arose from the absence of provisions regarding the execution of wills in South Africa during the pandemic. The facts of the *Roux* case deal with a testator who contracted COVID-19 and was admitted to a hospital.[24] While in the hospital, the testator indicated to his farm manager that he wanted to revoke his 2018 will. After this instruction, the testator was transferred to the intensive care unit.[25] An attorney drafted the new will, which included a revocation clause and the new testamentary provisions according to the testator's instructions. It is important to note that revocation is currently not statutorily provided for because it is governed by common law, with the exception of the revocation condonation provision in section 2A of the SA Wills Act.[26] This means that there are no formalities when it comes to the revocation of a will. To revoke a will effectively, the testator must have the intention to do so (*animus revocandi*) and then act on it.[27] An act of revocation could be to

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21 Section 4A of the *SA Wills Act.*

22 Anon 2020 https://www.fanews.co.za/article/covid-19-coronavirus-disease/1425/life/1427/a-covid-19-health-check-for-the-wills-act/29459.

23 (17064/2022) [2023] ZAWCHC 222 (23 August 2023) (hereafter referred to as the *Roux* case).

24 *Roux* case paras 4-9.

25 *Roux* case paras 4-9.

26 Section 4A of the *SA Wills Act 7 of 1953*; For general discussion see Pace and Van der Westhuizen *Wills and Trusts* 36.

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

destroy the whole will or part of the will by tearing the will or scribbling across it.[28] The testator in the *Roux* case did not have access to the 2018 will because he was in the hospital. The only other means he had to revoke the will was by the execution of a new will that included a revocation clause. This type of revocation is referred to as express revocation.[29]

As mentioned above, this period was marked by significant restrictions that made it logistically difficult to visit the testator or facilitate *inter alia* the witnessing of a will. The farm manager received the will from the attorney but was denied access when he wanted to deliver the will to the testator due to the COVID-19 diagnosis. The hospital personnel refused to deliver the will to the testator.[30] The deceased passed away without complying with the formalities for the execution of a new will.[31] The plaintiff argued that the testator was prevented from receiving the drafted will, so it was impossible to comply with the formalities of the *SA Wills Act*.[32] The Roux case highlights the difficulties testators faced in amending, executing, or expressing revocation of their wills during COVID-19, as it is one of the first cases to demonstrate how COVID-19 restrictions affected the execution and amendment of wills.[33]

1.3 The execution and amendment of wills during the COVID-19 pandemic in selected jurisdictions

Although the South African government failed to enact interim provisions for the execution and amendment of wills during the pandemic, various other jurisdictions (such as *inter alia* the United Kingdom and New Zealand) managed to put interim

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28 Pace and Van der Westhuizen Wills and Trusts 7; Jamneck et al *the Law of Succession in South* Africa 111.

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

30 *Roux* case paras 4-9.

31 *Roux* case paras 4-9.

32 *Roux* case para 48.

33 Consequently, the court was faced with the task of determining the validity of the proposed will, considering the circumstances in which COVID-19 restrictions made it impossible for the testator to sign. The court ruled that the new will was invalid as it did not comply with the formalities for the execution and amendment of wills, and it could not be condoned under section 2(3). *Roux* case para 41-72.

provisions for the execution of wills in place.

New Zealand enacted the *Epidemic Preparedness (Protection of Personal and Property Rights Act 1988—Enduring Powers of Attorney) Immediate Modification Order 2020. Immediate Modification Orders (IMOs*) are issued under section 15 of the *Epidemic Preparedness Act 2006* (hereafter referred to as *EPA*). Section 15 of the *EPA* empowered the New Zealand Governor-General to amend legislative requirements or prohibitions that are difficult or impractical to enforce during an epidemic.[34] These interim changes did not significantly alter elements of the law. The *EPA* and epidemic notices allowed the New Zealand parliament to amend primary legislation, allowing for the effective management of serious disease outbreaks.[35]

Due to the changes brought by COVID-19, the United Kingdom Law Society advocated for the amendment of the *Wills Act* of 1837 (hereafter the *Epidemic Preparedness (Protection of Personal and Property Rights Act 1988—Enduring Powers of Attorney) Immediate Modification Order*) to mitigate unintended consequences and ensure the validity of wills during the COVID-19 pandemic.[36] Section 8(2)(c) established the authority to amend other statutes to allow the use of electronic communications for a wide range of reasons, including those requiring a witness.[37] The *Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020* [38] (hereafter referred to as the *UK Order)* came into force in 2020 as secondary legislation amending the *UK Wills Act*. According to section 9 of the amended *UK Wills Act*, the term "presence" included physical and virtual presence *via* video conference or other visual transmission.

It is of paramount importance to take a functional approach to determine how the United Kingdom and New Zealand managed to put in place interim measures for the execution and amendment of wills during a period where freedom of movement was

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34 Section 15 of the *EPA*.
35 Gildenhuys *Electronic execution of wills* (in the time of COVID-19).
36 Lister 2020 https://www.stevens-bolton.com/site/insights/articles/the-virtual-witnessing-of-wills and-the-potential-for-disputes.
37 Sections 8 (2)(c) of *the Electronic Communications Act* of 2000.
38 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 SI 2020/952.

restricted. Even though some of the measures had challenges, South Africa, on the other hand, failed to put any measures in place for the execution and amendment of wills during the pandemic. As mentioned above, the study compares the responses of the United Kingdom, New Zealand, and South Africa. The three jurisdictions share the same fundamental rules when it comes to the execution and amendment of wills. The formalities for the signing of wills in all the above-mentioned jurisdictions are the same, with physical presence being one of the formalities. The execution and interpretation of wills in South Africa (the *SA Wills Act*) was influenced by English law. All three jurisdictions are influenced by English law, and restriction of freedom of movement was implemented in all three countries.

1.4 Research question

The research question that guided the study was: What lessons can South Africa take from the measures implemented by the United Kingdom and New Zealand during the COVID-19 pandemic in anticipation of possible future pandemics where people's freedom of movement may be restricted?

1.5 Research aim and objectives

The primary aim of this study is to address the above-mentioned research question. The following objectives were identified to facilitate this process, namely:

(i) To identify the challenges that arose during the COVID-19 pandemic in the execution and amendment of wills in view of possible future pandemics where freedom of movement may be restricted;

(ii) To examine the implications of the lack of legislative measures concerning the signing of wills by the South African government during the COVID-19 pandemic;

(iii) To identify and analyse the approaches of the United Kingdom and New Zealand to facilitating the signing of wills during the COVID-19 pandemic; and

(iv) To make informed recommendations for South Africa in the event of future pandemics where freedom of movement may be restricted.

1.6 Research method

The study followed a desktop-based research method. The method relies on existing data, including primary sources like legislation and case law, as well as secondary sources like internet data, books, and journal articles related to the law of succession. This research took a functional approach to *inter alia* identify how the identified legal systems addressed the execution and amendments of wills during the COVID-19 pandemic. The functional approach was used to identify potential future signing reforms or provisions for South Africa when dealing with a pandemic that restricts freedom of movement. It involves analysing and contrasting the legal frameworks of the United Kingdom and New Zealand, particularly concerning testamentary succession laws on the signing of wills. Prior to COVID-19, the formalities for all the jurisdictions where the same. Physical presence was a requirement for the signing of wills. This did not remain the same during and after the pandemic, as the United Kingdom and New Zealand found ways to promote the signing of wills. They enacted interim measures for the signing of wills. These measures allowed for wills to be signed virtually via video conference. The virtual signing of a will was crucial because it made it possible for testators to sign wills when freedom of movement was restricted. Challenges with video technology, including potential disruptions during virtual signings, may call into question the validity of signatures. Concerns about undue influence may also arise, particularly regarding individuals off-camera during virtual signings.[39] However, South Africa did not put any measures in place, which led to the recent *Roux* case where the testator could not exercise his right to freedom of testation. The functional approach aims to analyse how different legal systems solve similar challenges.[40]

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[39] Lister 2020 https://www.stevens-bolton.com/site/insights/articles/the-virtual-witnessing-of-wills-and-the-potential-for-disputes.

[40] Reimann and Reinhard *the Oxford Handbook of Comparative Law* 345-389.

1.7 Framework

Chapter 2: This chapter analyses testamentary formalities for the signing of wills in South Africa.

Chapter 3: The chapter explores the formalities and interim measures adopted by New Zealand, including an assessment of the benefits and challenges associated with such legislative measures.

Chapter 4: This chapter analyse the formalities and interim measures taken by the United Kingdom, and assesses both the advantages and challenges of these legislative measures.

Chapter 5: This chapter concludes the study and makes informed recommendations for South Africa in the event of future pandemics

Chapter 2: Testamentary formalities for the execution and amendment of wills in South Africa

2.1 Introduction

The signing of wills has a long history, extending back to ancient Egypt and medieval Europe.[41] During the Middle Ages, the practice of leaving wills for property distribution became formalised, with the church playing an important role in supervising the process.[42] The notion of a last will and testament evolved further throughout the nineteenth and twentieth centuries in South Africa, New Zealand, and the United Kingdom. Today, signing a will entails following certain formalities unique to each jurisdiction. Some of these formalities were affected by the COVID-19 pandemic. This chapter analyses the formalities for executing and amending wills in South Africa. The chapter also discusses how the restriction of movement during the COVID-19 pandemic made it difficult to adhere to the formalities.

The objectives of this chapter are to:

(i) give an overview of the formalities for the execution and amendment of a will as prescribed in section 2(1)(a)-(b) of the *SA Wills Act*; and

(ii) demonstrate the rigorous application of testamentary formalities by the Master of the High Court with reference to relevant case law; and

(iii) analyse the impact of the COVID-19 lockdown restrictions on the execution and amendment of wills.

2.2 Testamentary formalities in South Africa

Adherence to formalities in the execution and amendment of wills serves as the yardstick for determining the formal validity of a document containing a testator's

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41 Langellotti and Rathbone *Village Institutions in Egypt in the Roman to Early Arab Periods* para 7.1- 7.3

42 Anon 2023 https://onprobatelaw.com/how-did-inheritance-work-in-the-middle-ages.

last wishes.[43] Compliance with prescribed formalities is essential for the execution and amendment of the will.[44] Should an executed or amended will fail to meet these formalities, it runs the risk of being deemed invalid, rendering it devoid of legal force or effect.[45] Any challenge to its formal validity must be addressed through judicial proceedings to ascertain its enforceability.[46] The strict enforcement of formalities aims to prevent fraud, particularly in wills where the closest person involved (the testator) cannot testify.[47]

In recent years, there has been an upsurge in litigation on the validity of wills due to fraud and forgery.[48] Instances have been reported of people forging and committing fraud by editing a will. Courts have emphasised the need for adherence to formalities while executing wills.[49] According to section 2(1)(a) of the *SA Wills Act,* the execution of a will necessitates the signature of the testator or a designated amanuensis, with each page of the document requiring a signature by the testator or their appointed representative.[50] As stated in 2(1)(b) of the *SA Wills Act*, when it comes to amendments, the signature of the testator on the will certifies that he agrees with the amendments. Furthermore, the signing process for the execution and amendment of wills mandates the presence of two or more competent witnesses who attest to and sign the will in the presence of both the testator and each other.[51] Should the testator opt to sign with a mark rather than a traditional signature, the presence of a commissioner of oaths is requisite, with additional certification formalities being applicable.[52] The scope of this chapter centres on specific formalities for the execution (see paragraph 2.2.1) and amendment of wills (see paragraph 2.2.2). In this case, the focus is on the fact that the signing process

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43 Schoeman-Malan 2007 *PER* 127.
44 Jamneck 2023 *et al the Law of Succession* para 5.1.
45 Jamneck 2023 *et al the Law of Succession* para 5.1.
46 Jamneck 2023 *et al the Law of Succession* para 5.1.
47 Jamneck 2023 *et al the Law of Succession* para 5.2.
48 Schoeman-Malan 2015 *TSAR* 126. See *Molefi v Nhlapo* 2013 JOL 30227 (GSJ); *Levin v Levin* 2011 ZASCA 114; *Grill v Stoffels* 2011 ZAWCHC 119.
49 *Lauson v Pritchard & Lauson* (1863) 1 R 93; *Twine v Naidoo* [2018] 1 All SA 297 (GJ); *Froud NO v Lewitt* (18987/2005) [2009] ZAGPPHC 272.
50 Section 2(1)(a)(i) and 2(1)(b) of the *SA Wills Act*. This applies to all wills executed after 1 January 1954, where the testators died after 1 October 1992.
51 Section 2(1)(a)(ii)-(iii) of the *SA Wills Act*.
52 Section 2(1)(a)(v) of the *SA Wills Act*.

mandates the presence of two or more competent witnesses who attest to the execution and amendment of wills in the presence of both the testator and each other.

2.2.1 Section 2(1)(a)(ii)-(iii) of the SA Wills Act

Before analysing the term "presence", which is a central term due to its use in the *SA Wills Act*, it is important to establish the meaning of a "competent witness". Section 1 of the *SA Wills Act* defines a "competent witness" as someone above 14 years old who can provide evidence in court.

