Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN] **[REPORTABLE]**

Case no: 16108/19

In the matter between:

J W	Applicant
and	
DAVID HOWARD WILLIAMS-ASHMAN N.O (in his capacity as executor of the estate late NW)	First Respondent
MASTER OF THE HIGH COURT, GAUTENG DIVISION JOHANNESBURG	Second Respondent
J C	Third Respondent
I N F	Fourth Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	Fifth Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Sixth Respondent
MINISTER OF JUSTICE & CORRECTIONAL SERVICES	Seventh Respondent

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JUDGMENT DELIVERED ON 28 APRIL 2020

SHER, J:

1. Section 2B of the Wills Act[1] provides that if a person dies within 3 months after they were divorced or their marriage was annulled, any will which they executed prior to such divorce or annulment must be given effect to as if their former spouse had died before such dissolution, unless it appears from the will that they intended their spouse to benefit notwithstanding it.
2. In essence, in circumstances where it applies the provision disinherits the former spouse and results in their inheritance devolving by way of intestate succession on the testator's heirs, instead of to them in terms of any disposition which was made in their favour in the will.
3. Although the provision came into operation some 28 years ago [2] and is one which is found in similar form in many international jurisdictions including many states in the USA, as well as in the UK, New Zealand and a number of states in Canada and Australia, it is still not one which many people in this country are aware of.
4. The applicant seeks an order declaring that the provision is inconsistent with the Constitution, primarily on the grounds that it conflicts with s 25(1) thereof and is contrary to public policy. He also submits that it offends the provisions of s 34 of the Constitution. The application is opposed by the parents of the applicant's late wife (third and fourth respondents) as well as by the Master of the High Court (second respondent).

The relevant facts

5. The applicant is the former spouse of the late NW. The parties were married to one another out of community of property and subject to the accrual system, on 11 June 2011. Some 4 days before their marriage NW executed a will in which she bequeathed her entire estate to her 'husband' ie the applicant and appointed the first respondent, her attorney, as executor.
6. In 2015 the parties sought marriage counselling and a year later, some 5 years after their marriage, they separated and the applicant instituted divorce proceedings.

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[1] Act 7 of 1953.
[2] On 1 October 1992, by way of s 4 of the Law of Succession Amendment Act 43 of 1992.

7. In August 2016 the parties signed a ‘consent paper’ in terms of which they acknowledged that their marriage had broken down irretrievably and that there was no reasonable prospect of it being saved, and recorded their agreement in relation to the proprietary consequences which should follow in respect of their assets, on divorce.
8. In this regard, as far as their fixed assets were concerned they agreed that an immovable property in Greenside, Johannesburg which was registered in the name of NW should remain hers and an immovable property in Edgmead, Cape Town which was jointly registered in their names should be awarded to the applicant. They further agreed that a farm in Oudtshoorn and a flat in Cape Town which was held by a trust which they had established was to be awarded to the applicant and to NW respectively.
9. As far as their other assets were concerned they agreed that a 30% shareholding which NW held in a manufacturing business which was operated by the applicant should be transferred to him, as well as a Toyota Land Cruiser which was registered in NW’s name, whilst she was to keep an Audi which was registered in her name.
10. In addition, the applicant agreed to transfer an amount of R 332,000 to NW whilst the proceeds standing to the credit of a joint investment account which the parties held was to be split equally between them, as were their household effects and furniture.
11. According to the applicant the terms of this settlement were negotiated amongst the parties without legal assistance.
12. On 20 September 2016 the divorce came before the regional magistrate of Cape Town on an unopposed basis and a month later, on 24 October 2016, a final decree was issued which incorporated the provisions of the consent paper.
13. On 18 October ie about a week before the decree of divorce was issued NW sent the applicant an email in which she enquired whether he had changed his will, or whether their agreement that they would leave their assets to one another in the event of their death still stood. She repeated that this was her wish, to her former bridesmaid, shortly before her death.

14. I point out that although the applicant also made a will on 7 June 2011, in it he bequeathed his estate to the children of his former marriage, and not to NW. Given the contents of her email it appears that NW was under the impression that in his will the applicant had provided that she was to inherit his estate in the event of his death.

15. The applicant did not reply to this email and avers that in a subsequent telephonic conversation which he had with NW he informed her that notwithstanding their divorce their wills would remain 'the same'.

16. After they were divorced the parties continued to remain in regular contact with one another. The last communication which the applicant had with NW was at the end of November beginning December 2016, when she indicated that she wanted to move to his farm, a request which he was not amenable to as she was living on her own.

17. From 5 December 2016 onwards NW failed to respond to the applicant's cellphone messages and telephone calls. Over the course of the next few days he made enquiries of her friends and family members but none of them had heard from her. On 8 December he asked a friend to check on her, at which time it was ascertained that she had committed suicide. The death certificate records her date of death as 8 December 2016 ie within a period of less than 3 months from the date of the divorce.

18. In the circumstances the provisions of s 2B became applicable. The effect of this is that NW is to be considered as having died intestate, and by virtue of the relevant provisions[3] of the Intestate Succession Act [4] her parents would inherit her estate in equal shares, as there were no children born of the marriage.

19. In his founding affidavit the applicant said that NW had previously attempted to commit suicide in 2013 and again in 2014, and in 1991 she had been diagnosed with a bipolar mood disorder, and over the course of many years both before as well as during their marriage she had been treated by a number of psychologists and psychiatrists for this condition as well as for a range of other disorders

[3] S 1(1)(d)(i).
[4] Act 81 of 1987.

including anxiety and depression, which he alleged arose out of trauma she had sustained during her childhood due to emotional, psychological and sexual abuse she had suffered at the hands of various family members.

20. Third and fourth respondents objected to these allegations and the inclusion by the applicant of a number of deeply personal and extremely private letters which NW had written over the course of a number of years, which appeared to constitute the primary source from which these allegations were derived, and they made application for this material to be struck out, on the grounds that it was irrelevant and inadmissible.

21. They complained that these allegations were scandalous and vexatious and pointed out that some of the more egregious of them had been retracted by NW in further letters which she had written, in which she had declared that they were untrue, which letters the applicant had not included amongst the documents which he annexed to the founding papers.

22. The respondents averred that the contents of the documents which the applicant had annexed in support of these allegations not only breached the patient-doctor confidentiality which had existed between NW and her treating practitioners but, in addition, largely constituted unadulterated hearsay (not only because they emanated from NW but also because many of the practitioners from whom some of the information had been obtained had not been identified), and the allegations could thus not possibly be dealt with or refuted, if they were allowed to stand.

23. The applicant sought to justify the inclusion of this material (which was voluminous and which took up a good deal of his founding papers) on the basis that the respondents had only objected to some of it and much of it was not hearsay as it pertained to facts or circumstances which he had personally experienced, and was in any event not being presented for the truth thereof but rather because it constituted a ‘manifestation’ of NW’s subjective experiences and ‘struggles’ throughout her life, and demonstrated the unfortunate effect which the statutory provision had on him as a person. The applicant contended that, as a result, in a broad sense the material was relevant to the underlying issues which underpinned the constitutional challenge.

24. In my view the respondents are correct when they say that the inclusion of this material was inappropriate and irrelevant and was little more than an ill-disguised attempt to paint them as abusive and neglectful parents, and as such amounted to an attack on their character and reputation, as well as that of the broader family. That this was in fact the motive for including this material is evident from paragraph 44 of the founding affidavit where, after highlighting some of the more egregious incidents of abuse which NW was said to have suffered, the applicant alleged that whether or not such incidents were true was irrelevant, as NW believed them to be so, and consequently the persons who perpetrated these believed injustices were not persons who she wished should benefit on her death, and demonstrated that the operation of the statutory provision against the applicant would therefore lead to an 'unjust' result.

25. In my view, even if it could be said that it would be 'unfair' for third and fourth respondents to inherit by way of intestate succession (which it is common cause would be the effect of the Court upholding the contention that s 2B revokes any disposition which was made in NW's will in favour of the applicant), almost all of this material (which includes personal and disturbing musings pertaining to NW's childhood and a short and unhappy previous marriage which she entered into when she was 21 years old)- save for some background circumstances which formed a necessary part of the narrative which needed to be told, is wholly irrelevant to the issues which I am called upon to decide and should never have been included.

26. It does not have any direct bearing on the legal question of whether or not s 2B is unconstitutional or contrary to public policy, and if it is allowed to stand it would be extremely prejudicial to the respondents and affect their standing and reputation in the community, as well as that of other family members, and as such it must be struck out. The Order which I propose making in this regard appears at the end of this judgment.

The historical origins of the provision

27. S 2B was introduced into the Wills Act pursuant to the final recommendations which were made by the SA Law Commission in June 1991[5] following an exhaustive review which it conducted into the SA law of succession over a period of some 6 years between 1985 and 1991, which focused both on intestate succession as well as on the formalities pertaining to, and the alteration and revocation of, wills.

28. The Commission pointed out that since 1969 an increasing number of countries had introduced legislation which provided for the revocation, either wholly or in part, of a prior will which had been made by a testator who subsequently divorced or whose marriage was annulled, following upon similar studies which had been conducted by law reform bodies in a number of jurisdictions.[6]

29. The first of these statutory reforms occurred in the USA in 1969 when s 2-508 of the Uniform Probate Code (UPC) was adopted at a 'national' level, and was later adopted incrementally in a number of states.[7] It provided that a divorce or annulment would revoke any disposition of property which was made in a prior will to a former spouse[8] unless the will expressly provided otherwise, and any property which was prevented from passing to the former spouse by virtue of

[5] In its final report into the review of the law of succession (Project 22), June 1991.

