

FINAL RESEARCH REPORT

THE TESTAMENTARY CAPACITY OF ELDERLY PEOPLE AND THE RISK FOR UNDUE INFLUENCE IN SOUTH AFRICA

by

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CHAPTER 1: INTRODUCTION TO THE RESEARCH

1.1 Introduction

The process of making a will is a very important step that people take during their lifetime.¹ It is important that when a person drafts a will, his/her honest and truthful intentions are protected by the act of making the will.² There are formalities entrenched in section 2 of the Wills Act³ which need to be complied with for a will to be valid. It is said that as people live longer, the potential of them suffering from mental disorders increases,⁴ statistics show that “approximately 15% of adults aged 60 and over suffer from a mental disorder.”⁵ As a result of this, it may affect their capacity to draft wills and possibly make older people to be more vulnerable to “undue influence” in executing their wills.⁶ An example of this can be seen in a scenario where a testator who is 90 years old leaves his entire estate to someone (referred to as A) who prior to the testator’s death, took care of the testator and assisted the testator in his financial affairs which includes taking the testator to draft a will.⁷ As a result, the testator disinherits his/her close relatives and leaves the entire estate to A. In this situation, at the death of the testator, the question would be whether the will drafted by the testator expresses the influencer’s wishes rather than the wishes of the testator.⁸ It is important to ask this question to avoid the testator’s close relatives being prejudiced by the potential influence and to ensure that the wishes being carried out are those of the testator and not of the influencer.⁹

Therefore, the general theme of this research is to understand the testamentary capacity of elderly people and the risk of undue influence that they may face due to their age and other cognitive impairments.¹⁰ The research will further focus on recent judgements on South African law and other jurisdictions where testamentary capacity of elderly persons was analysed as well as looking at whether the testamentary capacity of an elderly person is sufficiently protected by common-law principles.¹¹

This is a desktop form of research¹² and will be conducted using primary sources such as legislation, case law and secondary sources such as articles, books and web resources. The purpose of chapter one is to provide a brief overview of the research, the purpose of the research and what the research aims to achieve.

¹ De Waal, M.J & Schoeman-Malan, M.C *Law of Succession* 5th ed (2015) 388.

² De Waal & Schoeman-Malan *Law of Succession* 304.

³ S2 of Act 7 of 1953.

⁴ World Health Organization “Mental health of older adults” December 2017 website at <https://www.who.int/news-room/fact-sheets/detail/mental-health-of-older-adults#:~:text=Approximately%2015%25%20of%20adults%20aged,suffer%20from%20a%20mental%20disorder> [Accessed 19 April 2022].

⁵ World Health Organization ‘Mental health of older adults’.

⁶ Peisah, C Finkel, S Shulman, K Melding, P Luxenberg, J Heinik, J Jacoby, R Reisberg, B Stoppe, G Barker, A Firmino, H Bennett, H “The wills of older people: risk factors for undue influence” 2009 *Journal in International Psychogeriatrics* (1) 7-9 at <https://www.researchgate.net/publication/23553754> [Accessed 17 April 2022].

⁷ Scalise, R.J “Undue Influence and the Law of Wills: A Comparative Analysis” 2008 *Duke Journal of Comparative & International Law* (19) 41- 42 at <https://ssrn.com/abstract=2094375> [Accessed 17 April 2022].

⁸ Scalise ‘Undue Influence and the Law of Wills: A Comparative Analysis’ 42.

⁹ MHi Attorneys “Grounds to Challenge A Will” March 2017 website at <https://mhilaw.co.za/2017/03/29/grounds-to-challenge-a-will/#:~:text=Undue%20influence%3A,his%20will%20is%20declared%20invalid>. [Accessed 07 November 2022].

¹⁰ Schoeman-Malan, M.C “Testamentary capacity of cognitive-impaired elderly - when is old too old to execute a will?” 2015 *Obiter* (2) 406.

¹¹ Schoeman-Malan 2015 *Obiter* 406.

¹² Type of research that is based on material that is already published.