The *SA Wills Act* (section 2(1)(a)) specifies formalities for executing a valid will, including:[53]

(i) The will must be signed at the end by the testator or amanuensis in the testator's presence as per his instruction.[54]

(ii) The testator or amanuensis must sign in the presence of two or more competent witnesses.[55]

(iii) The witnesses must sign the will in the presence of the testator, amanuensis (if applicable), and each other.[56]

The *SA Wills Act* does not attach a verbatim meaning to the term "presence". However, one can argue that the term "presence" refers to physical presence. Physical presence can be defined as being in the same place or seeing eye to eye, even if separated by glass.[57] Thus, the testator must sign the will in front of the two witnesses, and the witnesses must sign the will in front of the testator and each other.[58] For the will to be valid, all parties (the testator and amanuensis if applicable,

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53 Section 2(1)(a) of the *SA Wills Act.*
54 When a will consists of more than one page, the other pages must be signed by the testator or amanuensis anywhere on the pages. Section 2(1)(a)(i) of the *SA Wills Act*.
55 Section 2(1)(a)(ii) of the *SA Wills Act*.
56 Section 2(1)(a)(iii) of the *SA Wills Act*.
57 Hofmeyr and Paleker the *Law of Succession* in South Africa 97.
58 Hofmeyr and Paleker the *Law of Succession* in South Africa 97.

and the witnesses) must be present in the same room.[59] Failure to comply with these requirements can render the will invalid. For instance, if the witnesses do not attest to the testator signing the will, the will can be deemed void. Attesting to the testator's signature on the will is the witnesses' duty.[60] Therefore, if the witnesses leave the room before witnessing the testator's signature, the will would be invalid.[61]

In *Lauson v Pritchard & Lauson*[62] (hereafter referred to as the *Lauson case*), the Master rejected a will due to improper attestation. The testator signed his will in the presence of the witnesses, and then he went into another room after signing the will.[63] When the testator went into the other room, the witnesses started signing his will. The issue was that a will was signed by the witnesses when the testator was in another room with the door ajar. The plaintiffs contended that attestation in the testator's presence was required for the will to be valid.[64] The defendants claimed that the attestation was adequate. The Chief Justice ruled that Ordinance No 14 of 1845 required witnesses to attest and sign a will in the testator's presence.[65] In this case, the will was signed by attesting witnesses in a different room, and the door between the two rooms was either closed or ajar, preventing the testator from seeing the witnesses sign the document. This assertion led to the will being pronounced invalid. This judgment demonstrates the importance of physical presence and shows how the court strictly applies the formalities.[66]

In *Froud NO v Lewitt* [67] (hereafter referred to as the *Froud* case), the deceased, Marina Charlotte Vieira, and the first defendant, Mark Lewitt, were long-term

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59 Hofmeyr and Paleker *the Law of Succession in South Africa* 97. See *Sterban v Dixon* 1968 (1) SA 322 (C) para 324H–325A.

60 Hofmeyr and Paleker *the Law of Succession in South Africa* 96; Bosch v Nel 1992 (3) SA 600 (T) para 605E–F; Twine case.

61 Hofmeyr and Paleker *the Law of Succession in South Africa* 96; Bosch v Nel 1992 (3) SA 600 (T) para 605E–F; Twine case.

62 *Lauson v Pritchard & Lauson* (18611867) 1 Roscoe 93 Supreme Court of the Cape of Good Hope 1863. August 22. This case was heard long before the enactment of the Wills Act, but it was an applicable Ordinance (at that time), and it also required "presence" as is the case with the current *SA Wills Act*. The *SA Wills Act* was only enacted in 1953 and the case dates to 1863).

63 The *Lauson* case para 94.

64 The *Lauson* case para 94.

65 The *Lauson* case para 94.

66 The *Lauson* case para 94.

67 *Froud NO v Lewitt* (18987/2005) [2009] ZAGPPHC 272.

partners. Gillian Gabriel Ehlers was Lewitt's brother-in-law, and he was also an attorney. Vieira requested Ehlers to draw up a will on her behalf and Ehlers instructed his wife Tanya to type the will. Tanya then signed the will as a witness at their home in the absence of Vieira. Vieira and Ehlers later met in the Johannesburg Magistrate's Court on the first of July 2004, where Vieira read and signed the already signed will (by Tanya) in the presence of Ehlers. The legal issue is that the will was not signed by the testator in the presence of two competent witnesses. The plaintiff, Ms Froud,[68] argued that the will did not adhere to the formalities in section 2(1)(a)(ii) and (iii) of the *SA Wills Act*. The validity of a will is determined by the legality of the testator's signature and the witnesses signing in each other's presence. Ehlers stated that he was not an expert in civil law and was unaware of the incorrectness of a witness pre-signing a will and the absence of the second witness when signing a will.[69] Ehlers claimed that the attestation statement above the testator's signatures did not accurately represent what transpired[70] since the will was not signed in the presence of both witnesses. The declaration begins with the following words:

> 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.[71]

The court ruled that the will was void due to a lack of formality. The defendant applied that the court should declare the document to be a will under section 2(3). The court argued that section 2(3) aims to alleviate hardships and injustice by requiring strict formalities for wills.[72] It requires a document drafted or executed by a deceased person and intended as a will. In cases where authenticity is challenged, courts may disregard formalities and declare the draft a will. If the authenticity of the will cannot be demonstrated, the non-compliance with clauses 2(1)(a)(ii) and

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68 Linda Natalie Froud and Vieira were half-sisters, they share a mother.
69 *Froud* case para 57.
70 *Froud* case para 57.
71 *Froud* case para 20.
72 Section 2(3) of the *SA Wills Act.*

(iii) cannot be excused.[73] Ehlers admitted that the will was not signed in front of two witnesses, resulting in the non-compliance with the testamentary formalities prescribed in the *SA Wills Act*. The *Froud* case highlights the importance of physical presence. The absence of the second witness and the pre-singing of the will invalidated it.

In *Twine v Naidoo*[74] (hereafter referred to as the *Twine* case), the plaintiff asserted that the will did not comply with the formalities in section 2(1)(a)(ii) and (iii) of the *SA Wills Act*. In this case, the deceased executed two wills, one on 6 November 2011 and the other on 7 January 2014, giving the majority of his wealth to his younger partner in the latter will.[75] The evidence assessed by the Court revealed that the testator signed both the 2011 and 2014 wills.[76] However, the testator signed the 2014 will after the two witnesses left, making it invalid.[77] The court referred to section 2 of the *SA Wills Act*, which deems a will to be valid if it is signed by a testator in the presence of two or more competent witnesses present at the same time.[78] If not met, the will is invalid due to a lack of compliance with a statutorily required formality.[79] In this case, both witnesses who were supposed to attest to the testator's signing of the 2014 will, were not present when the testator signed it.[80] As a result, the 2014 will was declared invalid, null, and void. However, there was no evidence of irregularity in the execution of the 2011 will, leaving the 2011 will as the last will of the deceased.[81] Therefore, the court declared the 2011 will as valid because the 2014 will did not comply with formalities. This proves the importance of physical presence when it comes to the execution and amendments of wills. The 2014 will was invalidated because the testator signed the will after the witnesses had left

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73 *Froud* case.
74 *Twine v Naidoo* [2018] 1 All SA 297 (GJ).
75 *Twine* case paras 1- 9.
76 *Twine* case para 34.
77 *Twine* case para 34.
78 *Twine* case para 35.
79 *Twine* case para 35.
80 *Twine* case para 36.
81 *Twine* case para 37.

The above cases set a precedent. This will reduce potentials for fraud and ensure that the will reflects the testator's voluntary disposition.[82] When these formalities are met a will is deemed validly executed. Even though the SA Wills Act mandates that the testator sign in the presence of the witnesses, it allows for the possibility that the testator may have already signed the will by allowing him to acknowledge his signature to the witnesses.[83] This must be done in the presence of two witnesses.

2.2.2 Section 2(1)(b)(ii)(iii) of the SA Wills Act

It should be noted that valid wills can be amended by a testator at any time and point in his life. He can freely alter his will. The testator is permitted to amend his will, but he must adhere to the provisions of section 2(1)(b) of the *SA Wills Act.* Section 2(1)(b) specifies that no deletion, addition, alteration, or interlineation will be valid unless:

(i) There is a signature of the testator or the signature of a person as per the testator's request made in the presence of the testator.

(ii) The signature should be made in the presence of two or more competent witnesses simultaneously present.

(iii) The witnesses should also sign in the presence of the testator, the amanuensis (if applicable) and each other.

The *SA Wills Act* does not recognise additions, alterations, interlineations, and deletions of wills if the testator or witnesses do not adhere to the formalities for the amendment of a will. The *SA Wills Act* permits pre-execution amendments. For example, when a testator increases the amount of a legacy or changes the name of a beneficiary before executing the will.[84] A pre-execution amendment requires no formalities. However, this should be signed by the testator and two witnesses, as any amendment to the will shall be presumed to have been made after the will was

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82 Jamneck 2023 et al *The Law of Succession* para 5.2.7.
83 Jamneck 2023 *et al The Law of Succession* para 5.2.7.
84 Jamneck 2023 *et al The Law of Succession* para 5.3.

executed.[85] It may not be possible to establish that the amendment was made before execution after the testator's death.[86] Post-execution amendments are defined as amendments that occur after the will has been executed. These amendments are governed by section 2(1)(b) of the *SA Wills Act*. Failure to comply with formalities will render post-execution amendments invalid. Also, as with the case in section 2(1)(a), section 2(1)(b) of the *SA Wills Act* states that there is a need for presence at the execution of the will that is being amended for amendments to be regarded valid.

2.3 Requirement of a written document

A "will" is defined in section 1 of the *SA Wills Act* as "… including a codicil and any other testamentary writing".[87] A codicil is a document that alters terms in a prior will or revokes its provisions.[88] Historically, codicils were more valuable when a will was drafted by hand.[89] Nowadays, technological advancements such as computers make it simpler to draft a new will and have it signed by a testator, removing the need for several codicils appended to a will.[90]

Although the *SA Wills Act* does not explicitly state that a will must be a written document, it is implied given the necessity for the testator to sign it in specific places and reference particular pages in the will.[91] The *SA Wills Act* permits many types of signatures, such as handwritten, typed, and printed.[92] Pencil writing is permissible, but not advised due to fraud concerns. Due to signature restrictions, oral statements, video or DVD recordings, or computer files are not acceptable.[93] Electronic signatures are excluded for purposes of the *SA Wills Act* under schedule 1 (read together with section 4(3)) and schedule 2 (read together with section 4(4))

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85 Section 2(2) of the *SA Wills Act*.
86 Section 2(2) of the *SA Wills Act*.
87 Section 1(v) of the *SA Wills Act*.
88 Pace and Van der Westhuizen *Wills and Trusts* 36-(5).
89 Pace and Van der Westhuizen *Wills and Trusts* 36-(5).
90 Pace and Van der Westhuizen *Wills and Trusts* 36-(5).
91 Section 2(1)(a)(i) (iv) and (v) of the *SA Wills Act*.
92 Jamneck 2023 *et al The Law of Succession* para 5.2.1.
93 Jamneck 2023 *et al The Law of Succession* para 5.2.1.

of the *Electronic Communications and Transactions Act*.[94] A will constructed as an SMS[95] on a mobile phone or email likewise fails to fulfil execution requirements.[96] Thus, only handwriting, typing, and printing are permitted.

2.4 Section 2(3) of the Wills Act

It is important to analyse alternative remedies for wills that do not meet the requirements of section 2. According to section 4A(2), the court can declare a person or their spouse competent to receive a benefit from a will if they did not defraA (or influence the testator in its execution.[97] If a testator dies intestate, their beneficiary can still benefit from the will, provided the value is less than the portion they would have received under intestate succession law.[98] Additionally, a person or their spouse who attested and signed a will as a witness can still receive a benefit from the will.[99] Section 4A(2) could have played a fundamental role in instances of wills witnessed by beneficiaries during COVID-19.

In *Macdonald v The Master,*[100] the court found that a printed hard copy (printed in the presence of a police officer) of an electronic document stored on a computer hard drive was permissible under section 2(3) of the *SA Wills Act*, even if all statutory requirements were not met. The case deals with a deceased who left notes on his computer at IBM that were later discovered to be his final will and testament[101]. The court had to decide whether the notes were created by the deceased, if the deceased died after they were drafted, and if the notes were intended to represent his will.[102] The court took a liberal approach, ruling that the document did not have to be in the deceased's handwriting and may be typed or dictated by the deceased.

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94 Section 4(4)-4(3), Schedule 1 and 2 of the *Electronic Communication Transaction Act* 25 of 2002.

95 Short message service is a technology for sending short text messages between mobile phones.
Webster 2024 https://www.merriam-webster.com/dictionary/SMS.

96 Jamneck 2023 *et al The Law of Succession* para 5.2.1.

97 4A (2) of the *SA Wills Act*.

98 4A (2) of the *SA Wills Act*.

99 4A (2) of the SA Wills Act.