[6] The principal ones which the Commission had regard for were the reports which were prepared by the Ontario Law Reform Commission in 1977 ('*Report on the impact of divorce on existing wills'*), the 22nd report of the Law Reform Committee of the United Kingdom in 1980 ('*The making and revocation of wills'*), report 47 of the New South Wales Law Reform Commission in 1986 ('*Community Law Reform Programme: Wills-Execution and Revocation'*), and Consultative Memorandum 70 of the Scottish Law Commission in 1986 ('*The making and revocation of wills')*. In addition, the Commission also considered the British Columbia '*Report on the making and revocation of wills*' (1981) and the 44th report of the Law Reform Committee of South Australia (1977) relating to the effect of divorce on wills.

[7] The provision was adopted by the National Conference on Uniform State Laws and the American Bar Association before being adopted in a number of states, including Alaska, Arizona, Colorado, Florida, Idaho, Minnesota, Montana, Nebraska, New Mexico, New York, North and South Dakota and Utah. The Californian Probate Code also currently provides (S 6122) for the revocation on divorce or annulment of any testamentary disposition of property which was made to a former spouse, unless the will expressly provides otherwise. Prof N Cahn of the George Washington University Law School reports in her article in the Iowa Law Review 'Revisiting Revocation upon Divorce' (2018) ILR Vol 103:1879 at 1887 that virtually all states in the USA now have explicit revocation on divorce statutes.

[8] As well as any nomination of the former spouse as executor, trustee, 'conservator' or guardian.

such revocation would pass as if the former spouse had failed to survive the decedent ie as if he or she had predeceased the testator.[9]

30. Similar provisions were introduced in Ontario[10] and New Zealand[11] in 1977, in British Columbia in 1979,[12] Saskatchewan[13] and Queensland[14] in 1981 and Manitoba[15] in 1982.

31. In 1983 the UK Wills Act of 1837 was amended [16] to provide that the prior will of a testator in the UK who had been divorced or whose marriage had been annulled was to take effect as if the appointment of his/her former spouse as executor or trustee had been omitted, and any 'devise' or bequest to the former spouse would 'lapse', except insofar as a contrary intention appeared from the will.

32. Some 3 years later, in 1986, the Scottish Law Commission recommended[17] that statutory provision should be made for the revocation of any disposition in a prior will in favour of a former spouse[18] as if he/she had predeceased the testator/testatrix, unless the will provided otherwise. These recommendations were adopted into law in Scotland in 2016.[19]

33. Legislative amendments providing for the partial statutory revocation of wills were similarly affected in all the remaining states in Australia including South

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[9] In 1990 the ambit of the statutory revocation was extended to cover not only former spouses but also relatives, and not only probate but also non-probate assets ie assets which parties sought to exclude from their wills by transferring them to one another by substitute means, such as by way of *inter vivos* trusts, life insurance or retirement-plan beneficiary designations or so-called 'transfer on death' amounts, and other dispositions which were ever-increasingly being put into place before a divorce or annulment in order to attempt to circumvent s 2-508 v*ide* Cahn n 7 at 1885 ftn 22. Following the amendments which were made in 1990 the provision was re-numbered as s 2-804 of the UPC.

[10] Now s 17(2) of the Ontario Succession Law Reform Act 1980.

[11] By means of s 2 of the Wills Amendment Act 1977.

[12] By means of s 63 of the Attorney General Statutes Amendment Act 1979, which introduced s 16 into the Wills Act wef 1981.

[13] S 3 Wills Amendment Act 1981. The current provision, s 19 of the Saskatchewan Wills Act 1996 is in similar form.

[14] Ss 18 (1) and (2) of the Succession Act 1981.

[15] C 31 of the Wills Act SM 1982-83-84.

[16] By ss 18A(1)(a) and (b) which came into effect from 1 January 1983, following upon the recommendations of the Law Reform Committee in 1980.

[17] At para 5.7(a), p 43 Consultative Memorandum 70 (1986).

[18] Including any provision confirming a power of appointment, or nomination as executor or trustee.

[19] S 1 of the Succession (Scotland) Act 2016.

Australia[20] (1996) Victoria[21] (1997) New South Wales (2006)[22] and Western Australia.[23]

34. In Tasmania [24] an amendment which was apparently effected in 1985 whereby a prior will would be revoked in its entirety on divorce or annulment, unless a contrary intention appeared from it, was reversed in 2008 to provide for partial revocation only [25] and, in an opposite reverse in regard to its legal position, in the same year Western Australia amended its law to provide for the complete revocation of wills which predate a divorce or annulment (and not only dispositions made to a former spouse, or his/her appointment as executor or trustee, as was previously the case).[26]

35. In Victoria, Tasmania, South Australia and Queensland a statutory exception to the revocation of the appointment of a former spouse as a trustee in testamentary trusts which have been established for the benefit of children of the parties, or their appointment as guardian to such children, exists.

The justifications offered for statutory revocation on divorce

36. The principal justifications which were offered by the Commission for our own statutory amendment whereby a prior will is to be treated as having been revoked insofar as a testator's former spouse is concerned, are universal justifications which were put forward by all of the law reform bodies whose reports the Commission had regard for.

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[20] By the introduction of s 20A into the Wills Act of 1936, in terms of the Wills (Effect of Termination of Marriage) Amendment Act 39 of 1996.

[21] S 14(1)-(2) Wills Act 1997.

[22] Ss 13(1)-(4) Succession Act 2006.

[23] Prior to the introduction of s 14A into the Wills Act of 1970 (by way of the Wills Amendment Act 2007) which came into effect on 9 February 2008 and which provided for complete revocation, the formulation which was adopted in Western Australia appears to have been one which was similar to that adopted in s 2-508 of the UPC ie which provided for partial revocation in respect of gifts or dispositions to the former spouse as well as any appointment as trustee, executor or guardian, and the will was to be implemented as if the former spouse had predeceased the testator.

[24] According to the report of the New South Wales Law Reform Commission of 1986 (at para 10.12) the Tasmanian Wills Amendment Act of 1985 adopted the recommendation of the Tasmanian Law Reform Commission in its '*Report on Reform in the Law of Wills*' in 1983, that the entire will be revoked on divorce.

[25] The Tasmanian Wills Act of 2008 currently provides (ss 17(1)(a)-(c) and 17(3)-(4)) that divorce will revoke a beneficial disposition, appointment as an executor, trustee or guardian or any power of appointment exercisable by a former spouse (unless a contrary intention appears from the will or 'can otherwise be established').

[26] S 14A(2)(a) of the Wills Act 1970.

37. These justifications, briefly, are as follows. In the first place it was generally accepted that with the emotional upheaval which often accompanies divorce a testator/testatrix might not appreciate that a prior will which they had made in favour of their former spouse, during happier times, would have to be given effect to notwithstanding the divorce, unless it had been revoked by a subsequent will which gave effect to the testator's contemporary wishes, and many a testator/testatrix might neglect to make a new will whilst focusing on the divorce process. In this regard the prevailing view was that most spouses who got divorced would, if they thought about it, not want their former spouse to benefit upon their death, at least not to the same extent as they would have benefited had the marriage still been in existence.

38. In the second place, it was thought that in the majority of divorces the parties usually arrived at an agreement in terms of which they settled their differences and agreed upon the proprietary aspects pertaining thereto, including how their assets should be divided amongst themselves, and consequently in the event that a prior will in favour of a former spouse had not been expressly revoked by a later one it might result in the former spouse being unduly benefited by way of an 'over-provision', at the expense of other beneficiaries, if the will was given effect to.

39. In the third place all of the law reform bodies pointed to an ever-increasing divorce rate in most countries, which it appears, could be ascribed not only to the growing population rate but also the rising abolition of the fault requirement and a move towards the grant of divorce on the simple grounds of the irretrievable break-down of a marriage. The result of the increase in the divorce rate and simplified procedures that came with the modernization of the process inevitably meant that more and more people were opting to get divorced without the benefit of legal advice from lawyers, and many such persons would therefore not realize that unless they altered their wills on divorce their former spouses would continue to inherit in terms of them, often to the prejudice of new spouses and children which they may have had.

40. Thus, the Commission was of the view that because it was generally difficult to inform and educate the general public as to the consequences of leaving an unrevoked prior will in place in the event of divorce, it was necessary to provide for a legislative provision which effected an automatic, statutory revocation thereof.

41. However, because the Commission envisaged that there might be instances where, notwithstanding a divorce, a testator/testatrix might deliberately not wish to revoke a prior will because he or she intended nonetheless to benefit their former spouse, it proposed that the statutory revocation should make an exception for those instances where such intentions had clearly been expressed in a will.

42. In considering whether the proposed statutory revocation should revoke a prior will wholly (ie in its entirety) or only partially (ie only in respect of dispositions which were made in favour of a former spouse) the Commission considered various approaches which had been adopted in other countries.