1.2 Problem Statement

The main aim of this research is to discuss the common law grounds of undue influence that are existing and to critically analyse whether elderly people enjoy freedom of testation despite being vulnerable due to age and other impairments. This research also seeks to establish whether the testamentary capacity of the elderly people mentioned is sufficiently protected by common law principles.¹³ Moreover, the impairments affecting the mental status of older testators will be considered to establish how these aspects influence or negate testamentary capacity.¹⁴

As a starting point of this research, it is important to consider the case of *Spies v Smith*¹⁵ (*Spies*) as this case defined undue influence and when it occurs. The court in *Spies*¹⁶ had to determine whether a 'mentally retarded' individual was unduly influenced by his uncle, when he executed a will which benefited the uncle's children.¹⁷ The *Spies*¹⁸ case considered factors such as "flattery, unusual affection and professions of extraordinary love or respect" and whether these factors are akin to coercion, which is required when proving undue influence.¹⁹ An understanding of this is essential because before determining whether or not a testator (elderly testator) has been unduly influenced, it is important to understand what is undue influence and in which circumstances it can occur. Proving undue influence is particularly difficult because of the absence of the testator to explain reasoning behind distributing assets in a certain way.²⁰ It is argued that undue influence is mostly prevalent in cases where a testator is vulnerable and heavily relies on others for example, where the testator is an elderly or ill.²¹ With this in mind it raises an inquiry on whether the law sufficiently protects elderly testators in making sure that their wishes are expressed and conveyed instead of their influencer's wishes.

1.3 Research Objectives

The first objective of this research is to understand the risk of undue influence of elder testators and how it may affect the validity of wills. The second objective of this research is to evaluate to what degree the possible impairments affecting the mental status of older testators in South Africa influence testamentary capacity. The third objective of this research is to establish whether elderly persons who are vulnerable due to age enjoy freedom of testation and furthermore whether the common law principles sufficiently protect their testamentary capacity.

¹³ Schoeman-Malan 2015 *Obiter* 403.

¹⁴ Schoeman-Malan 2015 *Obiter* 403.

¹⁵ 1957 (1) SA 539 (A).

¹⁶ 1957 (1) SA 539 (A).

¹⁷ Jacobs, J & Lambrechts, L. "Valid or not? General principles for challenging a will" October 2013 website at <https://www.derebus.org.za/valid-not-general-principles-challenging-will/> [Accessed 21 April 2022].

¹⁸ 1957 (1) SA 539 (A).

¹⁹ Jacobs & Lambrechts 'Valid or not? General principles for challenging a will'.

²⁰ Hentys "Contesting a Will on the Grounds of Undue Influence" 2019 website at <https://www.willcontesting.com.au/contesting-will-grounds-undue-influence/#:~:text=In%20Estate%20Law%2C%20%E2%80%9Cundue%20influence,who%20is%20elderly%20or%20ill.> [Accessed 24 April 2022].

²¹ Hentys 'Contesting a Will on the Grounds of Undue Influence'.

1.4 Research Question(s)

The following **questions** will be addressed:

1. The risk for undue influence of elderly testators in South Africa and whether this may affect the validity of wills drafted.
 - 1.1 What is undue influence?
 - 1.2 What are the grounds for undue influence?
 - 1.3 Which risk factors may predispose the influence?
 - 1.4 Which effect does undue influence have on validity of wills drafted?
2. The degree in which the impairments affecting the mental status of older testators in South Africa influence or negate testamentary capacity.
 - 2.1 What is testamentary capacity?
 - 2.2 To what degree do the possible impairments negate testamentary capacity?
3. Whether elderly people in South Africa, who are vulnerable due to age and other impairments, enjoy freedom of testation. If their testamentary capacity is sufficiently protected by the common-law principles.
 - 3.1 What is the relationship between testamentary capacity and undue influence?
 - 3.2 What are some measures taken by other jurisdiction (such as United Kingdom etc.) to protect elderly persons in drafting wills?
 - 3.3 Are there sufficient measures employed in South Africa to protect elderly testators?

1.5 Research Methodology

This research will make use of the desktop form of research, which is a type of research that is based on material that is already published.²² This method of research involves making use of existing data.²³ The desktop form of research will be used to formulate legal doctrines through the analysis of legal rules and will be conducted using primary sources such as case law, legislation and the Constitution of the Republic of South Africa, 1996 (the Constitution).²⁴ This research will also make use of secondary sources such as books, internet sources and articles of South African academics.²⁵

The research will predominantly be conducted through a critical analysis of desktop literature reviews of articles on undue influence in South Africa, that is, information that is already available on the internet or published in books and journal articles. Relevant legislation such as the Wills Act²⁶ and other laws which are relevant to testamentary capacity will be

²² Question Pro "Desk Research" 2022 website at <https://www.questionpro.com/blog/desk-research/> [Accessed 02 August 2022].