100 *MacDonald v The Master* 2002 5 SA 64 (O) (hereafter referred to as the *MacDonald* case)

101 The *MacDonald* case para 68.

102 The MacDonald case para 70 F-G.

[103]The court determined that the applicant had proven that the data message comprised her late husband's final will and testament using the three-part test outlined in section 2(3) of the *SA Wills Act*.[104] The court cautioned that its power is discretionary and should not be viewed as a legal precedent for recognising electronic wills because it is not the data message that was condoned but rather the printed hardcopy.[105]

In *Bekker v Naude*,[106] the Supreme Court of Appeal ruled that a document must be drafted by the testator and have a personal relationship with the deceased.[107] Wood-Bodley[108] agreed with the Macdonald case judgement approach even after the decision in *Bekker v Naude*, but notes that the *MacDonald v Master* case is a Eastern Cape High Court case, while *Bekker v Naude* is a Supreme Court of Appeal case with higher authority.[109] The question arises as to how courts would approach situations where the document is available only on electronic devices. If courts follow the strict approach, it may not condone electronic wills.[110] The decision in *Bekker v Naude* has been criticised for its narrow interpretation, which undermines the goal of assisting testators whose documents do not meet formal requirements.[111]

This case shows the importance of section 2(3), which states that the court shall order the Master of the High Court to accept the document for the purposes of the *Administration of Estates Act* 66 of 1965 if the requirements of section 2(3) are met. Thus, the court condones the non-compliant document, which means it excuses the non-compliance and then orders the Master to accept the document for the administration of the deceased estate.[112] Section 2(3) is important because it is one of the sections that can condone the wills executed or amended during COVID-19.

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103 The *MacDonald* case para 71 C-G.
104 The MacDonald case para 72 A-B.
105 The *MacDonald* case para 72 H-73A.
106 *Bekker v Naude* 2003 5 SA 173 (SCA).
107 *Bekker v Naude* 2003 5 SA 173 (SCA).
108 Wood-Bodley 2004 *SALJ* 42-43.
109 Wood-Bodley 2004 *SALJ* 42-43.
110 *Bekker v Naude* 2003 5 SA 173 (SCA).
111 Sonnekus 2003 *Stellenbosch Law Review* 339.
112 Section 2(3) of the *SA Wills Act.*

They do not meet the requirements due to certain restrictions. Section 2(3) condonation does not validate the will it only "excuses the non-compliance." In other words, it will still be non-compliant (formally invalid) but condoned. Section 2(3) proves that as much as there were no interim measures in place there are still alternatives to rectify wills written during COVID-19.

Section 2(3) is achievable only if a written document is available, drafted, or executed by a person since deceased, and the deceased intended the document to be their will (or amendment if applicable). The most important factor in deciding whether to grant condonation is the intention requirement.[113] The intention requirement under section 2(3) of the *SA Wills Act* is evaluated from two perspectives: the testator's intention and the contents of the will.[114] The former centres on the deceased's wish for the document to serve as their will, whereas the latter focuses on the document's substance rather than its format.[115] In *Van Wetten v Bosch*,[116] Lewis JA contended that the true question to be answered is whether the deceased wanted the document to represent their will at all. The first perspective may limit the scope of the power of condonation since it appears to be founded on the belief that only officially non-compliant wills, such as those that resemble wills in appearance and structure, can be condoned.[117] In *Webster v The Master*,[118] the court limited the scope of section 2(3) to irregularly performed wills, leaving no possibility for unexecuted wills. The court's reasoning suggested that section 2(3) only allowed for officially irregular wills and did not allow for informal documents that do not fit the testamentary mould.[119]

The condonation section could excuse non-compliance for some of the wills executed by testators during COVID-19. The requirements of section 2(3) specify that the testator should have the intention, and this is proved by the testator drafting or executing the will. This implies that if all the requirements of section 2(3)

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113 *Ex parte Williams: In re Williams's Estate* 2000 4 SA 168 (T) 179A.
114 *Ex parte Maurice* 1995 2 SA 713 (CC) 716I-J, 717A-B.
115 *Ex parte Williams: In re Williams's Estate* 2000 4 SA 168 (T) 179D-G.
116 *Van Wetten v Bosch* 2004 1 SA 348 (SCA) para 16.
117 Faber 2022 *PERJ* 25(1) 5.
118 *Webster v The Master* 1996 1 SA 34 (D).
119 Webster v The Master 1996 1 SA 34 (D) 42B-G; Jamneck *et al Law of Succession* 79.

are met and if the High Court is approached with a section 2(3) condonation application, wills drafted by the testators during COVID-19 that do comply with the formalities of a will, can be condoned. However, this is not the case for wills that were created by third parties (such as attorneys) as they cannot be condoned because wills created by third parties do not fall under section 2(3) requirements. The assertion above proves that there was a need for interim measures to facilitate the execution and amendment of wills drafted by third parties. This is illustrated in the *Roux case* discussed above, where a testator ultimately passed away without signing a will. This resulted in the will not complying with the formalities and his draft will could not be condoned as it was drafted by an attorney.

2.5 The implications of lockdown for the execution and amendment of wills (formalities)

As mentioned in Chapter 1, when the state of disaster was declared, freedom of movement was also restricted. Individuals were restricted to their residences during this period unless it was for an essential service.[120] Gatherings were prohibited except for funerals, and movement between provinces and metropolitan areas was also prohibited.[121] Most businesses and other entities also ceased in-person operations and most people worked from home. Not adhering to the COVID-19 restrictions was a punishable offense. According to section 11G of the *Disaster Management Act*, any person who violates regulations 11B(1)(a) commits an offense and is liable to a fine, imprisonment for up to six months, or both. Furthermore, the signing of documents online was not possible as a will is defined as a written document. This means that the testator and witnesses could not sign a will *via* a video call because the statutory requirements specify that the will should be signed in the presence of the testator and the witness (see paragraph 2.2.1). COVID-19 was the first pandemic that resulted in freedom of movement being restricted for a while. This is why there were no provisions to facilitate the virtual

120 Section 11B(1)(a) and section 27(2) of the *Disaster Management Act* 57 of 2002.
121 Section 11B(1)(a) and section 27(2) of the *Disaster Management* Act57 of 2002.

signing of wills. This lack of precedence may have been the reason no provision was implemented.

COVID-19 made will signing impossible because, as mentioned above, one of the formalities for a valid will is that the will should be signed in the presence of the testator and two witnesses. In this case, due to the COVID-19 lockdown, all forms of movement were prohibited unless it was essential. Most people were with their families during the lockdown. However, according to section 4A of the *SA Wills Act,* a beneficiary who attests or signs a will, will forfeit the inheritance. This implies that beneficiaries or their spouses could not act in the capacity of a witness as they would lose the inheritance. Therefore, in scenarios where one's freedom of movement was restricted, and the available family members are beneficiaries, the beneficiaries will not be able to act as witnesses because they won't qualify to inherit. As most people would assume, inviting a neighbour to sign is a logical step. During COVID-19, police would move around to ensure there were zero to limited movement because the virus was contagious, making it close to impossible to execute and amend a will during this period. The *Roux case* is an illustration that depicts the challenges that the testators faced in the execution and amendments of wills.[122]

2.6 Conclusion

The chapter explored the formalities required for the execution and amendment of wills. The formalities serve as statutory requirements for the validity of a will. Wills are to be signed by the testator or someone who signs on behalf of the testator. The signing of the will should be done in the physical presence of two or more competent witnesses. The witnesses must also attest and sign the will in the presence of the testator and amanuensis (if applicable) and each other. A will is only validly executed when these requirements are met. The chapter also analysed why a will has to be a document. As mentioned in paragraph 2.3, this requirement is important because video, SMS, and digital signatures are not regarded as a formal way of executing, amending, or signing the will. They are therefore invalid. The

[122] *Roux NO v Stemmet* [2023] JOL 60598 (WCC).

formalities made it difficult to execute and amend wills in South Africa during the COVID-19 pandemic. The United Kingdom and New Zealand managed to put provisions in place to facilitate the execution and amendment of wills during COVID-19. The provisions made by New Zealand for the execution and amendment of wills during COVID-19 are discussed in the next chapter, while the provisions implemented in the United Kingdom are outlined in Chapter 4.

Chapter 3: Interim measures adopted by New Zealand during the COVID-19 pandemic

3.1 Introduction

On 1 November 2007, New Zealand adopted its own *Wills Act* (hereafter referred to the *NZ Wills 2007 Wills Act*) to replace *the New Zealand Wills Act* 26 of 1837 (hereafter referred to as the *NZ 1837 Wills Act*). In New Zealand, wills continue to be founded on the imperial statute despite several amendments made by the New Zealand parliament.[123] The *NZ 2007 Wills Act* aimed to simplify the *NZ 1837 Wills Act* and ensure that the *NZ 2007 Wills Act* is accessible and useful to anyone who wants to create a will.[124] Section 8 of the *NZ 2007 Wills Act* defines a "will" as a document executed by a natural person to distribute property upon the will-maker's death.[125] A "will" also refers to a codicil or other testamentary instrument that alters, revokes, or revives a will. A valid will is one that a competent individual created.[126] It adheres to the formalities outlined in section 11 and is validated under section 14 of the *NZ 2007 Wills Act* and has not been revoked by the will-maker[127] or law.[128] The will-maker must satisfy the formalities required for an ordinary will in New Zealand.

While Chapter 2 of this study focused on the formalities for the execution and amendments of wills in South Africa during COVID-19, this chapter analyses the formalities for the execution and amendments in New Zealand before COVID-19, the interim measures established during COVID-19, and the advantages and disadvantages of the interim measures.

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123 The Act remained in force in New Zealand under section 3(1) and the First Schedule to *the Imperial Laws Application Act* 1988.

124 Peart 2007 *Waikato Law Review* 27.

125 Section 8 of the *NZ 2007 Wills Act.*

126 Section 9 of the *NZ 2007 Wills Act*.

127 Section 6 of the *NZ 2007 Wills Act* defines a "will-maker" as the equivalent of a "testator" and "testatrix".

128 Sections 11 and 14 of the *NZ 2007 Wills Act.*

The objectives of this chapter are to:

(i) give an overview of the formalities for the execution and amendment of a will according to section 11 of the *NZ 2007 Wills Act*;

(ii) illustrate with case law how rigidly the Master of the High Court applies these formalities;

(iii) analyse the interim provisions for will signing during the COVID-19 pandemic;

(iv) discuss the advantages and disadvantages of the interim measures; and

(v) analyse the outcomes following the implementation of the interim measures.

3.2 Testamentary formalities in New Zealand

3.2.1 Testamentary formalities before the New Zealand 2007 Wills Act

Physical presence has always been an important requirement in the execution of wills in New Zealand. This is clear from case law illustrating the implications of non-compliance with physical presence before the *NZ 2007 Wills Act*. Section 9 of the *New Zealand 1837 Wills Act* requires that a will be signed in the presence of the testator and two or more witnesses. Strict compliance with section 9 is required, and failure to comply with it invalidated the will.

According to Langbein,[129] "there are generally four main functions of the formalities of the will: an evidentiary, channelling, cautionary, and protective function. For this study, the focus is on three functions". Writing, will-makers, and witnesses signatures serve an evidentiary function. The aim is to provide the court with evidence to prove the will-maker's intention and terms of the will.[130] The formalities of will-making, such as the presence of witnesses and their attestation, serve a cautionary function by reminding the will-maker of the significance of the process.[131]

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129 Langbein 1975 *Harvard Law Review* 489.
130 Langbein 1975 *Harvard Law Review* 489-495.
131 Langbein 1975 *Harvard Law Review* 489-495.

The formalities also provide a protective function by lowering the danger of fraud, forgery, or undue influence by requiring two independent witnesses.

3.2.2 The requirement for physical presence

The importance of physical presence was highlighted in the *Re Colling case*.[132] The will-maker, Mr Colling, was hospitalised when he executed his will. He used his sister and a patient in the next room as his witnesses. However, his sister was called away when he signed the will.[133] Mr Colling signed his will in the presence of the patient, who also attested and signed the will. Upon his sister's return, Mr Colling acknowledged his signature, and she also signed the will.[134] The court held that the will was invalid because one of the witnesses was not present when the will-maker signed the will, and the witnesses did not sign in each other's presence. This judgment shows the importance of physical presence.

In *Parata v Parata*,[135] the deceased died on the 8th of June 1981 and left a will in which she nominated her youngest son and daughter as executors.[136] The legal issue was the validity of the will. The will was regarded as invalid because it was executed without complying with the requirements of the 1837 *Wills Act*.[137] The witnesses, Mr and Mrs Tutahi, were the deceased's daughter's neighbour. The deceased's daughter, Mrs Martha Kotua, invited her neighbour to sign her mother's will.[138] When witness Mrs Tutahi came to sign the will, the will had already been already signed by the testator, who was not in the house. While Mrs Tutahi was signing, the testator and Mr Tutahi were outside and Mr Tutahi was talking to Mr Kotua.[139] Mr Tutahi later came into the house to sign the will; but it is unclear if Mrs Tutahi was even present when Mr Tutahi signed. It is clear that the testator was

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132 *Re Coling* [1972] 3 All ER 729: [1972] 1 WLR 1440.
133 Peart 2007 *Waikato Law Review* 31.
134 Peart 2007 *Waikato Law Review* 31.
135 *Parata v Parata* [1989] High Court, Auckland M205/87 (Unreported, Gault J, 8 November 1989) (hereafter referred to as *Parata case*).
136 *Parata* para 2-7.
137 *Parata* para 2-7.
138 *Parata* para 2-7.
139 *Parata* para 2-7.

not present when the witnesses signed.[140] According to Justice Gault, the will of deceased Lucy Parata, dated 16 April 1981, is regarded as invalid.[141]

In *Costelloe v Costelloe* the witnesses denied being present when the will was signed.[142] The testator, Gerrard Patrick Costelloe, died in 2006.[143] He was run over by a train. After his death, a will emerged, dated 1 February 2006.[144] After the discovery of the will the witnesses were approached to attest that they did sign it.[145] The deceased's business partner, Mr Saunders, contested that the signature next to his name was not his, stating that the deceased forged his signature because the signature on the will was not his handwriting.[146] Ms Forsyth, the second witness, acknowledged her signature. However, she had no idea she was signing a will.[147] The deceased had a tendency to make her sign documents. Ms Forsyth further stated that she did not see the testator signing any documents, nor did she sign any documents with Mr Saunders and the testator.[148] Justice Rhys Harrison declared the last will and testament of Gerrard Patrick Costelloe, dated 1 February 2006, invalid.[149] It is important to note that the witnesses need not know the contents of a will but they should be aware of what they are attesting to.[150] In this case, the testator the witnesses were not aware that they were attesting a will, which is why the will was declared invalid.