43. In the first instance, it noted[27] that in some states the Courts had been given a discretion to declare a will as being revoked, or to modify the ambit and operation thereof. The Commission was not in favour of such an approach, as in its view it would cause too much uncertainty.[28] In this regard it pointed out that the Ontario Law Reform Commission ('OLRC') had rejected this approach on the basis that it would pose difficult questions for a judge, and could lead to inconsistent judicial interpretations and the prospect of endless litigation and appeals.[29]

44. Because of the difficulties with this discretionary approach, an alternative which was adopted in some states [30] was to provide that divorce or annulment would result in an automatic revocation of the entire will.[31] Although, as the OLRC pointed out, such an approach appeared at first blush to be simple and

[27] At para 3.157 of its April 1987 Working Paper.
[28] *Id*.
[29] Para 2, p 5 of the report of the Ontario Law Reform Commission n 6.
[30] As in Oregon (Ore. Rev. Stat S 114.130), Georgia (Ga. Code Ann. S 113-408) and Connecticut (Conn. Gen. Stats S 45-162) and also initially in Tasmania *vide* n 24, and from 2008 in Western Australia *vide* n 23 and n 26.
[31] The Commission was of the view that such an approach would be too severe. In this regard it referred (at para 3.158 of its 1987 Working Paper) to the reports of the South Australian, Queensland and Ontario Law Reform Commissions.

straightforward and one which would be unambiguous in its operation, it could also result in unfairness to other beneficiaries, including children. The OLRC was of the view that a statutory provision which struck down an entire prior will on divorce would amount to 'legislative overkill' which could cause more hardship and injustice than a situation where the will was left unaffected.[32]

45. Thus, a third alternative which was adopted by certain states was to provide for partial revocation only, whereby a will was to be read as if any provision in it which favoured a former spouse had been omitted.[33] However, whilst this would have the salutary effect of leaving the remainder of the will intact the difficulty with the adoption of such a rule was that it too could disinherit innocent beneficiaries, particularly in cases where dispositions were linked to a former spouse ie where the will provided that a disposition to a former spouse should go to an alternative beneficiary, in the event of his/her death or incapacity. As the OLRC pointed out such an approach could result in bitter family disputes between family members with competing claims.[34]

46. In order to avoid these difficulties, the Commission therefore proposed[35] that the revocation should be specifically targeted at only preventing a former spouse from benefitting from a will, by simply providing that it was to be read and implemented as if the former spouse had predeceased the testator, unless it expressly provided otherwise, in line with the approach which was adopted by the USA at a national level by way of s 2-508 of the UPC, and subsequently endorsed by numerous states in the USA and a number of states in Canada and Australia.

47. Whereas in its Working Paper in 1987 the draft statutory provision which the Commission originally proposed contained a fiction whereby a former spouse was to be 'deemed' to be deceased as at the date of divorce or annulment, in its

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[32] Report of the OLRC n 6, at p 6.

[33] As per the amendment adopted in the UK *vide* n 16.

[34] Report of the OLRC n 6 para 4, p 6. This was the approach which was initially adopted by the state of New York in 1966. However, it subsequently elected to adopt s 2-508 of the UPC, in its place.

[35] At paras 3.160-3.176 pp 77-82 of its 1987 Working Paper and endorsed in its final report which was published in June 1991, at paras 3.58-3.63 pp 77-79.

final report[36] the Commission pointed out[37] that the use of a fiction in legislation was undesirable, as it was based on a false premise and lent itself to uncertainty in interpretation. In order to obviate this the Commission accordingly proposed that the statutory amendment should simply be worded to provide that a will which had been executed prior to divorce or annulment would take effect in the same manner as it would have if the former spouse were deceased as at the date of the divorce or annulment, and this recommendation was duly given effect to in the legislative amendment which was effected by means of s 2B.

48. Thus, although the applicant's counsel consistently submitted in argument that s 2B contains a fiction that a former spouse has predeceased a testator/testatrix this is not correct.

49. Lastly, whereas in its original recommendations in 1987 the Commission had provided for immediate and 'permanent' revocation on divorce or annulment, in its final report it recommended that this should be tempered by coupling the revocation to a finite time period, which it suggested should be 3 months. A prior will (which did not express a clear intent to benefit a former spouse notwithstanding a divorce or annulment), would only be revoked if the testator died within this period. In the event that the will had not been revoked (by a later will), by the time of the expiry of this period, it would not be statutorily revoked insofar as the former spouse was concerned, and would have to be given effect to.

50. The Commission was of the view that a period of 3 months would be sufficient time for the testator to amend or revoke an earlier will which they may have made, which favoured their former spouse, and if they had not done so within this period it could be assumed that they intended not to alter their previously expressed wish to benefit their former spouse.

The challenge in terms of s 25(1) of the Constitution

[36] At paras 3.60-3.63, pp 78-80.

[37] With reference to a doctoral thesis by Oliver J (the vice- chairman of the Commission), in 1975.

51. S 25(1) of the Constitution provides that no one may be deprived of property except in terms of a law of general application, and no law may permit the arbitrary deprivation of property.

52. The applicant contends that s 2B infringes s 25(1) because it arbitrarily deprived NW of her testamentary right to dispose of her property in accordance with her express wishes and arbitrarily deprived him of his right to receive it.

(i) Freedom of testation

53. Before turning to consider the relevant jurisprudence which has emanated in respect of how s 25(1) is to be applied it is necessary to say something about a testator's right, in our law, to dispose of their property on death.

54. Freedom of testation is a fundamental principle[38] of our law of succession[39] which is predicated on the commonly accepted notion that a testator is ordinarily free to dispose of their property on their death, by means of a will, in such manner as they see fit, and concomitantly, a Court is ordinarily obliged to give effect to their wishes as expressed in such will.[40] Consequently, our Courts do not enjoy a 'general jurisdiction' to vary the terms of a will as they see fit.[41]

55. In *Harvey* [42] the Supreme Court of Appeal confirmed[43] that the 'deeply entrenched' principle of freedom of testation enjoys constitutional protection not only in terms of s 25(1) but also in terms of the founding constitutional value of, and the right to, dignity.

56. In this regard it held that freedom of testation is an important facet of the right to dignity which protects not only a testator's right to dispose of their property, but also their right to choose their beneficiaries.[44] As was explained in *BOE Trust*[45] the right to dignity affords both the living and the dying the 'peace of mind' of knowing that their last wishes will be respected and given effect to on their death.

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[38] *Moosa NO & Ors v Minister of Justice and Correctional Services & Ano* 2018 (5) SA 13 (CC) at para [18].
[39] As it is in the English, Australian, Dutch and German legal systems *vide* Du Toit '*The limits imposed upon freedom of testation by the boni mores: Lessons from Common Law and Civil Law (continental) legal systems'* 2000 11 Stell LR 358.
[40] *In re BOE Trust Ltd & Ors NNO* 2013 (3) SA 236 (SCA) at para [26].
[41] *Harvey NO v Crawford NO* 2019 (2) SA 153 (SCA) at para [53].
[42] *Id,* at paras [22] and [56].
[43] As per its earlier decision in *BOE Trust* n 40 at paras [27]-[29].
[44] *Harvey* n 41 at para [64].
[45] Note 40 at para [27].

57. However, as sacrosanct as freedom of testation may be our Courts have also repeatedly held that it is not absolute,[46] and in appropriate instances it will not be given effect to it where to do so would be contrary to constitutional imperatives and public policy.

58. Thus, in a series of cases[47] primarily involving charitable testamentary trusts or scholarships of a public nature or character the Courts have refused to give effect to a testator's wishes where to do so would constitute unfair discrimination on the grounds of race, religion or gender.[48]

59. In its most recent decision in this regard[49] the SCA has pointed out that this is by no means a closed list of the grounds upon which a Court might legitimately refuse to give effect to the principle, on the basis of public policy. It held that, given the dynamic nature of public policy it will have to be moulded in the course of time to meet the conditions of an ever-changing society, and must at all times be infused with constitutional values such as dignity, equality and freedom.

60. However, that said, in cases involving matters of freedom of testation our Courts have nonetheless repeatedly cautioned[50] against interfering with the expressed wishes of testators, particularly in matters of 'private' testation, as the Constitution affords them a great deal of testamentary autonomy, which is 'an important part of what gives substance' to their right to dignity.[51]

61. Thus, it has been held one should be careful not to make a Court the final arbiter as to the choice of beneficiary in testamentary dispositions of a non-public character, for to do so would be to intrude on a particularly private and personal

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[46] *Harvey* n 41 at para [22], *BOE Trust* n 40 at para [28], *Rhode v Stubbs* 2005 (5) SA 104 (SCA) at paras [17] and [18].

[47] *Minister of Education & Ano v Syfrets Ltd NO & Ano* 2006 (4) SA 205 (C); *Curators, Emma Smith Educational Trust v University of KwaZulu Natal* 2010 (6) SA 518 (SCA); *In re Heydenrych Testamentary Trust & Ors* 2012 (4) SA 103 (WCC).

[48] Contrary to the provisions of ss 9(4) and (3) of the Constitution.

[49] *Harvey* n 41 at para [53], which concerned a 'private' testamentary trust and not one which had a public character.

[50] *King v De Jager* 2017 (6) SA 527 (WCC) at para [65]; *Harvey* n 41 at para [57] *in fin* and *a quo* reported *sub nom Harper & Ors v Crawford NO & Ors* 2018 (1) SA 589 (WCC).