²³ Question Pro 'Desk Research'.

²⁴ Jerome Hall Law "Legal dissertation: Research and writing Guide" October 2019 website at <https://law.indiana.libguides.com/dissertationguide#:~:text=Doctrinal,%2C%20statutes%2C%20or%20regulations> [Accessed 24 April 2022].

²⁵ Jerome Hall Law 'Legal dissertation: Research and writing Guide'.

²⁶ Act 7 of 1953.

considered. Case law and journal articles dealing with the topic will be used as well as subject matter platforms such as ResearchGate, Juta and Saffli to gather information.

1.6 Assumptions of the Research

Testamentary capacity is regulated by the Wills Act,²⁷ whereas testamentary undue influence is governed by common law.²⁸ It is argued that with the increase in the number of older people who are wealthier, there is a rise in cognitive impairments such as dementia and Alzheimer disease, which is prevalent in elderly people over the last 30 years.²⁹

In the case of *Estate of Wilbur Waldo Lynch*,³⁰ it was argued that there is irreconcilable conflict as a person cannot be both unduly influenced and lack testamentary capacity.³¹ It was argued that the two are mutually exclusive and implicate the same material facts,³² whether one excludes the other will be discussed in this research. Sonnekus,³³ advocates that there should be more intervention especially in the case of elderly persons who are potentially impaired and that there should be a cap for automatic testamentary capacity and that there should be a requirement that the will of the potentially impaired elderly should be witnessed by an impartial professional.

1.7 Chapter Outlines

1.7.1 Chapter 1

As an introductory chapter, chapter one will provide a brief background of the research.³⁴ It will introduce the topic, the research problem and questions as well as a brief overview of what the research deals with and the manner in which it will be outlined.³⁵

1.7.2 Chapter 2

The purpose of this chapter is to provide brief points on the existing literature on testamentary capacity of elderly persons and the risk for undue influence.³⁶ It will also analyse the gaps that the researcher has identified about the current research and present the literature in a way that is organised.³⁷ Amongst other literature that will be used in this chapter, is Francois Du

²⁷ Act 7 of 1953.

²⁸ Du Toit, F "Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?" 2013 *Journal of Civil Law Studies* (6) 524-525 at <https://www.researchgate.net/publication/314403087> [Accessed 17 April 2022].

²⁹ Schoeman-Malan 2015 *Obiter* 404.

³⁰ [2011] CV 3.

³¹ Schoeman-Malan 2015 *Obiter* 428.

³² Schoeman-Malan 2015 *Obiter* 428.

³³ Sonnekus, R & De Waal, M "Exploring the Law of Succession: Studies National, Historical and Comparative" 2012 *THRHR* (24) 87.

³⁴ Santelmann, L "Outline for Research Proposal" 2016 website at <https://web.pdx.edu/~dbls/proposals.html> [Accessed 19 April 2022].

³⁵ Santelmann 'Outline for Research Proposal'.

³⁶ Royal Literacy Fund "What is Literature Review" 2019 website at <https://www.rlf.org.uk/resources/what-is-a-literature-review/> [Accessed 21 April 2022].

³⁷ Royal Literacy Fund 'What is Literature Review'.

Toit's journal of Testamentary undue influence to give a conceptualisation of testamentary undue influence in South Africa.³⁸ Furthermore Ronald Scalise's journal on undue influence and the law of wills, will be used in discussing the doctrine of undue influence in South Africa.³⁹

1.7.3 Chapter 3

This chapter refers to the legislation applicable to the research and to provide how the legislation addresses or does not address the issues outlined by the research questions. The legislation applicable here is the Wills Act,⁴⁰ and testamentary capacity is regulated by the Wills Act,⁴¹ whereas testamentary undue influence is governed by common law.⁴² Section 2 of the Wills Act⁴³ provides formalities which needs to be complied with for a will to be valid. Testamentary capacity will be discussed by looking at the age restriction in terms of section 4 of the Wills Act.⁴⁴ Foreign Legislation such as the Mental Capacity Act⁴⁵ (MCA) will be considered as it outlines that in some jurisdictions (such as United Kingdom) additional measures are taken to protect elderly testators. Moreover, the Older Persons Act⁴⁶ will be considered as it aims to protect the rights, well-being and safety of elderly people.