3.2.3 Wills formalities in the New Zealand 2007 Wills Act

The *NZ 2007 Wills Act* was enacted to simplify the *NZ 1837 Wills Act's* formal requirements for a valid will. Section 11 of the *NZ 2007 Wills Act* affirmed section 9 of the *NZ 1837 Wills Act,* stating that a will must be signed in the presence of the

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140 *Parata* para 2-7.
141 *Parata* para 2-7.
142 *Costelloe (dec'd), Re; Costelloe v Costelloe & Ors* [2007] High Court, Auckland CIV 2007-404-000922 (Unreported, Harrison J, Aug 10, 2007) (hereafter referred to as *Costelloe* case).
143 *Costelloe* para 3-5.
144 *Costelloe* para 3-5.
145 *Costelloe* para 8-9.
146 *Costelloe* para 8-9.
147 *Costelloe* para 10-11.
148 *Costelloe* para 10-11.
149 *Costelloe* para 23.
150 *Costelloe* para 10-11.

testator and witnesses. The *NZ 2007 Wills Act* established a new attestation requirement, which required witnesses to affirm their presence on the document in the presence of the will-maker while signing or acknowledging each other's signature.[151] This alteration created serious complications because a will was regarded as void without such a provision. An affidavit of due execution would not suffice in the absence of such a declaration. The court made use of section 14 to validate wills once the *NZ 2007 Wills Act* went into effect, namely in *Stephenson v Rockell and Re Estate of Gates*. This was not practicable for wills executed before 1 November 2007 due to transitional requirements. This development was unforeseen and had serious consequences for the judicial system. Section 14 permitted wills to be validated, especially wills that do not meet the formal requirements of section 11 or section 9 of the *NZ 2007 Wills Act* or the *NZ 1837 Wills Act*. Section 14(1) requires four jurisdictional conditions: (1) a document, (2) it seems to be a will, (3) it does not meet the requirements for a valid will in section 11, and (4) it was created in or outside New Zealand. If all four conditions are met, the court could validate the document as a will.[152] The court used this power if the document reflected the deceased's testamentary wishes. The jurisdictional requirements are thoroughly analysed before determining how to use this power.

3.2.4 The requirement for physical presence in the New Zealand 2007 Wills Act

The case *Estate of Drury*[153] is about a attestation clause deemed ineffective because it did not disclose that the will had been signed by the testator in the presence of the witnesses.[154] The testator Frederick Leslie Drury signed his will on the 20th of May 2005.[155] The attestation clause stated, "attested by us in his presence". According to Justice AD MacKenzie, the statement is vague as it does not specifically reference the presence of the two witnesses at the time the will was signed.[156]

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151 Peart and Kelly 2013 *New Zealand Law Review* 30.
152 Section 14 New Zealand 2007 Wills Act.
153 *Estate of Drury HC Auckland CIV* 2009-404-2778 [2010] NZHC 1897; (2010) 28 FRNZ 170 (30 September 2010) (hereafter referred to as *Estate of Drury*).
154 *Estate of Drury* para 1-3.
155 *Estate of Drury* para 1-3.
156 *Estate of Drury* para 1-3.

Justice MacKenzie concluded that the attestation clause did not meet the requirements of section 11(4)(b).[157] Prior to the court case, the registrar had refused to probate, and Justice MacKenzie concurred with his decision.[158] In this case, the will was declared invalid, and section 14 could not be applied. As previously mentioned, section 14 enables the High Court to declare a will valid even if it does not comply with section 11. However, in this case, section 40(2)(k) is inapplicable to a will made before 1 November 2007, therefore the High Court cannot declare such a will valid.[159]

In *Re Estate of Gates*,[160] the case deals with legality under the *NZ 2007 Wills Act*. William Edward Gates amended his will on 15 August 2013. The amendments were handwritten and were done in the presence of one witness. Mr Hart, the witness, did confirm that the will was signed in his presence.[161] The main concern was adherence to formalities, including the presence of two witnesses. The High Court stipulated that the will did not fulfil the formalities because the other witness was not present at the same time to attest to the testator's signing, which is important under section 11 of the *NZ 2007 Wills Act*.[162] The court emphasised the necessity of strictly adhering to will-making regulations, such as having two witnesses present while signing.[163] The will was found void due to the failure to comply with the statutory requirements for witnessing. However, Justice Mallon validated the will under section 14 of the *NZ 2007 Wills Act* because the testator had testamentary intention.[164]

In *Re Estate of Olive Ruby Piper,*[165] the court declared a will invalid because it did not comply with section 11 requirements. The applicant, the Public Trust,[166] applied

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157 *Estate of Drury* para 14.
158 *Estate of Drury* para 5.
159 *Estate of Drury* para 16
160 *Re Estate of Gates* [2016] NZHC 589 [7 April 2016] (hereafter referred to as Estate of Gates).
161 *Estate of Gates* para 1-6.
162 *Estate of Gates* para 1-6.
163 *Estate of Gates* para 1-6.
164 *Estate of Gates* para 7.
165 *Estate of Piper* [2021] nzhc 534 (16 March 2021) (hereafter referred to as Estate of Piper).
166 A public trustee service organization is the Public Trust. The Public Trust Act of 2001 guarantees Public Trust's independence as an Autonomous Crown Entity. Anon date unknown https://www.publictrust.co.nz/about-us/.

to declare a will dated 9 March 2021 as the last will of Olive Ruby Piper.[167] Piper's last official will, dated 7 March 2011, named the Public Trust as her executor and trustee. Piper called the Public Trust on 6 March 2020 to schedule an appointment regarding her will, but the Trust did not answer promptly.[168] She provided a list of prospective beneficiaries she wished to include in her will, but it did not specify how many shares each should get. The draft will was created on 30 March 2020 and was approved on 31 March 2020.[169] It was not sent to Piper until 22 April 2020, and Piper died on 3 July 2020 without executing the draft will. Section 14 allows court validation of documents expressing the will-maker's wishes but not meeting formal requirements, requiring the document to be a will, not comply with section 11, and express the deceased's intentions.[170] In this case, the document came into existence in New Zealand, it is in writing, neither signed nor witnessed. However, the court was not convinced that the document prepared on 30 March 2020 and forwarded to the deceased on 22 April 2020 necessarily expressed the deceased's testamentary intentions.[171] The court has validated documents prepared on behalf of will-makers in previous cases, for example in *Re McLeod*[172] and in Re Scott.[173] However, in this case, there was a significant time lapse between the instructions being given, the draft being sent to the deceased, and the deceased death.[174] The deceased did not confirm that the document accurately recorded her testamentary intentions. Therefore, the court was not satisfied that the document prepared on 30 March 2020 and forwarded to the deceased on 22 April 2020 expressed the deceased's testamentary intentions.[175] Hence, the court declared the will invalid, and it could not be validated under section 14. This case is similar to the South African *Roux* case. The South African court followed the same logic, ruling that if the testator did not see the will or did not draft it, there is no intention.[176]

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167 *Estate of Piper* para 1-2.
168 *Estate of Piper* para 3-11.
169 *Estate of Piper* para 3-11
170 *Estate of Piper* para 18.
171 *Estate of Piper* para 19,
172 *Re McLeod* [2020] NZHC 1992.
173 *Re Scott* [2018] NZHC 3177.
174 *Estate of Piper* para 21-22.
175 *Estate of Piper* para 21-22,
176 *Roux* case para 70.

It is important to note that most of the cases mentioned above were validated in terms of section 14 even though they were declared invalid. As previously mentioned, in terms of section 14(2) of *NZ 2007 Wills Act*, a court can validate a will if it accurately reflects the deceased person's testamentary intentions.[177]

3.3 Interim measures put in place due to COVID-19 restrictions

On the 25th of March 2020, the Minister of Defence, Peeni Ereatara Gladwyn Henare, declared a state of emergency according to section 66 of the *Civil Defence Emergency Management Act* of 2002. Prime Minister Jacinda Arden[178] implemented a new four-level alert system, limiting human interaction, travel, and commercial activities. The government swiftly implemented Alert Level 2, which required New Zealanders to stay at home as much as possible, including working from home and limiting non-essential travel.[179] The deVere Group study found a 76% rise in demand for wills as a result of COVID-19. This was ascribed to the fear of death.[180] Certain regulations had to be developed to accommodate will-makers during the lockdown period. The COVID-19 pandemic prompted the *EPA* legislature to enact methods that lessen the formal requirements and simplify the execution and amendment of wills.[181] This shift was pushed by a growing interest in will-drafting in society as well as the limitations of traditional approaches, which frequently demand the participation of people during social isolation. This modification aimed to streamline and simplify the execution of wills for people.[182] The modifications were limited to the signing and witnessing procedures outlined in section 11 of the *NZ 2007 Wills Act.* The modifications were temporary and they expired on 20 October 2022.[183]

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177 Peart and Kelly 2013 *New Zealand Law Review* 40.

178 Anon 2020 https://nzhistory.govt.nz/page/new-zealand-enters-nationwide-lockdown-fight-against-covid-19.

179 Anon 2020 https://nzhistory.govt.nz/page/new-zealand-enters-nationwide-lockdown-fight-against-covid-19.

180 Slingo 2020 https://www.lawgazette.co.uk/news/coronavirus-demand-for-wills-jumps-by-76/5103703.article.

181 Slingo 2020 https://www.lawgazette.co.uk/news/coronavirus-demand-for-wills-jumps-by-76/5103703.article.

182 Slingo 2020 https://www.lawgazette.co.uk/news/coronavirus-demand-for-wills-jumps-by-76/5103703.article.

183 *Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020*: revoked, on 20 October 2022, by clause 5.

New Zealand amended its *NZ 2007 Wills Act* to enable the signing and witnessing of wills via audiovisual links during the epidemic.[184] *The Epidemic Preparedness (Wills Act 2007—Signing and Witnessing of Wills) Immediate Modification Order 2020* established this approach, allowing wills to be signed and witnessed via a variety of platforms such as Zoom, Skype, Facetime, and Google Meet.[185] The *EPA* was enacted as part of New Zealand's COVID-19 legislation. Amid lockdown measures, the *EPA* proposed to enable the digital signing and witnessing of wills, especially via an audiovisual linkage such as Zoom, Skype, Facetime, and Google Meets. The *EPA* came into effect on 17 April 2020 and was rescinded when the *Epidemic Preparedness (COVID-19) Notice 2020* expired or was cancelled.[186]

3.3.1 Provisions for will signing using audio-visual links

There were modifications to how the will-maker was required to sign. The modification order made provision for the usual prescribed requirements for the execution of wills as provided for the *NZ Wills Act*, but they also gave the option of virtual presence.[187] The will-maker had to additionally sign the will with one or both witnesses virtually present using an audio-visual link. The will-maker had to state that the will was signed due to an epidemic directive.[188] In cases where an amanuensis was used, the amanuensis had to sign a copy of the document before the will-maker via an audiovisual link from another place, stating that it was signed in this manner.[189] Photographs or scans of signed documents had to be created.[190] The document, together with signed copies, had to be promptly delivered to the person designated to handle the document and scans, such as an attorney.[191] When it comes to modifications of how witnesses were required to witness while signing, the will-maker had to comply with section 11(3) or acknowledge his signature in the

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184 Newbould 2020 https://www.moneymag.com.au/coronavirus-demand-for-wills-rise.
185 *Epidemic Preparedness (Wills Act 2007 Signing and Witnessing of Wills) Immediate Modification*
Order 2020.
186 Section 2 of the *EPA.*
187 4(1)(b) of the *EPA.*
188 Section 4(1)(c)(i) of the *EPA.*
189 Section 4(1)(c)(ii) of the *EPA.*
190 Section 4(1)(c)(iii) of the *EPA.*
191 Section 4(1)(c)(iii) of the *EPA.*

virtual presence of the witnesses.[192] The witnesses had to sign a copy of the document in front of the will-maker, explicitly noting that it was signed in this manner, and then email a photograph or scan of the signed copies to the holder.[193] The document, as well as any needed pictures or scans, had to be submitted to the holder.[194] The *EPA* also modified the attestation clause stating that section 11 (5) of the *NZ Wills Act* requires at least two witnesses to state their compliance with section 11(4) of the Act, as modified by subclause (2).[195] This includes being present with the will-maker, signing the document, acknowledging their signature, directing another person to sign the document, and directing another person to do what is specified in subclause (1), (ii), (iii), (v), or (vi).[196] This entails signing the document in the will-maker's presence, or signing a copy of the document before the will-maker via an audiovisual link, making it clear on the copy, and sending a photograph or scan of the signed copy promptly to one holder identified by the will-maker.[197] This ensures that the will-maker has access to all required photographs or scans of signed copies of the document. As mentioned above, the modifications modified how the will-maker was required to sign or direct signing, how the witnesses were required to witness the signing process, and the attestation clause.