[51] *King* n 50 at para [65].

sphere of life, involving a person's last wishes as to how and to whom to dispose of their property, and might open a 'Pandora's box' of litigation.[52]

(ii) Ad a law of general application

62. In the case of a so-called 'frontal' challenge to the constitutional validity of a legislative provision the test is an objective one, and the subjective position in which a party to the dispute may find itself does not have any bearing on the legal status of the provision.[53] The danger of a Court adopting a subjective approach is that it could result in it recognizing the validity of the provision in respect of one particular litigant only to deny it in the case of another. This would amount to unequal treatment under the law and result in legal uncertainty.[54]

63. At the time when it was passed in 1992, s 2B would only have been applicable to divorces[55] which took place in respect of civil marriages which had been solemnized in terms of the Marriage Act.[56] It is common cause that the marriage of the parties in this matter was such a marriage.

64. As third and fourth respondents rightly point out this matter is not concerned with a challenge to the constitutionality of the provision on the grounds that it applies arbitrarily and unequally only to the divorces of parties who were married civilly in terms of the Marriage Act, but not to parties who were married in terms of other marital regimes, or to parties in long-standing but non-marital relationships.

65. As was further pointed out by way of supplementary submissions, since the passing of the Recognition of Customary Marriages Act in 1998[57] customary marriages are recognized as valid and effective marriages for all purposes in our law, and may only be dissolved by way of a decree of divorce on the grounds of the irretrievable break-down thereof, as in the case of civil marriages.

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[52] *Id,* at para [61].

[53] *Ferreira v Levin NO and Ors; Vryenhoek & Ors v Powell NO & Ors* 1996 (1) SA 984 (CC) at para [26], as endorsed in *Shoprite-Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs & Tourism, Eastern Cape & Ors* 2015 (6) SA 125 (CC) at para [31].

[54] *Id.*

[55] In terms of the provisions of the Divorce Act 70 of 1979.

[56] Act 25 of 1961.

[57] Act 120 of 1998.

66. Similarly, since 2006 a so-called 'same sex' marriage or civil partnership which is solemnized as a civil union in terms of the Civil Union Act[58] is subject to the selfsame legal consequences as a civil marriage, and it too is therefore subject to dissolution by way of a divorce in terms of the Divorce Act.

67. Whilst it is so that at present marriages which are solemnized according to the tenets of Islamic law are not afforded the same level of legal recognition as other forms of marriage, pursuant to the decision and Order of a full bench of this Court in *Women's Legal Centre*[59] in August 2018, until the necessary legislation has been passed by Parliament [60] every such marriage may similarly be dissolved in accordance with the provisions of the Divorce Act. [61]

68. Thus, as it stands at present, it can be said that s 2B is a provision which is of general application to divorces in South Africa.

69. As third and fourth respondents further point out, the fact that it applies only to parties who were divorced ie to parties who were previously married, and not generally to those in long-standing relationships who have separated, accords with the significance which marriage is afforded in our law.

70. As Boqwana J pointed out in *Women's Legal Centre* [62] marriage is an institution by means of which a private relationship of voluntary commitment and support between two parties is brought into the public, state-regulated domain, which results in legal consequences (including a range of socio-economic benefits and legal obligations *inter alia* of support and maintenance), which do not apply to other relationships.

71. In any event as the relationship between the applicant and NW was a marital one which was dissolved by a divorce in terms of the Divorce Act, it is not open to the applicant to challenge the provisions of s 2B on the basis of any unequal

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[58] Act 17 of 2006.

[59] *Women's Legal Centre Trust v President of the Republic of South Africa & Ors* 2018 (6) SA 598 (WCC).

[60] The full bench directed the president and cabinet to prepare and enact the requisite legislation granting formal recognition to Muslim marriages within 24 months ie by 30 August 2020.

[61] As per para 4 of the Order which was handed down on 31 August 2018.

[62] Note 59 at para [3], with reference to the decisions of the Constitutional Court in *Minister of Home Affairs & Ano v Fourie & Ano; Lesbian & Gay Equality Project & Ors v Minister of Home Affairs & Ors* 2006 (1) SA 524 (CC) and *Dawood & Ano v Minister of Home Affairs & Ors; Shalabi & Ano v Minister of Home Affairs & Ors; Thomas & Ano v Minister of Home Affairs & Ors* 2000 (3) SA 936 (CC).

treatment between parties to a marriage, as opposed to parties to a long-standing relationship.

(iii) Has there been a deprivation of rights?

72. As De Waal has pointed out[63] no one has a fundamental right to inherit and a potential beneficiary who is nominated in a will has no more than a *spes* or hope of inheriting. Thus, the exclusion of a beneficiary from a will does not ordinarily result in the deprivation of any existing right *per se*.

73. However, an heir or legatee of an unconditional bequest in terms of a will obtains a vested right on the death of a testator which becomes enforceable by way of a claim at the time when the liquidation and distribution account is confirmed.[64]

74. When the applicant sought to assert his claim as an heir in this matter, he was informed by first respondent[65] that he had not been recognized as a beneficiary in terms of the liquidation and distribution account, because he was excluded by virtue of s 2B.

75. The question which arises is whether the applicant is an heir in terms of his late wife's will. If not, then the provisions of s 2B do not find application.

76. As previously mentioned, in the will which she made some 4 days before they were married his late wife sought to bequeath her entire estate to her 'husband', who she identified by name and identity number as the applicant. Strictly speaking therefore, her nominated heir should have been referred to as her husband 'to be'.

77. Be that as it may, it is trite that when construing a will the cardinal principle is to ascertain the intention of the testator, at the time of the *execution* thereof, from the language used therein.[66] What a testator may later say about what their intentions were at the time when they executed the will, or what their intentions were at a later date, even if they had changed, would ordinarily not be of any assistance in regard to the Court's duty to ascertain what the testator's intentions

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[63] MJ de Waal 'The Law of Succession and the Bill of Rights' Bill of Rights Compendium (2012) 3G 19-3G 20 cited in *King* n 50 at para [59], *Harvey* n 41 at para [64].

[64] *De Leef Family Trust & Ors v CIR* 1993 (3) SA 345 (A) at 358C-E.

[65] In a letter dated 17 April 2018.

[66] *Verseput & Ano v De Gruchy NO & Ano* 1977 (4) SA 440 (W) at 443C-E cited by Meer J in *Louw NO v Kock & Ano* 2017 (3) SA 62 (WCC) at para [18].

were at the time when the will was executed, by interpreting the will, and would thus generally be inadmissible.

78. This is because, for well-established and long-standing reasons pertaining to legal certainty in relation to written testamentary expressions, which constitute the bedrock for the law of testate succession, such evidence cannot be admitted and the will must be given effect to as it stands.[67] As such, the beneficiaries will be those who are appointed as such, in terms of the will, and not those who the testator may have intended to constitute as beneficiaries at a later date, but who were not appointed as such in the will. After all, as was said by Corbett J (as he then was) in *Aubrey-Smith v Hofmeyr*[68] in construing a will the object is not to ascertain what a testator meant to do, but what his intentions were at the time, as expressed in the will.

79. Even where an event has occurred which was not contemplated by the testator at the time when he made his will, a Court is not entitled to surmise what his intentions would have been had he contemplated the occurrence thereof and in so doing give effect to such surmise, for to do so would be to add something to the will and not to construe it.[69]

80. On the face of it therefore, third and fourth respondents may well be correct when they submit that on an ordinary literal interpretation of the words used in her will the applicant's late wife intended to benefit him in his capacity as her future husband and not personally, and thus once they were divorced he no longer qualified as an heir in terms of the will and was not entitled to inherit under it. On this basis it could be argued that the applicant never fell within the ambit of s 2B. The applicant on the other hand submits that on a proper interpretation of the will his description as NW's 'husband' was meaningless as he was not in fact married

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[67] *Robertson v Robertson's Executors* 1914 AD 503. Evidence of an extrinsic nature is only admissible in very limited circumstances ie where there is some latent ambiguity or so-called 'equivocation' in the language which was used, such as where the words are equally open to multiple interpretations and evidence is needed to clarify what was meant at the time, in the light of the surrounding circumstances ie the material facts and circumstances known to the testator at the time when he made the will. In such limited instances the Courts have allowed evidence to be given to identify the subject or object of a disposition. But extrinsic evidence has not been allowed where its object, or the result of its admission, would be to contradict, add to, or alter the expressed intention of a testator, where that is clear *vide Aubrey-Smith v Hofmeyr* 1973 (1) SA 655 (C) at 657E-658C.

[68] *Id,* at 657G, citing *Ex parte Estate Stephens* 1943 CPD 397 at 402.

[69] *Parker v Fletcher's Estate* 1932 CPD 202 at 205, cited by Meer J in *Louw* n 66 at para [18].

to her at the time, and it should thus be disregarded, and the will evinces a clear intention to benefit him personally, given his identification by name and identity number.

81. As this issue was dealt with, during the hearing, on the basis that the question of whether or not the applicant was NW's heir in terms of the will is a matter of interpretation which is not clear cut and not properly before me in these proceedings and is an issue which possibly falls to be dealt with by another Court in subsequent proceedings, depending on the outcome of this matter, I make no pronouncement on this aspect, and for the purpose of what follows I have assumed that the applicant is a potential beneficiary in terms of the will.

82. On this basis, if s 2B applies to the will the applicant will suffer a deprivation of his right to inherit the property which may have been bequeathed to him and s 25(1) will be applicable.