1.7.4 Chapter 4

This chapter refers to the case law applicable to this research. This chapter will provide an in-depth discussion of the *Spies*⁴⁷ case which is an important case that aligns with one of the requirements of undue influence.⁴⁸ The case of *Katz v Katz*⁴⁹ (*Katz*) will be considered as it highlighted the potential risk of undue influence that can occur due to the testator being dependent on another person.⁵⁰ Moreover, the case of *De Bruin v Stoffberg*⁵¹ (*De Bruin*) will be considered as it also dealt with undue influence in the case of an elderly testator, the court evaluated whether the elderly testator was unduly influenced and if the testator had testamentary capacity which would have an effect on the wills drafted.⁵²

1.7.5 Chapter 5

This chapter gives an analysis of the authoritative sources and will show how they tie together with the viewpoints expressed in chapter three and four. This chapter will engage with additional measures that other jurisdictions have taken to protect elderly testators by looking at the MCA.⁵³ The MCA⁵⁴ was designed to protect and empower individuals (including old testators) who may lack the mental capacity to make their own decisions about their care and

³⁸Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 529.

³⁹ Scalise 'Undue Influence and the Law of Wills: A Comparative Analysis' 43.

⁴⁰ Act 7 of 1953.

⁴¹ Act 7 of 1953.

⁴² Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 529.

⁴³ S2 of Act 7 of 1953.

⁴⁴ S4 of Act 7 of 1953.

⁴⁵ Act 2005.

⁴⁶ Act 31 of 2006.

⁴⁷ 1957 (1) SA 539 (A).

⁴⁸ Jacobs & Lambrechts 'Valid or not? General principles for challenging a will'.

⁴⁹ 2004 4 All SA 545 (C).

⁵⁰ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 529.

⁵¹ 2020 ZAFSHC 3.

⁵² Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 529.

⁵³ Act 2005.

⁵⁴ Act 2005.

treatment. In considering the MCA,⁵⁵ the researcher will establish whether there are additional measures that South Africa has taken to protect elderly testators and further if there is a necessity for further measures to be considered.

1.7.6 Chapter 6

This chapter will provide a reflection of the previous chapters and give an overview and conclusion. The important points and findings based on the topic of the research will be summarised in this chapter.

1.8 Conclusion

Chapter one has given a brief overview of the research, the purpose of the research and what the research aims to achieve. The next chapter will focus on expanding on the existing literature on the topic and providing different viewpoints of authors and how their viewpoints relate to the topic.

⁵⁵ Act 2005.

CHAPTER 2: LITERATURE REVIEW

The main purpose of this literature review is to consider different authors views and approaches on the testamentary capacity of elderly testators and the risk for undue influence that they may face.

In a will, what the testator expresses should be based on his/her free will.⁵⁶ This means that the testator's wishes should be expressed. It is important that when a person drafts a will, his/her honest and truthful intention are protected by the act of drafting the will.⁵⁷ Du Toit⁵⁸ explored this construct of testamentary undue influence and stated that this generally protects vulnerable or aged testator's testamentary freedom against the "importunities of false persuaders or enterprising impostors. Du Toit⁵⁹ also explained the undue influence concept as a concept in which one uses power over another for the purposes of financial exploitation or gain.

There are various factors that a court may use in establishing if the testator was unduly influenced as outlined by Persiah.⁶⁰ The first being, the confidential relationship between the testator and the influencer, which created an opportunity for the influencer to control the testamentary act.⁶¹ The second factor, is the vulnerability of the testator to the undue influence, the third is whether the influencer had an inclination to influence and the fourth being, whether the influence was undue.⁶² The fifth being whether the influencer used the relationship to ensure that there is a testamentary change which would not have occurred without the undue influence and lastly, any suspicious circumstances with making the will.⁶³ These six factors are relevant in this research as they help to establish whether undue influence has occurred.

Scalise⁶⁴ is of the view that mere circumstantial evidence of undue influence is not enough in proving undue influence, but rather, what is needed is proof of actual coercion. This is because of the difficulties in proving the motives of people who stand to benefit from the will and the state of mind that the deceased was in when executing the will.⁶⁵

Now considering, the element of testamentary capacity, Schoeman-Malan⁶⁶ explored the concept of testamentary capacity especially looking at the elderly and compared it with the cognitive impairments that elderly people face as they age. Schoeman-Malan⁶⁷ explored the legal perspective of capacity which refers to a testator's ability to understand the nature and effect of bequeathing assets to someone else.