3.4 Advantages and Disadvantages of the Interim Measures

3.4.1 Advantages of the Interim Measures

The most important advantages of the interim measures taken in New Zealand was they were convenient, flexible, accessible, promoted the validity of the wills, promoted adaptability, and set precedence. The interim measures were convenient and flexible because will-makers were able to sign wills in the comfort of their homes considering that there was a contagious virus and freedom of movement was restricted.[198] This allowed will-makers to execute their wishes and rights without

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192 Section 4(2)(a)(i)-(ii) of the *EPA.*
193 Section 4(2)(b)(i)-(iii) of the *EPA.*
194 Section 4(2)(b)(i)-(iii) of the *EPA.*
195 Section 4(3) of the *EPA.*
196 Section 4(3)(a) of the *EPA.*
197 Section 4(3)(b) of the *EPA.*
198 Anon *date unknown* https://www.lawsociety.org.nz/news/newsroom/in-the-presence-of-change/.

compromising their health and safety. It is important to consider the accessibility of the interim measures (the modification order). The Modification order was easily accessible it was published on the New Zealand legislation website.[199] This means that the order was accessible because anyone who had internet access could access the order through the website. Another advantage is that the wills that were executed during this period are regarded as valid, and the will-makers need not execute another will now that the interim measures have expired.[200] Overall, the implementation of interim measures proves that the law is adaptable. The attorneys and testators adapted quickly to the new changes by providing for the electronic signing of wills. This revealing an increase in professional adaptability, which will help in case of any future pandemics. It is safe to note that the interim measures have cleared certain uncertainties concerning the signing of wills during a pandemic.

3.4.2 Disadvantages of the Interim Measures

The disadvantages of the interim measures included a lack of measures to ensure that the original document is signed, a lack of confidentiality, potential fraud or coercion, a lack of access to technology. The interim measures also lacked clarity on the established law and there were a few uncertainties. "The government did not put measures in place to ensure that the copy signed by the amanuensis or witnesses was identical to the original document".[201] This could easily lead to fraud cases, or the witnesses could attest to the another will that is not the testator's will. The virtual signing also affected confidentiality aspects, seeing that witnesses (and the amanuensis, if applicable) had access to the entire will. Under normal circumstances, the witnesses need not know the contents of the will[202]. In this case, it was inevitable to prevent the breach of confidentiality because the will had to be sent to the witnesses and the witnesses could choose to read the contents of the will, leading to the breach of privacy. The other disadvantage of the interim measures is potential fraud or coercion; with virtual signing, it is difficult to note

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199 https://www.legislation.govt.nz/regulation/public/2020/0065/38.0/LMS337342.html

200 *Legal status of the Epidemic Preparedness (Wills Act 2007 Signing and Witnessing of Wills) Immediate Modification Order 2020*.

201 Gildenhuys *Electronic execution of wills* (in the time of COVID-19).

202 Gildenhuys *Electronic execution of wills* (in the time of COVID-19).

coercion because witness can only see the testator and not necessarily everyone in the room with the testator. During normal face-to-face interactions the witnesses can easily detect coercion or any fraudulent activities. It is not clear whether attestation by the witnesses is necessary during the same audio-visual session. The *EPA* did not state if the recording of the remote virtual witnessing was required. However, the Law Society of New Zealand recommended that the virtual witnessing be recorded for evidential purposes because the recording could serve as proof.[203] It is important to note that not everyone had the means to participate in remote signing, in some instances due to a lack of means or limited access to technology. The interim measures introduced temporary measures, but they often lacked clarity on the established law. Virtual witnessing was not expressly provided for in the interim measures to amend an already executed will. There were uncertainties about the exact requirements, for example the *EPA* did not mention that a specific link had be used. It is unclear if the link had to be a live link[204] or real-time.[205]

3.5 Outcomes following the implementation of the interim measures

The measures provided a convenient way for the signing of wills in a period where freedom of movement was restricted. No case law has been reported relating to the ambiguity of the interim measures. As much as the practicality and some of the established laws were flawed (see paragraph 3.4.2), they managed to be sustained during the pandemic. One would presume that the implementation of interim measures encouraged individuals to adhere to the virtual signing of will and have validly executed wills, but this was not the case. There are a few cases on the validity of wills due to non-compliance with the formalities in section 11 and non-compliance with the interim measures.

In *Will of Henry*,[206] the applicant Stuart McLeod sought for an order under section 14 of the Wills Act 2007 to declare an unsigned and undated document of Sonya

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203 Gildenhuys *Electronic execution of wills* (in the time of COVID-19).

204 Live streaming is the continuous delivery of video and audio content over the internet, often used for sports coverage. Real-time streaming enhances this by minimising external factors, enabling immediate feedback in interactive online lessons and events.

205 Gildenhuys *Electronic execution of wills* (in the time of COVID-19).

206 *Will of Henry* [2020] NZHC 1992 (7 August 2020). (Hereafter referred to as Will of Henry)

Maree Henry as a valid will.[207] The deceased died in Christchurch on 7 May 2020. In 2007, Henry executed a will appointing her parents as the executors and trustees of her will and sole beneficiaries of her estate.[208] The applicant was Ms Henry's de facto partner. He argued that the testator instructed Carolyn Foss, a legal executive, by telephone and email to prepare a new will.[209] Ms Foss emailed Ms Henry the new will with the advice that they could not meet to have the will properly signed and witnessed due to New Zealand being at Alert Level 4 of the COVID-19 pandemic.[210] Ms Henry expressed her satisfaction with the new will and confirmed it on 24 April 2020. Ms Foss also stated that the document dated 23 April 2020, prepared by her, reflects the testator's instructions that the applicant should be the executor and sole beneficiary of her estate.[211] Section 8(1) of the Wills Act 2007 defines a will as a document made by a natural person that disposes of the property to which the person is entitled when they die.[212] The court discussed section 11 formalities (see paragraph 3.2.2) and applied section 14 (see paragraph 3.2.2). The document dated April 23, 2020, appeared to be Ms Henry's will, outlining her intended distribution of assets. However, it was neither signed nor witnessed, which violates section 11 of the Wills Act.[213] The document acknowledged that it is her last will and testament and conveyed her testamentary intentions.[214] The documents could not be signed and attested in person due to COVID-19, but the testators stated that it will be signed and witnessed when it was feasible.[215] The court noted that the processes for signing and witnessing a will were not followed while the *EPA* was in effect.[216] The court concluded that the document dated 23 April 2020 was a valid will of the deceased. The court found that the document reflects the deceased person's testamentary intentions and can be made without notice to any other person.[217] The testator acknowledged that the *EPA* was in place during time she executed the

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207 *Will of Henry* 1.
208 *Will of Henry* 3-4.
209 *Will of Henry* para 5.
210 *Will of Henry* para 5.
211 *Will of Henry* para 6.
212 *Will of Henry* para 8.
213 *Will of Henry* para 11-13.
214 *Will of Henry* para 11-13.
215 *Will of Henry* para 11-13.
216 *Will of Henry* para 14.
217 *Will of Henry* para 17.

will. It is questionable why the testator did not use virtual signing and witnessing of the will.

In *Collins*,[218] Michael Collins sought an order to declare a document dated 18 April 2020 as the last will of Gordon Alfred Illingworth, who died on 23 April 2020.[219] The deceased became unwell during the government's COVID-19 alert level 4 restrictions.[220] On 15 April 2020, the deceased asked Mr. Collins (the deceased's friend) to check if his will was in order, to which he said he wished to make amendments to it.[221] Ms Miller(the deceased's attorney) spoke with the deceased via Facetime, arranging changes to his will. The revised will was sent to Mr Collins, who printed it for the deceased. Collins did not express interest in further changes.[222] On 18 April 2020, Ms Miller contacted the deceased via Facetime call, with Mr Collins present. Ms Miller explained the changes to the will and confirmed that the revised will contained the changes he had wished to make.[223] Due to alert level 4 restrictions, Ms Miller was unable to witness the revised will and had no other adult witness available. Due to the deteriorating physical health of the deceased, Ms Miller felt there was a sense of urgency to get the will signed.[224] The procedures for witnessing the will were adopted. The will witnessed by Ms Miller involved the deceased holding up to the camera each page of the revised will, initialling the first page, signing the second page in full, and dating the cover page.[225] The will was then placed on a tray in view of the camera. After the deceased signed the will, Mr Collins delivered it to Ms Miller's home address at 6.05 pm on 18 April 2020.[226] He also sent a text message to confirm the will's availability for collection. Ms Miller confirmed that the will was the same as she had seen the deceased sign and held it securely in her home office. The process was completed in a timely manner, ensuring the authenticity of the will.[227] The 2020 revised will revoked all former wills

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218 *Collins* [2020] NZHC 2550 (29 September 2020). (Hereafter referred to as Collins)
219 *Collins* para 1-2.
220 *Collins* para 3.
221 *Collins* para 4.
222 *Collins* para 5.
223 *Collins* para 6-7.
224 *Collins* para 6-7.
225 *Collins* para 8.
226 *Collins* para 8.
227 *Collins* para 8.

and testamentary dispositions made by the deceased. It appoints Collins, Miller, and Smillie as executors and trustees, and distributes the deceased's residuary estate in two equal parts to the beneficiaries. The deceased had made an earlier will dated 19 April 2016, which also appointed Collins, Miller, and Smillie as executors and trustees. According to Mallon J, the document was not executed in accordance with s 11 of the Wills Act 2007 due to its audio-visual link signing and lack of two witnesses.[228] It appears to be a will from New Zealand, expressing the deceased's intentions. The consent of all potential beneficiaries has been given, and jurisdiction under s 14 of the Wills Act is appropriate.[229] The document, marked "A" and attached to the applicant's and Devon Miller's affidavits, is declared valid as the last will of the deceased. The application can be made without notice to any other person.[230]

In *Re Hudson*,[231] the executors of the late Jean Hudson's estate, Dalley and Roberts, sought an order to declare a document as a valid codicil to her will under section 14 of the Wills Act 2007.[232] The deceased's passed on 31 May 2022, leaving a will dated 9 September 2014. This will was amended in July 2021 to increase the legacy payment to her nephew.[233] The proposed codicil was prepared by Duncan Cotterill but could not be executed due to COVID-19 restrictions.[234] The court discussed section 11 formalities (see paragraph 3.2.2) and applied section 14 (see paragraph 3.2.2).[235] The court stated that the deceased's intention to increase her legacy payment to her nephew was confirmed by her solicitor and her financial advisor in affidavits provided to the court.[236] The document was not formally executed as a codicil due to COVID-19 restrictions on visiting the deceased. The court argued that the fact that the codicil was prepared by the deceased's lawyers, on her instruction, and after discussing the matter with her financial adviser, suffices as the testator’s

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228 *Collins* para 12-13.
229 *Collins* para 12-13.
230 *Collins* para 12-13.
231 *Estate of Hudson* [2023] NZHC 411 (7 March 2023). (Hereafter referred to as *Estate of Hudson*)
232 *Estate of Hudson* para 1.
233 *Estate of Hudson* para 3.
234 *Estate of Hudson* para 4.
235 *Estate of Hudson* para 8-12.
236 *Estate of Hudson* para 14.

intention.[237] The application to declare the document as a valid codicil to the deceased's will was granted, and an order is made in terms of the draft order accompanying the application.[238]

The cases discussed above proves that as much as it was necessary to put the interim measures in place, the significance of section 14 cannot be overlooked. Section 14 gives the High Court jurisdiction to validate such wills. Section 14 permits validation of wills that would otherwise be held invalid under section 11, which requires the physical presence of witnesses for signing of wills. Despite the interim measures, some individuals were still unable to execute their wills according to section 11. This raises the question if interim measures were necessary, considering that section 14 validates all the wills that do not meet the requirements of section 11. While failing to sign wills due to a lack of provisions is understandable, it is concerning when individuals fail to sign wills despite having the provisions to facilitate the signing of wills. One can argue that the court is too lenient when it comes to the execution and amendment of wills because section 14 validates anything that looks like a will or proves that the will maker had the intention to exercise his testamentary capacity. In *Collins* the case was about non-compliance with the interim measures. The court does not even refer to the interim measures the court validated the will with section 14. In the cases above, the testators had the opportunity to sign the will using virtual witnessing. This could prove that the interim measures were not accessible to everyone. It could also prove that there were some ambiguities in the measures because in *Collins* the testator managed to sign the will in front of the attorney, it is difficult to understand why the testator failed to use the same process for the witnesses. One can contend that the implementation of interim measures was beneficial in reducing the number of section 14 validation cases, which are often time-consuming and expensive. The people had to adhere to the interim measures while freedom of movement was restricted. Overall, it is important that the New Zealand government implemented

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237 *Estate of Hudson* para 14-15.
238 *Estate of Hudson* para 16-17.

the interim measures and section 14 served as a remedy for people who failed to meet section 11 requirements.