(iv) <u>If there was a deprivation, was it arbitrary</u>?

(a) <u>The principles</u>:

83. Previously, an arbitrary act was defined as one which was capricious, or which proceeded 'merely from the will' (sic) and was not based on reason or principle.[70] In this sense then an arbitrary act refers to one which is irrational ie one in which, according to the accepted formulation, there is no rational connection between the means by which the action is affected and its ends ie the purpose which it is aimed at achieving.

84. However, in its seminal judgment in *First National Bank*[71] (the first of a trio in relation to s 25(1), the so-called 'property clause') the Constitutional Court held that the use of the word 'arbitrary' in the clause had to be understood in the context of the Constitution as a whole and the historical context in which it came into existence, against a backdrop of colonial conquest and wholesale expropriation and deprivation of land rights.

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[70] *Johannesburg Licensing Board v Kuhn* 1963 (4) SA 666 (A) 671C.

[71] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002(4) SA 768 (CC).

85. It referred[72] to the inevitable tension which existed in s 25(1) between individual property rights and societal interests, and was of the view that the clause aimed to strike a proportionate balance between them.[73] As such, it held that (as is the case with freedom of testation, which is an incident thereof) the protection of property as an individual right was not absolute, and was subject to societal considerations.[74]

86. In the context of s 25(1) an arbitrary deprivation was therefore not limited to a non-rational deprivation (in the sense of there being no rational connection between means and ends) and referred to a 'wider concept and controlling principle' that was more demanding than mere rationality, but narrower than the proportionality required by the limitations clause (s 36), which speaks of reasonableness and justifiability.[75]

87. Consequently,[76] it is important in every case in which s 25(1) is in issue to have regard for the legislative context in respect of the deprivation concerned, and the nature and extent thereof.

88. Whereas in some instances the deprivation might be of such a nature that no more than a rational connection between means and ends may be required in order to prevent it from being arbitrary, in other instances the ends would have to be more 'compelling' [77] in order for it to pass muster.

89. After considering comparative law[78] the Court concluded that in terms of s 25(1) a law which provides for deprivation of property will be arbitrary where it does not provide 'sufficient reason' for the deprivation, or where it is procedurally unfair.[79]

90. Whether or not sufficient reason for a deprivation exists is to be determined by evaluating a 'complexity' of relationships, to wit those between the means employed (ie the form of the deprivation) and the ends sought to be achieved by

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[72] With reference to Van Der Walt, *The Constitutional Property Clause* (Juta, 1997), pp 15-16.
[73] *First National Bank* n 71, at para [50].
[74] *Id*, para [49].
[75] Paras [65] and [98].
[76] Para [63].
[77] *Id,* para [66].
[78] By having regard for property right clauses in the Constitutions of the United States of America and Australia, the European Human Rights Convention and the German Basic Law.
[79] *First National Bank* n 71 at para [100].

it (ie its purpose), as well as the relationship between the nature and purpose of the deprivation and the extent thereof, and the persons affected and the property concerned.[80]

91. Where a deprivation includes all the incidents of ownership ie where it is total in effect its purpose will have to be more compelling, than where it only affects some incidents.[81] Thus, a 'minor' deprivation will more easily be found to have been effected for sufficient reason than a more invasive one. [82]

92. In *Mkontwana*[83] the Court held that limitations on property rights which are widely accepted in other open and democratic societies may also be acceptable in ours, and may thus not constitute arbitrary deprivations in terms of s 25(1), and where the government's purpose for a deprivation is 'legitimate and compelling' there may well be 'sufficient reason' for it.

93. If a deprivation is found not to be arbitrary there is no limitation of the right in s 25(1) and the question of justification in terms of the limitations clause (s 36(1)) does not arise. It is only if, and once, a deprivation is it is found to be arbitrary that a Court is thereafter required to consider if it is nonetheless justified in terms of the limitations clause ie whether it is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom.[84]

94. Lastly, in *Shoprite-Checkers*[85] the Constitutional Court held that where a deprivation is closely connected to (or would extinguish) fundamental rights and constitutional values, in order for there to be sufficient reason for it the deprivation should 'approximate' proportionality. Simply put, in such instances whether or not it is arbitrary must be determined by testing it against the proportionality standard.

(b) <u>The principles applied</u>:

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[80] *Id.*
[81] *Id*.
[82] *Mkontwana v Nelson Mandela Metropolitan Municipality, Bissett v Buffalo City Municipality, Transfer Rights Action Campaign v MEC for Local Government & Housing, Province of Gauteng* 2005(1) SA 530 (CC) at para [90].
[83] *Id*, at paras [51] and [90].
[84] *First National Bank* n 71, at para [70].
[85] *Shoprite-Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs & Tourism, EC & Ors* 2015 (6) SA 125 (CC) at paras [80] and [82].

95. Given that the deprivation which occurs when s 2B is of application substantially affects a testator's right to freedom of testation, which is a fundamental incident of their property right in terms of s 25(1), and may also affect the property rights of their beneficiaries, and may thereby also breach the testator's constitutional right to dignity and those of their beneficiaries, the scale in this matter clearly tips towards the higher, proportionality side of the test rather than the lower, which requires mere rationality. Thus, in order for there to be a sufficient reason for the deprivation there needs to be more than simply a rational connection between the means adopted and the ends aimed at.

96. The applicant contends that s 2B lacks sufficient reason on a number of grounds. Firstly, he submits that the relationship between the means employed and the ends sought to be achieved thereby is disproportionate, as there is no way to rebut the 'fiction' contained in the provision by evidence outside of the will, and with 'court oversight'.

97. Secondly, he contends that the provision contains an element of irrationality in it, in that it seeks to protect those who are 'too emotional or unawares' (sic) of the effect of divorce on their testamentary bequests, whilst at the same time expecting the same 'class' of persons to be familiar with a specific provision of the Act, an action which he describes as 'counter-intuitive'.

98. Thirdly, the applicant contends that the provision fails to cater for the complexity of relationships that exist between persons who are divorcing, by creating a presumption that cannot be rebutted except by way of an express indication 'on the face of' (sic) the will.

99. Fourthly, the applicant contends that the section ousts the 'general discretion' of the High Court which exists elsewhere in the Act and creates a fictionalized set of circumstances which cannot 'guarantee truth-finding', and which cannot be justified. Lastly the applicant contends that the provision is also procedurally unfair in that it does not permit any extraneous evidence to be considered.

100. I will attempt to deal with these contentions in the respective constitutional rights categories (ie ss 25(1) and 34), in which they appear to fall. Some obviously transcend both, at least in the way the arguments have been made.

101. At the outset I point out that the justifications which were put forward by the SALC for why there was a need to amend our law of intestate succession to provide for the statutory revocation of a prior will in favour of a former spouse on divorce or annulment, were traversed in some detail above, and I do not propose repeating them all over again. In my view, these justifications are no less cogent and relevant today than they were some 28 years ago when the provision was enacted.

102. In this regard, and by way of summary, I believe that most people who get divorced today generally still do not want their former spouses to inherit in terms of a prior will which was made in their favour in happier times, especially not after arriving at a proprietary settlement with them in terms of which their respective matrimonial assets are to be distributed.

103. Secondly, I think that most people who get divorced today still do not realize that unless they revoke a prior will which favours their spouse it will have to be given effect to, notwithstanding the terms of any generous settlement they may have arrived at with them, and notwithstanding that they have parted ways with them. In fact, they would probably be disconcerted to hear that this is the legal position and would probably assume that divorce would automatically result in disinheritance of their former spouse.

104. In the circumstances the legislative purpose which the provision sought to achieve when it was introduced in 1992 is in no way less compelling today than it was then, and the provision still seeks to give effect to legitimate and important societal considerations.

105. In addition, with the jurisdiction to hear divorces having been extended to regional courts and with legal costs becoming increasingly unaffordable, more and more people are opting to do their own divorces and to settle their differences by way of their own negotiated settlements, without legal assistance. In my view this is an important reason why the protection which the provision affords should remain in place, as many people will not be aware of the legal position in relation to the validity of a pre-divorce will, and will ever-increasingly not have the benefit of legal advice.

106. As is also apparent from what is set out in the discussion above the provision is one which is found in similar form in many open and democratic societies like ours which prize dignity, equality and freedom, including the UK, Canada, Australia and the USA.

107. If one turns to consider the complexity of, and the interplay between, the various relationships the following may be said. Firstly, as far as the relationship between the means and the ends is concerned, the purpose which the provision seeks to achieve is to prevent a former spouse from benefiting unfairly in terms of a will which was made by the other spouse prior to a divorce or annulment, unless the testator/testatrix made it clear in the will that this is what he/she intended. It seeks to achieve that purpose by providing that the will is to be implemented as if the former spouse had predeceased the testator/testatrix as at the dissolution of the marriage.

108. When one considers the means which have been adopted to achieve these ends then one notes that the ambit and effect of the provision is limited, and focused. In the first place, as far as the testator/testatrix spouse is concerned only the right to dispose of their assets in favour of their former spouse is limited, and not their right to do so in respect of any other beneficiaries.