Champine⁶⁸ is of the view that one must first address testamentary capacity and if the testator is found to have capacity, then the question of undue influence from another party may be

⁵⁶Jacobs & Lambrechts 'Valid or not? General principles for challenging a will'.

⁵⁷ De Waal & Schoeman-Malan *Law of Succession* 40.

⁵⁸ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 512.

⁵⁹ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 512.

⁶⁰ Peisah *et al* 'The wills of older people: risk factors for undue influence' 9.

⁶¹ Peisah *et al* 'The wills of older people: risk factors for undue influence' 9.

⁶²Peisah *et al* 'The wills of older people: risk factors for undue influence' 9.

⁶³Peisah *et al* 'The wills of older people: risk factors for undue influence' 9.

⁶⁴ Scalise 'Undue Influence and the Law of Wills: A Comparative Analysis' 52.

⁶⁵ Scalise 'Undue Influence and the Law of Wills: A Comparative Analysis' 52.

⁶⁶ Schoeman-Malan 2015 *Obiter* 414.

⁶⁷ Schoeman-Malan 2015 *Obiter* 417.

⁶⁸ Champine, P "A Blueprint for Testamentary Capacity Reform" 2005 *Social Science Research Network* at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=696081 [Accessed 3 June 2022].

addressed. This illustrates the relationship between testamentary capacity and undue influence, in that, once the testator's testamentary capacity has been proven, then a prove for undue influence may arise.⁶⁹ However, if there is no testamentary capacity then the prove for undue influence falls away.⁷⁰

Sitkoff⁷¹ is of the view that the mere fact that one is of old age and begins to suffer from cognitive illness, does not necessarily mean he/she is not capable of appreciating the nature and effect of the will he/she is executing or has executed. Considering that people are becoming older in modern times, it can be expected that their capacity will increasingly be contested or possibly if they have capacity, there may be a risk of undue influence faced while executing their will.⁷² Sitkoff⁷³ supports Champine's⁷⁴ view that testamentary capacity and undue influence must not be confused and one must be proved first, before proving the other.

Sonnekus,⁷⁵ in looking at South Africa, advocates that more intervention or measures should be put in place when dealing with elderly persons who are potentially impaired and there should be a requirement that the will of the potentially impaired elderly should be witnessed by an impartial professional. However, Schoeman-Malan's view is different from that of Sonnekus. Schoeman-Malan⁷⁶ is of the view that putting an additional requirement for disqualifying wills of elderly testators on the ground of incapacity would in a way interfere with the principle of testation. Schoeman-Malan⁷⁷ is of the view that adding another requirement would most probably result in more wills of elderly testators being contested. Schoeman-Malan states that the basic requirements set within the boundaries of common law must rather be used when assessing the capacity of an elderly person.⁷⁸ And that if undue influence has occurred, it must be proved by the disgruntled alleged.⁷⁹

Finally, there is literature that speaks to undue influence as a whole, however, it is clear that there are different views in terms of whether South Africa is sufficiently protecting the interests of the elderly and whether additional requirements need to be employed as a result and this must be considered by looking at case law.

This chapter has outlined the different authors' views and approaches on the testamentary capacity of elderly testators and the risk for undue influence that they may face. The next chapter will discuss legislation that relates to the topic and how the statutes address or does not address the issues outlined in this research.

⁶⁹ Champine 'A Blueprint for Testamentary Capacity Reform'.

⁷⁰ Champine 'A Blueprint for Testamentary Capacity Reform'.

⁷¹ Sitkoff, R.H. "Trusts and Estates: Implementing Freedom of Disposition" 2014 *Saint Louis University Journal* (58) 649 at https://dash.harvard.edu/bitstream/handle/1/15117785/Sitkoff_StLouis_2014.pdf?sequence=1 [Accessed 01 June 2022].

⁷² Sitkoff 'Trusts and Estates: Implementing Freedom of Disposition' 649.

⁷³ Sitkoff 'Trusts and Estates: Implementing Freedom of Disposition' 649.