3.6 Conclusion

The chapter explored the formalities required for the execution and amendment of wills. Section 11 of the *NZ 2007 Wills Act* requires the will-maker and witnesses to be physically present, which was impracticable amid restrictions on freedom of movement such as lockdowns, social distancing, and isolation. It was important for individuals to create wills during the COVID-19. This was, however, not easy for individuals living alone or with a competent witness (who is a beneficiary) as they were unable to have witnesses. This made it difficult for them to sign a will in front of two witnesses. The pandemic resulted in temporary adjustments to general will requirements, and these interim measures had advantages and disadvantages. The implementation of the interim measures was beneficial as it promoted flexible provisions for the execution and amendment of wills. However, the interim measures were temporary and had to expire after the pandemic. The role of section 14 does not goes unnoticed as it validated wills that did not comply with section 11 and interim measures. This can however, be regarded as the courts being too lenient.

In conclusion, South Africa can take important lessons from the advantages, disadvantages and aftereffects of the interim measures to plan for measures that will suit South Africa best in the event of another pandemic that restricts freedom of movement. Chapter 4 explores the formalities and interim measures adopted in the United Kingdom to promote the execution and amendments of wills during COVID-19.

Chapter 4: Analysing the formalities and interim measures taken by the United Kingdom

4.1 Introduction

Many individuals execute wills or receive inheritance under wills. The *Wills Act* of 1837 (hereafter the *UK Wills Act*) governs the execution and amendment of wills in the United Kingdom.[239] In the United Kingdom wills are written documents, but in a few instances "privileged" wills are permitted and they can be an oral declaration. It applicable to members of the Military service.[240] A will is ambulatory as it permits the testator to change his mind after the execution of a will, and the consequences are not set in stone. This means that the will can be revoked if the testator has the intention to revoke the will.[241] The law always emphasises testamentary freedom, permitting people to make wills according to their terms. Testator's moral obligations to others are integral to testamentary freedom, as demonstrated in *Banks v Goodfellow*,[242] where the law naturally makes provision for distributing property to those closest to them.

Chapter 3 focused on the formalities in New Zealand for the execution and amendments of wills before COVID-19, the interim measures implemented and the outcomes following the implementation of interim measures. This chapter analyses the formalities for the execution and amendments of wills in the United Kingdom before COVID-19, the interim measures established during COVID-19, and the outcomes following the implementation of interim measures considering the advantages and disadvantages of the interim measures.

The objectives of this chapter are to:

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239 For this study the United Kingdom refers to England and Wales.
240 Section 9 of the *UK Wills Act.*
241 *Re Berger* [1990] Ch 118 at 129. This necessary intention is sometimes called the *animus revocandi.*
242 *Banks v Goodfellow* (1869-70) LR 5 QB 549 at 563.

(i) give an overview of the formalities for the execution and amendment of a will according to the *UK Wills Act;*

(ii) illustrate the how courts apply formalities to case law;

(iii) analyse the interim provisions for will signing during Covid-19;

(iv) discuss advantages and disadvantages of the interim measures; and

(v) analyse the outcomes following the implementation of interim measures

4.2 Testamentary formalities in the United Kingdom

A will must adhere to certain formalities and requirements for it to be valid. These formalities have been defined as matters of substance to be put into a specific form for legal effect.[243] These requirements are found in section 9 of the *UK Wills Act*.[244] Section 9 states that a will must be in a written document, signed by the testator or amanuensis in each other's presence. [245]The signature must be made or attested in the presence of two or more witnesses, and each witness either attests and signs the will or acknowledges it in the testator's presence.[246] No form of attestation is necessary for the will to be valid.

4.2.1 The requirement for physical presence in the United Kingdom

Section 9(c) requires that the testator's signature be made or acknowledged in the presence of two or more witnesses simultaneously.[247] If the testator signs in the presence of witnesses, they merely have to be aware that the testator is signing his will.[248] They are not required to see or understand what the testator is writing. In cases where the will is signed without the witness being present, the testator must acknowledge his signature as his own.[249] The acknowledgment need not be specific

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243 Law Commission, *'Making a will'* Consultation paper 231 72.
244 Section 9 was substituted by the *Administration of Justice Act 1982 (c. 53, SIF 116:5), ss. 17, 73(6)* the new section is not fundamentally different in its requirements.
245 Section 9 of the *UK Wills Act.*
246 Section 9 of the *UK Wills Act.*
247 Section 9(c) of the *UK Wills Act.*
248 *Smith v Smith* (1866) 1 P & D 143.
249 *Pearson v Pearson* (1871) 2 P & D 451.

but the testator's signature should be included.[250] In *Kayll v Rawlinson*,[251] the testator remained silent while the first witness stated that both the testator and the first witness had signed and requested the second witness to sign. This was deemed as a recognition of the testator's earlier signature. The witnesses are not required to see the signature; nevertheless, they must have had the chance to do so.[252] Witnesses are valuable because they serve an evidential purpose, as the validity of a will might be challenged years after it is executed.[253] While three witnesses may offer more protection, the added value is deemed insignificant and outweighed by the difficulties of creating a will.[254] As previously mentioned, when a testator signs or acknowledges a will, two witnesses must be present simultaneously. A line-of-sight test determines what is known as "presence".[255] A will can be declared invalid if the testator acknowledges their signature in front of both witnesses separately.[256] Although locating two witnesses might be challenging, the protective and evidential benefits of having both present simultaneously surpass any difficulty. They can safeguard the testator from undue influence and fraud, and if the will is questioned, each witness can add supporting or challenging evidence.

Section 9(d) of the *UK Wills Act* requires witnesses to either testify to and sign the will or confirm their signatures in the presence of the testator, but it is not necessary for witnesses to sign in each other's presence.[257] Witnesses need not have clear knowledge of the will. If the testator recognises their signature, the witnesses do have to understand that acknowledgment is a legal prerequisite for proper execution.[258] Section 9(d)(i) of the *UK Wills Act* compels a witness to both "attest" and sign the will. However, no kind of attestation is required, and it is uncertain how the requirement for attestation adds to the formalities of a will.[259] According to

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250 *Hudson v Parker* (1844) 1 Rob Ecc 14.
251 *Kayll v Rawlinson* [2010] EWHC 1269 (Ch), [2010] WTLR 1443 19-21.
252 *Re Gunstan* (1882) 7 PD 102.
253 Law Commission, *'Making a will'* Consultation paper 231 p78
254 Law Commission, *'Making a will'* Consultation paper 231 p78
255 *In the Goods of Allen* (1839) 2 Curt 331; *Shires v Glascock* (1688) 91 ER 584; *Casson v Dade* (1781) 28 ER 1010.
256 *Re Groffman* [1969] 1 WLR 733.
257 *Re Benjamin's Estate* (1934) 150 LT 417.
258 *Kayll v Rawlinson* [2010] EWHC 1269 (Ch); [2010] WTLR 1443 18-21.
259 Section 9(d) *of the UK Wills Act.*

Barlow *et al*,[260] "attestations suggest that the testator should sign in the presence of two witnesses, who must then attest to and sign (or acknowledge) their signatures in the testator's presence".[261] If this is the case, attestation does not appear to increase the requirements under section 9(c). The witnesses must intend to attest to the will, although that intent can be demonstrated by simply signing it.[262] Witnesses may acknowledge their signature in the presence of the testator rather than sign in the presence of the testator where there is no statutory requirement for attestation. Section 9 has posed some challenges since the prerequisite that a witness attests and signs the will in the presence of the testator is not met when the witness acknowledges their signature.[263] Section 9 of the *UK Wills Act* assumes that validity issues arise after the testator's death, requiring two witnesses. This is safer than a posthumous will with a single witness but can be registered for authenticity during the testator's lifetime.[264]

4.2.2 Case law asserting the importance of physical presence

In *re Groffman decd,*[265] the testator's widow claimed that the will had been properly executed, while the defendant claimed that the will was not properly executed.[266] The deceased died on 11 April 1967.[267] In 1964, a testator had a will prepared by an attorney and met with his wife and friends to witness it. The deceased and his wife were close family friends of Mr and Mrs David Block and Mr and Mrs Julius Leigh. They met alternately at their respective houses during the summer holidays of 1964.[268] The parties met on 1 September 1964 at the house of Mr and Mrs David Block. The will was purported to have been executed that evening, with Mr Block and Mr Leigh signing as attesting witnesses.[269] The witnesses signed the will in the dining room, but not in each other's presence. The court was satisfied that the

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260 Law Commission, *'Making a will'* Consultation paper 231 37.
261 Law Commission, *'Making a will'* Consultation paper 231 37.
262 *Hudson v Parker* (1844) 1 Rob Ecc 14; *Re Cunningham's Goods* (1860) 4 Sw & Tr 194. 1.1.
263 Law Commission, *'Making a will'* Consultation paper 231 81
264 Law Commission, *'Making a will'* Consultation paper 231 81
265 *In re Groffman decd* 1969 1WLR733
266 *In re Groffman decd* 1969 1WLR733; Simon 1969 The Weekly Law Reports 734.
267 *In re Groffman decd* 1969 1WLR733; Simon 1969 The Weekly Law Reports 735.
268 *In re Groffman decd* 1969 1WLR733; Simon 1969 *The Weekly Law Reports* 735.

269 *In re Groffman decd* 1969 1WLR733; Simon 1969 The Weekly Law Reports 735.

document represented the deceased's testamentary intentions.[270] However, the legal question was whether the will was duly executed because the witnesses did not sign and witness the will the presence of each other. The court applied section 9 of the *UK Wills Act* to determine the validity of the will. The court stated that the testator's signature should have been on the document at the time of acknowledgment, and the witnesses should have had an opportunity to see it.[271] The court found a fatal flaw in this argument, as the witnesses' acknowledgment was not completed in the presence of both witnesses, indicating that there was no completed acknowledgment in the presence of both witnesses.[272] The defendant succeeded in the action and the court declared the will as invalid.[273] The fact that the witnesses did not sign and attest in each other's presence rendered the will invalid.[274]

In *Channon v Perkins*,[275] there was a probate action that revolved around the estate of the late Professor Derek French Channon, who died in 2003. After a serious accident, he suffered irreversible brain damage and was placed in a nursing home in Eastbourn.[276] His children received a copy of the will in dispute and they learned that they would receive only a small share of the residue. In 1995, Professor Channon and his girlfriend, Pamela Ogden, sent a note to their attorney, Mr Mainman, stating that he wanted a will and that his estate should go to Pamela in case of his death. In 1996, Miss Ogden and Channon's wills were questioned by Miss Stoker, who received draft wills and authorisations for property holding.[277] Professor Channon's will, titled "The Will of Derek French Channon," included a revocation clause, nominating executors Mainman and Haywood, and directions for trustees to hold the residuary estate for sale and administrative trusts, with 50% to Miss Ogden and 10% to his children. In this case, four people knew what happened on 9 April 1996 when two wills were purported to have been

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270 *In re Groffman dec*d 1969 1WLR733; Simon 1969 The Weekly Law Reports 735.
271 *In re Groffman decd* 1969 1WLR733; Simon 1969 The Weekly Law Reports 737.
272 *In re Groffman decd* 1969 1WLR733; Simon 1969 The Weekly Law Reports 737-740.
273 *In re Groffman decd* 1969 1WLR733; Simon 1969 The Weekly Law Reports 737-740.
274 *In re Groffman decd* 1969 1WLR733; Simon 1969 The Weekly Law Reports 737-740.
275 *Channon v. Perkins & Ors* [2005] EWCA Civ 1808. (Hereafter referred to as *Channon* case)
276 *Channon* case para 3.
277 *Channon* case para 10-11.

executed.[278] The testator is dead and cannot help, and Mrs Day cannot remember the events of that day and cannot explain how the two ladies came to execute the wills as witnesses. Neither the applicant nor the two witnesses can explain the circumstances in which their signatures occur on Professor Channon's will.[279] In 2004, two attesting witnesses, Mrs Roth and Miss Reilly, were examined orally before Master Moncaster under *Section 122 of the Supreme Court Act 1981*.[280] They maintained their testimony that they had not intentionally witnessed Professor Channon's will, never witnessed him sign a will, and were not in the same room together on April 9, 1996, when the will was claimed to be signed.[281] The court pronounced against the will of Derek French Channon, bearing the date of 9 April 1996, and ordered a grant of letters of administration on intestacy to his children.[282] The court also noted that there was a dress rehearsal of the evidence before Master Moncaster in January 2004, and that the defendants were at a substantial risk in continuing to maintain their case that the will should be admitted to probate[283]. The *Channon v Perkins* case shows the importance of physical presence. The will was declared invalid as the witnesses did not sign in each other's presence.