109. Equally, only the former spouse is disinherited (and then only in respect of any assets which were not previously given to them in terms of a divorce or annulment settlement), and none of the other beneficiaries under the will, and the effect of the provision is that the former spouse forfeits their inheritance in favour of the intestate heirs of the decedent spouse in accordance with the rules of intestate succession. In effect this will result in family members such as children or parents inheriting in place of the former spouse. Where the former spouse and the decedent spouse have children from their marriage the former spouse's inheritance will devolve on the children in equal shares. Where there are no children, as in this case, it will devolve upon the decedent's parents in equal shares.

110. When considering the effect the provision would have the SALC had regard for the fact that the former spouse's inheritance would devolve by way of intestate

succession. It was of the view that inasmuch as the rules of intestate succession are generally accepted to be based on principles of fairness and probably reflect what a testator/testatrix would want to happen to their assets in the event of intestacy, and given that in most instances the former spouse would already have received a fair and agreed share of the decedent spouse's assets on settlement of the divorce, the provision will effect a fair and equitable distribution of the balance of the former spouse's assets (to which they should as a matter of principle and fairness have no claim), to deserving beneficiaries.

111. The one possible area where the provision could perhaps be criticized for being overbroad is that it could serve to prevent a former spouse from being appointed as a trustee to a testamentary trust which is established for the parties' minor children. As pointed out above, in the majority of Australian states a statutory exception to the ambit of the rule of revocation has been made to cater for this. But, inasmuch as this case is not about this issue and is directed purely at a challenge to the constitutionality of the proprietary disposition of NW's assets in respect of her ex-husband this is not a matter which calls for a decision by me.

112. Furthermore, and most importantly, as far as the extent of the deprivation which is to be brought about is concerned, although its aim is to divest a testator/testatrix of their right to dispose of their assets, which materially impacts on their fundamental right to freedom of testation and ownership, this is a deprivation which can only be affected if they should pass away within 3 months of divorce or annulment. In this regard, from what I was able to establish SA's legislation is unique. In all other countries which have such legislation there is an automatic and immediate 'guillotine' revocation of a will (be it partially or wholly) on divorce or annulment of a marriage, and it is permanent in effect. This is an important aspect to which I will revert in due course.

113. I think it is fair to say that inasmuch as dissolution of a marriage by divorce or annulment is more likely to take place amongst younger and middle-aged couples rather than those who are elderly, the chances of a testator/testatrix spouse dying immediately after their divorce ie within the 3 month period provided for in s 2B is extremely low. Thus, in all likelihood, in real terms the

provision will only affect a very small number of persons, and the overwhelming majority of persons who get divorced in this country (and the very few whose marriages are annulled) are not likely to be struck by it. This is also the likely reason why this provision is relatively unknown ie because it is rarely applicable. In fact, the effect of the 3 month period in the provision is that, practically speaking, for the overwhelming majority of the population who die testate there is no rule of revocation on divorce, and in the majority of cases a prior will which favours a former spouse will thus still be given effect to (unless it is revoked by a later will, such as is likely to occur on remarriage).

114. I would further venture to say that in this country, which is struggling with mass unemployment and great poverty the majority of persons probably die intestate, as they do not have the means to have a will prepared and to obtain legal advice in relation to estate planning, and this is another reason why the provision has a very limited effect.[86] In this regard the rules of intestate succession function much in the same way as s 2B does, in that a *former* spouse does not qualify to inherit from their 'ex' if they die intestate, only a spouse does. Thus, where parties have divorced and one of them dies intestate there is already in any event a forfeiture of inheritance by the surviving former spouse *ex lege*, as would occur in cases of testate succession within the bounds of s 2B.

115. I point out that there is no challenge to the provision on the basis that it provides for different and unequal treatment and therefore unfairly discriminates between divorced testators who die testate, and those who die intestate, if such a challenge is at all feasible.

116. As third and fourth respondents further point out the provision only applies to a testator who has not expressed an intention in their will to benefit their former spouse, notwithstanding the dissolution of the marriage. Although in real terms one might be cynical about this- after all who would be willing to make a will in which they declare that they are prepared to benefit their spouse even in the

[86] Prof Cahn n 7 at pp 1900-1901 has pointed out that in the USA people who have wills are likely to be older, wealthier and more formally educated: whereas 55% of Americans whose annual household income is more than USD 75 000 have wills only 31% of those earning below USD 30 000 have one, and 61% of persons with a postgraduate qualification have one. She has also noted that in the USA there is a higher rate of divorce amongst those with a lower income.

event of divorce- the provision allows for this, and one can imagine situations where parties may wish to divorce amicably and because of the length of time they were married and the contributions which they made to the marriage, both financially as well as emotionally, they may as part of their divorce settlement agree to benefit one another in specially crafted wills, and proceed to do so, prior to obtaining the decree. Similarly, there may be instances where although they did not express such an intention initially in a will which they made shortly after they got married a testator or testatrix later decide, as part of their divorce settlement, to prepare a codicil to this effect.[87]

117. In addition, the provision does not apply in respect of a testator who has executed another will post divorce. Only a will which is made prior to a divorce is hit by the rule of revocation and a will which is made after a divorce is excluded from s 2B's ambit and will therefore not be affected, even if it was made within the 3 month period after the date of divorce and favours the former spouse.

118. In the circumstances, although the extent of a deprivation which is affected when s 2B does apply can be far-reaching as far as property dispositions are concerned, the actual ambit thereof ie when it will come into operation, has been severely curtailed. To my mind this is a very important factor that goes into the scale when weighing up the various relationships and factors concerned.

119. One may contrast the limited ambit of s 2B as far as the deprivation of property is concerned with that which featured in *First National Bank*[88] where the constitutionality of s 114 of the Customs Act[89] was challenged. The section allowed the Commissioner of the South African Revenue Services to seize and sell goods belonging to someone other than a customs debtor (as long as they were found in the debtor's possession), in satisfaction of a customs debt, without a judgment from, or Order of, a Court. Although the purpose of the provision was laudable in that it sought to provide for the satisfaction of customs debts owing to the fiscus, inasmuch as it allowed for the deprivation of property which belonged

[87] Prof Cahn, n 7 at p 1897 reports that there are studies which suggest that currently less than half of spouses who get divorced in the USA wish to completely disinherit their former spouses.
[88] Note 71.
[89] Act 91 of 1964.

to a third party (in this case the bank which had provided finance for the acquisition of a motor vehicle which had been seized by SARS), in circumstances where there was no connection or relationship between that party, whose property right would be deprived, and the debt which had been incurred by another, the Constitutional Court held that it was arbitrary and violated s 25(1).

120. That then leaves the question of whether s 2B is arbitrary in that it is procedurally unfair. In *Mkontwana*[90] the Constitutional Court held that procedural fairness is a flexible concept, which is to be evaluated on the facts and circumstances before the Court.

121. *Mkontwana* concerned s 118 of the Local Government Municipal Systems Act,[91] which limits the right of a property owner to transfer immovable property without a certificate from the local authority certifying that consumption charges for municipal services (ie water, electricity and sewerage) which have become due in respect of the property during the preceding 2 years, have been paid, and renders the owner liable for such charges, irrespective of who the actual consumer thereof may have been.

122. After evaluating the various relationships between the means and the ends, and the nature and purpose of the provision and what it sought to achieve, as well as the nature and extent of the deprivation which it effected (in this regard it can only prevent an owner from transferring their immovable property for a maximum of two years), the Constitutional Court held that sufficient reason existed for it, and it was not arbitrary. It also held that the provision had a legitimate and compelling purpose in that it sought to prevent the accretion of municipal debt and sought to preserve the solvency of municipal authorities.

123. It was contended that s 118 was procedurally unfair inasmuch as it did not provide that the municipal authority was to render accounts to a property owner, who would therefore not know what was owing in respect of the property. Although there was indeed no such express obligation in the provision, the Constitutional Court was of the view that an implied duty on the part of the

[90] Note 82 at para [65].
[91] Act 32 of 2008.

municipality to do so, if and when requested by an owner, could be read into the provision and in the circumstances it was held not to be procedurally unfair.

124. As previously indicated, the applicant submits that the provision is procedurally unfair because it does not permit extraneous evidence of an intention on the part of the testator to benefit their former spouse notwithstanding the divorce, to be put before a court. Inasmuch as this submission is inextricably bound up with those made in relation to the challenge in terms of s 34 of the Constitution it will be convenient to consider it under that rubric.

The challenge in terms of s 34 of the Constitution

125. Although s 34 is loosely referred to as the 'right of access to court' clause it is necessary, at the outset, to remind ourselves of what it actually says.

126. It provides that everyone has the right to have a dispute which can be resolved by the application of law decided in a fair public hearing before a Court, or where appropriate, another independent and impartial tribunal or forum.

127. Inasmuch as s 2B does not contain a so-called ouster clause (whereby a right to approach a court or its jurisdiction is ousted) nor a statutory time-bar or time-limitation clause[92] whereby such a right is limited in time ie in terms of which it can only be exercised within a certain period of time, after which it will expire or prescribe, it does not constitute a breach of s 34, at least not in the customary sense in which it is most often invoked.