In *Payne (Deceased),*[284] the appellant is the second wife of the deceased and a beneficiary under his will. She appealed a decision that the will had not been properly attested and the deceased was to be treated as having died intestate.[285] The deceased had made two wills, one in 1998 and the other in 2012. The 1998 will appointed the appellant as executor and bequeathed most of the estate to her. "The deceased had written his name in a space reserved for his signature, underneath his name were spaces for two witnesses to each write their names, addresses, and occupations".[286] There was no separate space designated the witnesses to sign their

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278 *Channon* case para 10-18.
279 *Channon* case para 19-24.
280 *Channon* case para 6-8.
281 *Channon* case para 8.
282 *Channon* case para 33-42.
283 *Channon* case para 56-63.
284 *Payne v Payne* 2018 EWCA [2018] EWCA Civ 985. (Hereafter referred to as *Payne case*)
285 *Payne case* para 1-3.
286 *Payne case* para 1-3.

signature. Consequently, there were no witness signatures in the sense in which that word is commonly understood.[287]

The 2012 will appointed the respondents as executors, the appellant alleged that the 2012 will was not validly executed. The respondents issued proceedings seeking proof in solemn form.[288] The judge concluded that neither will was valid. With regards to the 2012 will, she found the respondents unreliable witnesses so any presumption of due execution that might otherwise have arisen was displaced.[289] Concerning the 1998 will, she noted that the appellant had produced neither the original will, nor statements from either witness as to the circumstances in which it was executed.[290] She considered that merely filling in the names of the witnesses in capital letters did not satisfy the need for the will to have been "signed", and that as neither witness had been called to give oral testimony, there was insufficient evidence of the will being properly attested[291]. At the instant hearing, one of the witnesses gave oral evidence of being present at the deceased's house with the deceased's wife and another friend of theirs whom he did not know.[292] He explained how they sat around a table for the purpose of executing the 1998 will, how the deceased signed it first, and then how he and the other witness filled in their details in the appropriate places on the form.[293]

The judge reached her decision without seeing the original and in the knowledge that the appellant wished to adduce fresh evidence from the two attesting witnesses.[294] She should have appreciated that the issue could not otherwise be justly resolved. The principles in *Ladd v Marshall*[295] did not exist in a straitjacket; sometimes the overriding object had to prevail, even where the evidence could and should have been obtained before trial. She should have insisted upon hearing

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287 *Payne case* para 4-6.
288 *Payne case* para 7-10.
289 *Payne case* para 11.
290 *Payne case* para 11-14.
291 *Payne case* para 35-44.
292 *Payne case* para 35-44.
293 *Payne case* para 45-48.
294 *Payne case* para 44-51.
295 *Ladd v Marshall* [1954] 1 WLR 1489 (CA).

evidence from at least one witness.[296] However, the conclusion was that the court invalidated both the wills.

In summary, physical presence plays a fundamental role in the signing of wills. The case law serves as precedence of how the master strictly applies the formalities. Physical presence should not be taken lightly when adhering to the formalities.

4.3 Interim measures put in place due to COVID-19 restrictions

In March 2020, UK Prime Minister Boris Johnson advocated against non-essential travel, working from home, and attending social events.[297] On 20 March 2020, schools closed, and so did pubs, restaurants, nightclubs, and movie theatres. The first formal lockdown was declared on 23 March 2020, with limitations on shopping, outdoor exercise, and non-essential stores, libraries, houses of worship, and playgrounds.[298] The government did not declare a state of emergency, but they put emergency measures in place. The *Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, also known as the Lockdown Regulations* (hereafter referred to as the *UK Order*), was a statutory instrument UK enacted in response to the COVID-19 pandemic, limiting freedom of movement and business closures.[299] During the COVID-19 pandemic, an increased number of individuals wanted to draft wills, but for those shielding or self-isolating, it was exceedingly difficult to follow the standard laws of drafting a will, which includes having it witnessed by two persons.[300] The UK's legislator swiftly modified will-making regulations to accommodate the pandemic, despite the longevity of traditional testamentary formalities.[301] A literature review revealed numerous articles from other jurisdictions, urging lawmakers to adopt the changes made to the UK's Wills Act.[302]

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296 *Payne case* para 44-51.
297 Finns 2022 https://inews.co.uk/news/covid-when-start-how-coronavirus-pandemic-started-reach-uk-timeline-explained-1413316.
298 Finns 2022 https://inews.co.uk/news/covid-when-start-how-coronavirus-pandemic-started-reach-uk-timeline-explained-1413316
299 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 No. 350.
300 "Guidance On Making Wills Using Video-Conferencing". GOV.UK, July 25, 2020. https://www.gov.uk/guidance/guidance-on-making-wills-using-video-conferencing
301 Kuek et al 2022 *Hasanuddin Law Review* 212.
302 Kuek et al 2022 *Hasanuddin Law Review* 212.

4.3.1 Provisions for will signing using audio-visual links

As a reform measure to address issues arising from COVID-19, the UK government amended section 9 of the *UK Wills Act*. The *UK Order* came into effect on 28 September 2020, and it amended section 9 of the *UK Wills Act* to include "presence" *via* videoconference or other visual transmission for wills made on or after 31 January 2020, and before 31 January 2022.[303] This enabled testators to sign a will or codicil in front of two or more witnesses using video conferencing platforms like Zoom, Google Meet, WhatsApp Video Call, and others.[304] The amended *UK Wills Act* only allowed for video witnessing of wills, which necessitated at least two separate video conferences: observing the testator signing the will and witness attestation.[305] The document signed in the UK necessitated at least two separate video conferences, as the testator's document had to travel to the first witness.[306] This exemption of the requirement is confined to witnessing a will and does not apply to anyone authorised by the testator to sign the will in the testator's presence. This prohibition was intended to avoid fraud that may occur if the testator does not have control of the will.[307] The *UK Order* is retroactive, which means that wills made by video conference as early as January 2020 will be regarded as meeting the physical presence criteria.[308] It is important to note that the changes are not permanent; they are valid until 31 January 2022. This amendment applies to wills made between January 31, 2020, and January 31, 2022, although it does not affect any grant of probate or anything done in accordance with a grant of probate before its effective date.[309] The new definition of" presence" is confined to seeing the will and does not apply to instances in which someone other than the testator signs the will in the

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303 Section 2(3)(2) *of the UK Order*.

304 Explanatory Memorandum to The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020", The 221 Law Society, 2020 https://communities.lawsociety.org.uk/download?ac=93720.

305 Explanatory Memorandum to The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020", The 221 Law Society, 2020 https://communities.lawsociety.org.uk/download?ac=93720) (hereafter referred to as The Explanatory Memorandum).

306 The Explanatory Memorandum.

307 Kuek et al 2022 Hasanuddin Law Review 221.

308 Kuek et al 2022 Hasanuddin Law Review 221.

309 The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020 explanatory note

testator's presence and under their instruction.[310] The *UK Order* allowed for the use of video conferencing facilities for the execution of wills and other types of "visual transmission". The government went further to explain that this relaxation applies to videoconferencing and visual transmission[311] and is confined to Skype, Zoom, WhatsApp video calls, FaceTime, and other video calling services.[312] This clarification is critical to prevent creative individuals from claiming that taking a photo or film of witnessing constitutes "visual transmission" and necessitates actual presence.[313]

4.3.2 UK Minister of Justice Guidance on the execution of wills in light of the UK Order

The Minister emphasised that the *UK Order* applies to wills made since 31 January 2020, except in cases where a grant of probate has already been issued.[314] It can be shortened or extended if necessary and codicils must satisfy the same signing and witnessing rules as wills.[315] *UK Order* required a "clear line of sight" for a witness to witness the will-maker signing, particularly during the pandemic. This can be accomplished using a variety of methods, including a window, corridor, or outdoor location. The *UK Order* applies to wills that are video-witnessed, requiring the person making the will and their two witnesses to have a clear view of the signature.[316] The type of video-conferencing device used was irrelevant, as long as the will-maker and witnesses had a clear line of sight.[317] Pre-recorded videos were not permitted, and the will-maker had to be acting competently and without undue

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310 The Explanatory Memorandum
311 Video conferencing provides transmission of static images and text between two locations. Visual transmission refers to the conveyance of information or message through visual elements.
312 Guidance On Making Wills Using Video-Conferencing GOV.UK
313 Elisabeth Squires 2020, https://brittontime.com/2020/10/20/how-has-covid-19-affected-the-wills-act-1837.
314 Guidance On Making Wills Using Video-Conferencing GOV.UK
315 Guidance On Making Wills Using Video-Conferencing GOV.UK
316 Guidance On Making Wills Using Video-Conferencing GOV.UK
317 Guidance On Making Wills Using Video-Conferencing GOV.UK

influence. [318]The entire video-signing and witnessing process had to be recorded and saved to aid a court in cases where a will had to be challenged.

The Minister of Justice went into detail to explain the process. Signing and witnessing a will via video-link includes multiple steps. The first stage requires the individual to make the will to ensure that their two witnesses can see them, each other, and their acts.[319] The will-maker or witnesses had to request that the process of executing the will is recorded, and the will-maker had to present the first page of the will document in front of the camera to demonstrate to the witnesses.[320] By law, witnesses must see the will-maker (or someone signing on their behalf) sign the will, not simply their head and shoulders.[321] If the witnesses do not know the person making the will, they should request proof of the individual's identity. The second stage required the witnesses to prove their capacity to see, hear, recognise, and understand their part in witnessing the signing of a legal document.[322] Ideally, they had to be physically present with each other; however, if this is not feasible, they had to be present simultaneously via a two or three-way video link. The will should then be taken to the two witnesses and signed within 24 hours.[323] A longer amount of time between the will-maker and witnesses signing the will may be inevitable, but they had to keep in mind that the longer this procedure lasts, the more likely complications will be to occur.[324] A will is completely recognised only if the testators (or someone acting on their behalf) and both witnesses sign it and either witness the signing or acknowledge their signature to the testator.[325] The next step was for the two witnesses to sign the will documents, which normally involves the testator seeing both witnesses sign and acknowledging that they saw them sign. Both sides had to be able to observe and understand what was happening.[326] The witnesses had to present the will to the will-maker to

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318 Guidance On Making Wills Using Video-Conferencing GOV.UK
319 Guidance On Making Wills Using Video-Conferencing GOV.UK.
320 Guidance On Making Wills Using Video-Conferencing GOV.UK.
321 Guidance On Making Wills Using Video-Conferencing GOV.UK.
322 Guidance On Making Wills Using Video-Conferencing GOV.UK.
323 Guidance On Making Wills Using Video-Conferencing GOV.UK.
324 Guidance On Making Wills Using Video-Conferencing GOV.UK.
325 Guidance On Making Wills Using Video-Conferencing GOV.UK.
326 Guidance On Making Wills Using Video-Conferencing GOV.UK.

demonstrate that they were signing it, and then sign it. In cases where the two witnesses were not physically present when they signed, step 4 had to be repeated to ensure that both the will-maker and the other witness could see and follow what was going on.[327] Professional groups, such as the Law Society and STEP[328], were expected to provide their advice to their members regarding this procedure.

4.4 Advantages and disadvantages of the UK Order

4.4.1 Advantages of the UK Order

The *UK Order* recognised the need to minimise the risk to the predominantly elderly clients writing wills.[329] "*The UK Order* was important because it dates back to January 2020 and clearly outlines how video conferencing technologies can be used to solve some of the issues that COVID-19 brought to the fore". The government left no room for ambiguities because the Minster released guidance explaining that the legislation intended to limit the relaxation of the rules to include only Skype, Zoom, WhatsApp video call, FaceTime, and other video calling services. The guidance provided detailed step-by-step instructions on how the will should be signed using video-witnessing. The guidance prevented fraudsters from using pre-recorded videos. The *UK Order* explicitly did not affect any grant of probate, or anything done under a grant of probate before the order came into force. Wills created during the amendment act remain valid.

4.4.2 Disadvantages of the UK Order

The disadvantage of the *UK Order* lies in the delivery of the will to the witness. The UK Order took time be enacted, the order did not consider technological delays, screen freezing. It also did not explain the virtual witnessing process, which lacked confidentiality. The *UK Order* required that a testator's will be transmitted to witnesses for signing, which was delayed by local lockdown restrictions. "The

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327 Guidance On Making Wills Using Video-Conferencing GOV.UK.

328 "STEP is a global professional body, comprising lawyers, accountants, financial advisors and other practitioners that help families plan for their futures" Anon date unknown https://www.step.org/about-step.

329 Squires 2022 https://brittontime.com/2020/10/20/how-has-covid-19-affected-the-wills-act-1837/.

guidance by the government of the United Kingdom stated that the wills must be delivered to the witnesses within 24 hours of the testator signing the will". This was clearly a challenging task considering the implementation of the movement restriction.[330] The document's trip had to be meticulously documented, and the testator's mental ability could be compromised during the wait. Wills were often disputed before to lockdown for reasons such as a testator's lack of mental competence and improper influence. The *UK Order* legislative was not in force until September due to Parliament's need for them to be laid before Parliament.[331] The *UK Order* was designed as a last option, with the will being re-executed using the traditional method if feasible. The guidelines were sensitive to possible abuse and offered protections for witnessing via pre-recorded video. The government did not put measures in place in case of technological delays, screen freezing, and interference with the will's content. The *UK Order* sought to strike a balance between formality protection and flexibility, but critics thought that it was pointless. The Minister's guidance was more comprehensive than the *UK Order*. The *UK Order* had three headings, Citation and Commencement, Amendment of the Wills Act 1837, and Saving Provision, neither of which explains the process of signing of wills. This raises the question of the legal status and enforceability of the Guidance. It is important to highlight that with the virtual signing of a will comes certain confidentiality concerns as the witness are able to read the contents of the will. The Order does not explain if all the various stages should be recorded, and it is uncertain who will be responsible for the upkeep of the recordings.

4.5 Outcomes following the implementation of the interim measures

One can conclude that the *UK Order* was successful in explaining the process as the Minster went the extra mile to explain the witnessing process. It is, however, impossible to assess the success of the order because there have not been cases in which the court granted probate to wills that were executed during the *UK Order*.

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330 Sloan 2020 https://www.law.ox.ac.uk/research-and-subject-groups/property law/blog/2020/08/witnessing-law-reform-coronavirus-era.

331 Sloan 2020 https://brittontime.com/2020/10/20/how-has-covid-19-affected-the-wills-act-1837/.

This could mean that the cases are still yet to be probated because granting probation takes time. The most effective way to measure the success of an amendment would be to see is if there many cases due to the ambiguity of the *UK Order*. Many cases would equate to failure of the *UK Order* because then most people would have failed to execute wills regardless of the Order. As mentioned above, there have not been cases, which could mean it was a success, or it could mean that grant probate cases are just difficult to access. UK wills probate is not easily accessible. Some companies even search for probated cases and charge people for it.

There are currently no condonation or statutory dispensing powers in the UK, which is why the court cannot state if there had been cases that did not comply with the Order or if there was any ambiguity with the Order. A dispensing power is defined as "a statutory power to uphold expressions of testamentary wishes in alternative formats or that do not comply with all the formal requirements of a will but where the testator's intentions are clear."[332] The dispensing powers for distributing wills in England are broader than *UK Order* enacted during COVID-19. It is important to note that the UK needs dispensing power because the UK Wills Act does not currently validate or condone wills that do not meet the requirements. This means all the wills executed during or prior to COVID-19 that did not meet the requirements of the Order will be regarded as invalid. In cases where a beneficiary or spouse attests the will according to section 15 of *the UK Wills Act,* the witness will be disqualified from inheriting, there is no provision put in place to enable the witness to inherit again. *The UK Order* solved part of the problem as one can argue that there should be other means to validate a will that was not formally executed during COVID-19. Some people may not have been able to afford the technology or may have been of an age where they could not understand the technological process, there could have been technological problems like screen freezing.

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[332] Chauhan "To Dispense or Not to Dispense, that is the Question…" 1-7.

4.6 Conclusion

This chapter aimed to analyse the measures implemented by the UK. In *re Groffman decd* the court declared a will invalid because it was not clear if both witnesses signed the will in each other's presence. In *Channon v Perkins* the witnesses claimed to have never seen the will and were definitely not in the same room the day the will was signed. In *Payne v Payne* the court invalidated both wills that executed by the deceased. With the 1998 will, there were no statements from the witness to attest that they had signed the will in each other's presence. With the 2012 will the court found the witnesses unreliable. These cases highlight the importance of physical presence. The lack of physical presence can result in a will being invalidated.

It is clear that the restriction on freedom of movement posed difficulties in the execution and amendments of wills as mentioned in paragraph 4.3. The government enacted the *UK Order* to counter the rise in probate litigation due to an increased number of intestate deaths. The interim measures promoted the signing and attesting of wills by people without exposing them to the pandemic. Although the *UK Order* was temporary, the wills that were executed or amended in accordance with the amended Wills Act remained valid. The *UK Order* did not provide provisions for a will that still met the formalities regardless of the *UK Order* being in place. South Africa can take many lessons from the advantages and disadvantages of the *UK Order*. Chapter 5 summarises the key findings, lessons, and recommendations.

Chapter 5: Conclusion

5.1 Introduction

The purpose of the study was to answer the research question. This chapter takes a functional approach to the different jurisdictions to take lessons for South Africa since it did not put any measures in place for the signing of wills during a pandemic were freedom of movement was restricted. The Wills Acts of South Africa, New Zealand, and the United Kingdom are all influenced by English Law. The formalities for the execution and amendment of wills in all jurisdictions are the same, with physical presence being of great essence. The COVID-19 pandemic changed the world, forcing lockdown restrictions on all three jurisdictions. The lockdown restrictions affected the right to freedom of movement, which made it difficult for people to sign wills in the presence of each other. The three jurisdictions all took different approaches concerning provisions facilitating the execution and amendment of wills. The research conducted aimed to address the following research question: What lessons can South Africa take from the measures implemented by the United Kingdom and New Zealand in facilitating the execution and amendment of wills during the COVID-19 pandemic in anticipation of possible future pandemics where people's freedom of movement is restricted? This chapter summarises the findings and lessons in Chapters 2, 3, and 4, and follows with recommendations and a conclusion.

5.2 Summary of key findings and lessons that South Africa can take from the implemented measures

Chapter 2 focused on the testamentary formalities regarding the signing of wills in South Africa, examining the implications stemming from the lack of legislative measures concerning the signing of wills by the South African government during the COVID-19 pandemic. The aim was to understand the formalities for the execution and amendment of wills in South Africa. The point of departure was to analyse the importance of physical presence in the execution and amendments of

wills. From this discussion, it became evident that physical presence is important or the execution and amendment of wills. This can be seen in the *Lauson case, Froud case, Twine case,* and *Roux case*. In all these cases the wills were invalidated because the witness did not sign the will, or the witness did not sign in each other's presence. In other words, the wills were invalidated due to a lack of compliance with the testamentary formalities as prescribed in section 2 of the *SA Wills Act*.

South Africa failed to put in place measures for the signing of wills during the COVID-19 pandemic. This means that for some people, circumstances made it challenging to validly execute or amend a will during the COVID-19 pandemic. People could not validly execute and amend wills due to certain restrictions on freedom of movement. This made the execution and amendment of wills difficult, specifically with respect to the witnessing of wills in each other's presence. The *Roux case* serves as an illustration of the implications of the lack of provisions. The testator passed away without executing his will. When the case was brought to court it was for the amendment of the draft will. The court could not condone the will under section 2(3) because the will was drafted by a third party and therefore did not reflect the true testamentary intentions of the deceased. This case could be the beginning of many similar cases because most South Africans are laypersons when it comes to the execution and amendment of wills. This means that most South Africans rely on attorneys for the executions and amendment of wills. These events prove the importance of interim measures. The lack of provisions for the signing of wills will result in many condonation cases.

Chapter 2 showed that by not putting measures in place, the courts violated individuals' right to freedom of testation. Many testators' testamentary wishes will not be taken into account because the testator did not draft the will himself. In instances where the testator did draft the will, there is a possibility that it will be condoned, but not it was drafted by a third party. The courts should note that the lack of formalities was not intentional, the restrictions on movement made the execution of wills difficult.

Chapter 3 focused on analysing the formalities and interim measures taken by New Zealand and assessing both the advantages and challenges of these legislative measures. The aim was to understand the importance of testamentary formalities and interim measures in New Zealand. The point of departure was to analyse the importance of physical presence in the execution and amendments of wills, the significance of the interim measures, and lessons that South Africa can take from the implemented measures. From this discussion, it became evident that physical presence is important in the execution and amendment of wills. The importance of physical presence is asserted in the cases *re Colling, re Harvey, Parata v Parata,* and *Estate of Drury.* In all of these cases the wills were invalid due to lack of physical presence. Even though some of the cases were validated by section 14 of the *New Zealand Act,* they were first declared invalid.

The interim measures were pivotal as they facilitated the execution and amendment of wills during a time when freedom of movement was restricted. The lesson that South Africa can take from the implemented measures is that the interim measures provided convenience and flexibility for will-makers, allowing them to sign wills at home during the restrictions. These measures also cleared uncertainties and made wills valid, reducing disputes and ambiguities. The implementation of the interim measures demonstrated the adaptability of law, with testators quickly adapting to electronic will signing, demonstrating adaptability in case of future pandemics. However, South Africa can also learn that the interim measures for remote will signings have faced criticism for not ensuring identical copies of the original document and affecting confidentiality. Witnesses had access to the full will, potentially leading to privacy breaches and potential fraud. The *EPA* did not specify if recording remote virtual witnessing is required, but the Law Society of New Zealand recommended recording for evidential purposes. The measures were temporary and often lacked clarity on established laws, and virtual witnessing was not explicitly provided for in existing wills. The exact requirements of the link to used were unclear, with uncertainty about live or real-time links. It is important to recognise that even though the interim measures were enacted, section 14 played a fundamental role. Section 14 aims to validate wills that do not meet section 11

requirements, allowing the Court to declare wills that do not comply with the formalities valid. However, some individuals still failed to validly execute their wills, raising concerns about the court's leniency.

Chapter 4 examined the formalities and interim steps taken by the United Kingdom, weighing the benefits and drawbacks of these legislative measures. The goal was to explore the significance of wills and interim measures in the United Kingdom. The starting point was to examine the value of physical presence in the execution and amendment of wills, the significance of interim measures, and the lessons that South Africa may learn from the implemented measures. The discussion highlighted the importance of physical presence in the execution and amendment of wills. The following instances demonstrate the relevance of physical presence in the execution and amendment of wills: *Channon v Perkins,re Groffman decd* and *Payne (Deceased).*

The interim provisions were critical because they enabled the execution and amendment of wills during a period when freedom of movement was limited. South Africa can learn the following lessons from the adopted measures: The *UK Order*, enacted in January 2020, reduced the risk of the elderly being exposed to the COVID-19 virus. It clearly outlined the process for signing wills using video-witnessing and prevented fraudsters from using pre-recorded videos. However, the *UK Order* mandated that wills be delivered to witnesses within 24 hours of signing. This was a challenging task due to the need for meticulous documentation. The Order was not in force until September, and while it sought to balance formality protection and flexibility, critics criticised it for being pointless. The Minister's guidance was more comprehensive, but it did not explain the process of signing wills, raised legal questions, and raised concerns about confidentiality and recording upkeep. It is important to note that as much as the UK put measures in place, there is still a need for statutory reform because there is currently no statutory dispensing power in the UK, which is needed to validate wills that do not meet the *UK Order's* requirements. There are measures to facilitate the execution and amendment of wills but there are no measures to condone wills that do not meet the formal requirements.

5.3 Recommendations

This research aimed to identify lessons South Africa can take from the measures implemented by the United Kingdom and New Zealand in facilitating the execution and amendment of wills during the COVID-19 pandemic, in anticipation of possible future pandemics where people's freedom of movement may be restricted. From the analyses, it is clear that South Africa should implement interim measures in the event of another pandemic. It will be advisable to use both the approaches of the United Kingdom and New Zealand, as they both had advantages and disadvantages. South African can take lessons from the advantages and disadvantages. Video witnessing was successful in the United Kingdom and New Zealand. As much as it had flaws, it facilitated the signing of wills reducing case law on the validation of wills.

The legislature can start by perfecting measures to suit South Africa best while anticipating possible future pandemics where people's freedom of movement may be restricted. This can be achieved by educating people about executing wills. The first step will be to create a website specifically for the execution of wills. The Minister of Justice can upload guidance explaining normal procedures and virtual execution and witnessing of wills so that people can familiarise themselves with the processes. The government does not need to wait for another pandemic to take action.

The government can also look into legalising a "do it yourself will kit" to be used in times where freedom of movement is restricted as the enactment of interim measure could take time. The "do it yourself will kit" can be condoned under section 2(3) if proved that it was the testator that drafted the kit. The legislator can also amend the *SA Wills Act* to include audio and visual links in the definition of "sign" to ensure the practicality of setting up a valid will. The current definition in the *SA Wills Act* only allows initials and marks, but a possible amendment could include audiovisual links for testators and witnesses. This would allow for alternative methods of signing and witnessing documents. The interim measures implemented

by The United Kingdom and New Zealand serve as a lesson that virtual signing using audio or video links is achievable.

Section 2(3) also need reform. Faber[333] suggested that an act-based model, rather than the section 2(3) requirements, is the best method to address the testator's intention in the South African Law of Succession. This approach has the potential to improve the legal position established in *Bekker v Naude*[334] by guaranteeing that the decision to condone or not condone is based on whether the document expresses the deceased's intention rather than who drafted it. It is supported by the processual view of a will as a product of a will-making process and the introduction of an intent doctrine in South African law of succession.[335]

5.4 Conclusion

In summary, the significance of a valid will cannot be overstated. Without a valid will, estate planning is futile. It is clear from the study that the requirement of the physical presence of the testator and the witnesses is of paramount importance. Physical presence has been a hindrance for the testators to legally execute their last wishes. In South Africa, during a time when freedom of movement was restricted, physical presence was still required for one to witness a will. As discussed above, the government should learn from the lack provisions and also take lessons from the measures implemented by the United Kingdom and New Zealand.

333 Faber 2022 Uncertainty *PERJ* 25(1).
334 *Bekker v Naude* 2003 5 SA 173 (SCA).
335 Faber 2022 Uncertainty *PERJ* 25(1).

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