128. Furthermore, the applicant's challenge in terms of s 34 is also not based on any suggestion that the legislature's determination in s 2B of a 3 month period is 'arbitrary' (in the irrational sense) and no argument was put forward to the effect that the provision was constitutionally assailable on this basis, or on the basis that the period was too long or too short or that it operated unfairly and

[92] See for example *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC), where it was held that s 113 (1) of the Defence Act 44 of 1957, which provided for a period of 6 months within which to institute an action for damages, was unconstitutional as it did not afford claimants sufficient period of time to seek judicial redress, *contra* the decision in *RAF v Mdeyide* 2011 (2) SA 26 (CC) where the Court held that s 23 (1) of the Road Accident Fund Act 56 of 1996, which provided for a period of 3 years within which to institute a claim in respect of loss or damage arising out of a motor vehicle accident where the identity of the driver had been established, was held not to be unconstitutional.

indiscriminately as a period in time, nor on the basis that a period of time should not have been set by the legislature at all.

129. The applicant submits that the provision offends s 34 because in the first place it seeks to exclude the Court's 'general oversight function' (sic).[93] Secondly, because it ousts the 'general discretion' which the Court has[94] in terms of the Wills Act (such as that which it has to condone non-compliance with the formalities required for a will[95] or the revocation of a will[96]), thereby preventing it from accepting evidence which a former spouse may be able to put forward of a testator spouse's intent, which might be recorded in another document, or which may have been expressed in terms of an oral agreement which is 'publicly accepted as true' (sic).[97]

130. Thirdly, the applicant contends that the provision is in conflict with s 34 as it 'deletes' (sic) the constitutional right which the applicant has to seek judicial redress in circumstances where he is able to provide 'direct' evidence of a testator spouse's testamentary intentions, and instead directs that the Court must operate under a 'false fiction' that a former spouse has predeceased a testator spouse, which is contrary to public policy .

131. Before proceeding further it may be convenient to deal, once and for all, with the applicant's (repeated) contention that s 2B provides for a fiction. I previously set out (in the introductory paragraphs above) how, whereas the draft provision which the SALC initially circulated in 1987 was based on a fiction, in its final report in 1991 it indicated that it was not in favour of using a fiction, and it accordingly recommended wording that would simply provide that in the event of the death of a testator spouse within a period of 3 months after a divorce, the will was to be implemented as if the former spouse had predeceased the testator. The provision which was subsequently adopted by the legislature in the form of s 2B was based on this proposal, and it does not incorporate a fiction. In my view, it simply amounts to what is commonly referred to in our law as a deeming

[93] Paras 78 and 101, founding affidavit.
[94] *Id*, para 93.
[95] In terms of s 2(3).
[96] In terms of s 2A.
[97] Para 79, founding affidavit.

provision ie if certain stipulated events occur then it will be deemed that the former spouse predeceased the testator spouse, unless a contrary intention appears from the will.

132. In this regard, in *S v Rosenthal*[98] it was held that the precise meaning and effect of a deeming provision must be ascertained from the context in which it appears. Whereas certain deeming provisions may be exhaustive, definitive or conclusive of the subject matter they purport to deal with and in their formulation may include or amount to an irrebuttable presumption, others may, wholly or in part, merely include or amount to a rebuttable presumption as to a state of affairs.

133. In my view the proviso in s 2B that, unless it appears from the will that a testator intended to benefit his former spouse notwithstanding a divorce or annulment, a will which was made prior to a divorce or annulment must be implemented in the same manner as it would have been if the testator's former spouse had died before the divorce or annulment, does not contain or amount to a rebuttable or irrebuttable presumption. To paraphrase Navsa JA in *Eastern Cape Parks & Tourism Agency v Medbury (Pty) Ltd*[99] the words in the deeming provision simply state the effect of (the) meaning which it has ie the way in which the matter which is referred to therein is to be adjudged, without importing any artificiality or fiction. The provision simply amounts to a statement of an 'indisputable conclusion' which will take effect, if the factual requirements stipulated are present.

134. As far as the alleged deprivation of the Court's 'general oversight function' is concerned, in my view nothing in s 2B prevents a Court from exercising its powers of oversight. The applicant is not prevented from having any judicial dispute which he may have in relation to either the operation, validity, or the interpretation of the provision from being determined by a Court, and the provision does not bar the applicant from having any dispute which he may have in this regard from being adjudicated upon. Thus, for example, the applicant is not prevented from approaching the Court to rule on whether the necessary

[98] 1980 (1) SA 65 (A) at 75G-76A.
[99] 2018 (4) SA 206 (SCA) at para [53] ftn 12, citing *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693 at 696.

contrary intention to benefit him as former spouse, notwithstanding the divorce, was adequately expressed in NW's will, as required by the provision.

135. Similarly, as far as any alleged ouster of the Court's 'general discretion' ie its discretionary power is concerned I do not read the provisions of the Act as affording the Court such a power, at least not one based on what a Court might consider to be just and fair, if this is what is being suggested, and it would be anathema to the fundamental principles of testate succession were such a discretionary power to exist. In this regard, as I previously mentioned in the section which dealt with freedom of testation, the bedrock of the law of testate succession is certainty, and that is why it is a fundamental principle of the law of testate succession that a Court is obliged to give effect to a testator's wishes ie his intention as it is expressed in the will, and it has no general power to amend, alter, add to or contradict the terms of a will based on what it might consider to be just and fair in the circumstances. In fact, if anything, as we all know the law of testate succession can often be extremely unfair, and even harsh in its application.

136. Although s 2(3) of the Act provides that a Court may order the Master to accept that a document or an amendment thereto qualifies as a will, it can only do so if it is 'satisfied' that the testator intended it to be so. It does not have a 'general discretion' to do what may in its view be fair, and it certainly does not have a discretion to decide who should be a beneficiary and who not, or who should get what, in terms of a will.

137. In similar vein, whereas s 2A provides that a court may declare a will or part thereof to be revoked if it is 'satisfied' by evidence to such effect, including evidence that the testator performed an act with regard to the will by which he intended to revoke it, this power is also not a discretionary one.

138. In his oral submissions the applicant refined his argument to contend that, just as in the case of these provisions of the Wills Act, which allow for extraneous evidence to be submitted to a Court which is seized with having to decide the issues referred to in the preceding paragraphs, s 2B should have allowed for the provision of such evidence, and by not doing so it unfairly and unconstitutionally

limited his right of access to the court. To this end in the notice of motion the applicant proposed that the Court should, in the event that it found the provision to be unconstitutional, provide for a reading in of words which would allow it to be satisfied of a testator's intention to benefit their former spouse, not only where it was expressed in a will but also from evidence extraneous thereto.

139. From what I was able to establish from the limited facilities available to me (regrettably none of the parties provided any assistance on this aspect in their heads of argument), in a few states in the USA and Australia which have adopted statutory revocation on divorce legislation, provision has been made for evidence of a testator's intention *aliunde* their will.

140. So for example the Californian Probate Code[100] allows for the admission of 'clear and convincing' evidence of a testator's intent outside of their will, Wisconsin's legislation allows for extrinsic evidence 'to construe intent' and in Alaska the courts have read such a power into their legislative provision on the basis that it creates only a rebuttable presumption of revocation and is not a 'strict and inflexible' rule.[101]

141. In Tasmania the Wills Act provides that a divorce will revoke a beneficial disposition to a former spouse unless a contrary intention appears from the will or can 'otherwise be established',[102] and in Victoria statutory revocation will not occur if it 'appears' that the testator did not want a disposition to be revoked upon the ending of his marriage.[103]

142. In contrast to this, in its report which also came out in 1991 (the same year in which the final report of the SALC came out), the Law Reform Commission of Western Australia indicated[104] that it was not in favour of allowing evidence *aliunde* a will as this would 'create uncertainty and foster litigation' and would 'involve the danger of fraud' and this recommendation was accepted and given effect to in the legislation which was initially adopted.

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[100] S 5040(b)(2).
[101] Per Cahn n 7 at pp 1892, 1910.
[102] S 17(4) Wills Act 2008.
[103] S 14(2) Wills Act 1997.
[104] At para 4.37, p53 (Project no. 76-Part II *Effect of Divorce on Wills* (1991)).

143. However, in 2007 an amendment was passed whereby revocation will take place unless a contrary intention appears from the will, or there is 'other evidence' establishing such an intention.[105]

144. In its report the New South Wales Law Reform Commission also expressed the view that there was no reason in principle why proof of a contrary intention should be restricted to expressions in the will, especially as a testator might not know of the rule of revocation on divorce. It was accordingly of the view that it should be possible to use statements made by the testator outside of the will, as evidence of their intention. Whilst it accepted that this might create uncertainty it was of the view that this was the 'necessary price' to pay to ensure that a testator's real intentions were not frustrated. It also felt that although there was a danger of fraud the Courts were well used to weighing evidence and were 'alert' to such a possibility. Consequently, it also recommended that the general rule should be rebuttable by any evidence, including evidence of statements made by the testator, which established to the satisfaction of the Court that he did not intend, at the time of the termination of the marriage, that the rule of revocation should apply.[106]

145. Thus, in New South Wales an amendment which was effected in 1989 to the Wills Probate and Administration Act of 1898 provided that a prior will would not be revoked if the Supreme Court was satisfied by any evidence, including evidence of statements which were made by the testator, that he did not intend at the time of termination of his marriage to revoke a testamentary disposition or appointment.[107]

146. However, it appears that this position was changed subsequently, and the current legislation in force[108] in New South Wales does not allow for evidence *aliunde* the will and revocation will only not occur if a contrary intention is expressed in the will itself.

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[105] Ss 14(2)(a)-(b) to the Wills Act 1970, which was introduced wef 9 February 2008 by the Wills Amendment Act 2007.

[106] Para 10.32 of its report.

[107] S 15A, inserted in terms of the Wills Probate and Administration (Amendment Act).

[108] S 13(2) of the Succession Act 2006.

147. As far as Canada is concerned the OLRC similarly recommended that in Ontario revocation should only not apply where the will expressly provided for a contrary intention.[109] This appears to also be the standard formulation which has been adopted in most states in the USA, certainly those who have adopted s 2-508 of the UPC.

148. When it dealt with this aspect in its working paper in April 1987[110] the SALC expressed the view that effect should not be given to an intention which appeared in a document which was not a will or a codicil to it, and it was of the view that an exception should be made to statutory revocation only if an intention that a divorce should not affect a will appeared 'from' the will, or a later will ie one made post-divorce. This recommendation was endorsed in its final report.

149. There is no indication, from a consideration of the working paper and the final report which it presented in June 1991 that the SALC deliberated this issue amongst its members, nor does it appear as if it received any submissions from any interested parties in this regard.

150. In my view there are a number of factors which strongly militate against the desirability of accepting evidence of a contrary intention, *aliunde* a will, in relation to our form of statutory revocation.

151. In the first place, unlike in the case of evidence which may be tendered in respect of s 2(3), pertaining to whether a document constitutes a will and s 2A pertaining to whether a will has been revoked, which most often will extend beyond evidence tendered by a surviving former spouse and will include evidence from other persons such as a legal representative or family members, as well as documentary evidence (eg a draft will not yet signed, a letter expressing an intention to revoke a will etc), if an exception were to be allowed in relation to s 2B such evidence would, in many instances, only be forthcoming from a surviving former spouse, and would be easy to fabricate. All that a former spouse would need to do to get past the provision, would be to claim that the decedent spouse had told them orally that they wished them to inherit in the event of divorce,

[109] Recommendation no. 1, at p 11 of its report of 28 February 1977, n 7. This is also the position in Saskatchewan in terms of s 19(2) of its Wills Act of 1996.
[110] At paras 3.174-3.176 pp 81-82.

notwithstanding that such an intention had not been expressed in their will, and it would be very difficult for a Court not to accept such evidence, as there would be no witnesses who would be able to refute it.

152. As the Arizona Court of Appeals said in *Lamparella*[111] the purpose of the provision would be 'eviscerated if a former spouse could circumvent the automatic revocation effected…. by submitting self-serving testimony'.

153. Secondly, if evidence of a contrary intention outside of a will were to be allowed it would in my view completely negate an important objective which the legislature sought to achieve by means of s 2B viz to get people who are getting divorced and who have made a prior will in favour of their spouse to apply their minds to the situation and if they wish to benefit their spouse notwithstanding, to say so in writing, in a will.

154. In addition, in my view allowing for evidence of intention to be forthcoming from sources outside of a will would create uncertainty, on many levels. For one thing, family members would not know where they stood in relation to whether they were to inherit or not, and the administration of a testator's estate by their executors could be hampered. In matters where there is no extraneous written indication by the testator of a contrary intention (which is likely to often be the case), and little or no evidence of an oral expression thereof (which is also often likely to be the case, particularly where the testator might have been unaware of s 2B) the Court might be required to construe whether or not the conduct or behaviour of the testator was indicative of such a contrary intention. Once again, this opens the door to uncertainty- what one Court might find constitutes acceptable and satisfactory evidence another might not.

155. All of this would result in an increase in probate litigation, and the prospect of endless appeal processes which could delay the winding-up of a deceased estate for many years. It might also lead to grotesque results where a former spouse has already been more than handsomely rewarded, by way of a divorce settlement, and could potentially foment greedy and opportunistic attempts by a former spouse to grab the last remaining assets from their late 'ex' which they

[111] *In re* Estate of Lamparella 109 P.3d 959 at 966 (Ariz. Ct. App. 2005) cited by Cahn n 7 at p 1891 ftn 66.

had previously agreed would go to them in terms of a divorce settlement, thereby depriving their ex-spouse's heirs of what should rightfully come to them.

156. When considering these aspects one must again emphasize that s 2B only applies in the very limited instances where a testator dies within 3 months after their divorce, which is unlikely in the case of most divorced couples. As I previously indicated, in practice the provision probably affects very few people, and in the overwhelming majority of cases a will which was previously made and which favours a spouse will be given effect to.

157. In the circumstances, in my view the legislature's decision not to make provision in a section of the Wills Act which has limited application in time and extent, for proof of a contrary intention by a testator otherwise than in their will (where one would ordinarily expect to find it in accordance with longstanding and fundamental principles of testate succession), is not 'disproportionate' in any sense or procedurally unfair, nor does it amount to a limitation of the applicant's right of access to a Court.

158. Ultimately, and to get back to first principles, I think sight must not be lost of the fact that (as was set out in paragraphs 78-79 above), ordinarily in any matter involving the determination of a testator's intention as to who is to be their beneficiary and what they should inherit, other than one involving the application of s 2B, it is a trite and long-standing principle of the law of testate succession in this country that a Court is confined to the contents of a testator's will, no matter how long ago it may have been made, and no matter that in the meantime the testator's intentions may have changed. A former spouse or any other potential beneficiary would have no right to put before a Court extraneous evidence of the testator's intention, from sources outside of the will, either to show that it was consistent with that expressed in the will, or that it had changed. That would be completely contrary to accepted principles. In the context of an argument in terms of 34, there would thus be no right of access to a Court with a view to putting such evidence before it. Thus, outside of s 2B the applicant had no right to approach a Court to put extraneous evidence before it of NW's intention

outside of her will, and the provision accordingly did not take away such a right of access to Court.[112]

Conclusion

159. In the result, in my view for the reasons set out above s 2B serves a legitimate and compelling social purpose and the deprivation which it affects when it applies is not arbitrary in terms of s 25(1), and there is sufficient reason for it. It is also not procedurally unfair. In addition, the terms of s 2B do not constitute a limitation of the applicant's right of access to a Court, in breach of s 34. Consequently, the application falls to be dismissed.

160. As far as costs are concerned I believe that this is not a matter where the general principle that costs should follow the event, should apply, as it traversed novel issues of law involving important societal considerations and it would be unduly punitive to order the applicant as the losing party to be liable for the respondents' costs, save in respect of the application to strike out, which concerned a large amount of material which was not only irrelevant, but also scandalous and vexatious and should never have been included. This added unnecessary bulk to an application which was already much longer than it should have been. In this regard the material which was included in the record in reply to third and fourth respondents' notice in terms of rule 35(12), should also not have been there as it was not incorporated in, and does not constitute an attachment to, any of the affidavits. But second respondent was also at fault in that he also added lengthy annexures in support of his affidavit, which included the entire series of reports which were produced by the SALC in their extensive review of the law of succession in SA between 1985 and 1991 or lengthy extracts therefrom, without attempting to cull what was not necessary. This too, made the papers unduly prolix.

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[112] Contrast for example the position in *Twee Jonge Gezellen (Pty) Ltd & Ano v Land & Agricultural Development Bank of SA t/a The Land Bank & Ano* 2011(3) SA 1 (CC) where it was held that the rules and procedure for provisional sentence (which provide that a liquid document gives rise to a rebuttable presumption of indebtedness and a Court has no jurisdiction to hear oral evidence other than in relation to the authenticity of a defendant's signature), constituted a limitation of a defendant's constitutional right to a fair hearing in terms of s 34, insofar as they might prevent him from showing there was a balance of success in his favour on the principal case, without oral evidence. The applicant in this matter did not put up a constitutional challenge in these terms.

161. Although in matters such as these Courts often direct that costs should be borne by the estate to my mind this would also not be fair. I see no reason why, having brought an application which failed, the applicant should be afforded the luxury of having his costs (which will be considerable given the amount of paper involved and the fact that he employed two counsel), paid for out of his late wife's estate, nor in my view should the Master's costs come out of the estate. This would deplete what little will be left for third and fourth respondents as an inheritance, once the costs which they have incurred are settled. In my view, this is also not a matter where costs can or should be dealt with in terms of the principle in *Biowatch.*

162. In my view the fair and proper Order to make in respect of costs is that, save for the application to strike out, each party should bear their own costs.

163. I accordingly make the following Order:

163.1 The interlocutory application by third and fourth respondents in terms of rule 6(15) is upheld with costs.

163.2 Paragraphs 22-24 and 31-46 (inclusive) of the founding affidavit, together with annexures 'FA2' to 'FA8' thereto, are struck from the record.

163.3 The application for an Order declaring that s 2B of the Wills Act 7 of 1953 is inconsistent with and/or contrary to ss 25(1) and 34 of the Constitution, is dismissed.

163.4 Save for the Order made in terms of para 163.1 in respect of the interlocutory application each party shall be liable for their own costs of suit.

M SHER

Judge of the High Court

Appearances:

Applicant's counsel: Adv JH Loots SC and Adv GP Solik

Applicant's attorneys: Norton Rose Fulbright (Cape Town)
Second respondent's counsel: Adv T Golden SC
Second respondent's attorneys: State Attorney (Cape Town)
Third & fourth respondents' counsel: Adv MTA Costa
Third & fourth respondents' attorneys: Lawtons (Sandton)
c/o Dunster Attorneys (Cape Town)