⁷⁴ Champine 'A Blueprint for Testamentary Capacity Reform'.

⁷⁵ Sonnekus & De Waal 2012 *THRHR* 87.

⁷⁶ Schoeman-Malan 2015 *Obiter* 433.

⁷⁷ Schoeman-Malan 2015 *Obiter* 433.

⁷⁸ Schoeman-Malan 2015 *Obiter* 433.

⁷⁹ Schoeman-Malan 2015 *Obiter* 433.

CHAPTER 3: TESTAMENTARY CAPACITY AND UNDUE INFLUENCE IN TERMS OF APPLICABLE LAW

3.1 Introduction

As discussed in Chapter one, the purpose of this research is to give an overview of the possible undue influence that people who are elderly face because of being vulnerable due to their age and other impairments.

This chapter refers to the legislation applicable to the research, the purpose of the legislation and how the legislation addresses or does not address the issues outlined by the research questions.

3.2 South African Law

3.2.1 Wills Act

The aim and purpose of the Wills Act⁸⁰ is to “consolidate and amend the law relating to the execution of wills.” Moreover, the Wills Act⁸¹ confirms the right that an individual has to dispose his/her personal and real property, whether the individual is the outright owner or simply a beneficiary.⁸² This is achieved through making a will which complies with the formalities in the Wills Act.⁸³

A will is important as it is aimed at capturing the deceased’s wishes with regards to how the deceased would like to distribute his/her assets.⁸⁴ A will includes a testator’s instructions on how his/her assets must be distributed to the beneficiaries.⁸⁵ Section 2 of Wills Act⁸⁶ provides formalities that are needed in order to execute a will or in order for a will to be valid.⁸⁷ Not complying with the formalities would potentially make the will invalid or without effect.⁸⁸

Although there is a discretion given to courts when there is a dispute in terms of wills, a huge importance is placed on giving effect to what the testator wishes.⁸⁹

3.2.1.1 Legal theories used to contest wills

A will is presumed to be valid on the face of it until it is proven to be invalid, the onus then rests on the individual that alleges that the will is invalid, to prove that the will is invalid.⁹⁰ The

⁸⁰ Act 7 of 1953.

⁸¹ Act 7 of 1953.

⁸² van Deventer, C “Under Which Grounds may the Validity of a Will be Challenged?” September 2021 website at <https://www.vandeventers.law/Legal-Articles/entryid/1909/under-which-grounds-may-the-validity-of-a-will-be-challenged> [Accessed 09 September 2022].

⁸³ Act 7 of 1953.

⁸⁴ van Deventer ‘Under Which Grounds may the Validity of a Will be Challenged?’

⁸⁵ van Deventer ‘Under Which Grounds may the Validity of a Will be Challenged?’

⁸⁶ S2 of Act 7 of 1953.

⁸⁷ van Deventer ‘Under Which Grounds may the Validity of a Will be Challenged?’

⁸⁸ van Deventer ‘Under Which Grounds may the Validity of a Will be Challenged?’

⁸⁹ van Deventer ‘Under Which Grounds may the Validity of a Will be Challenged?’

⁹⁰ Jacobs & Lambrechts ‘Valid or not? General principles for challenging a will’.

two most common legal theories that are used to contest a will are undue influence and lack of testamentary capacity.⁹¹

Firstly, looking at undue influence, undue influence is an acceptable ground to make a will invalid which had complied with the formal requirements.⁹² The essence of a will is that it must illustrate the testator's wishes and if it is shown that the testator was under undue influence when he/she drafted the will, then it will be declared invalid.⁹³ This was confirmed in the cases of *Spies*⁹⁴ and *Katz*⁹⁵ where the courts confirmed what undue influence refers to and what undue influence is not defined as.

It is not advised that an old or frail prospective testator draft a will by himself, if someone is not familiar with the will-drafting process, a professional should be consulted to ensure that the will complies with the requirements as prescribed by section 2 of the Wills Act⁹⁶ and to ensure that the true wishes of the testator are captured.⁹⁷

Testamentary capacity is another acceptable ground to make a will invalid.⁹⁸ Testamentary capacity refers to a "person's ability to make a will."⁹⁹ As alluded by section 4 of the Wills Act,¹⁰⁰ in order for one to execute a will he/she must be of the age of 16 years and above, and he/she must also have the capacity to execute the will, meaning he/she must be able to understand and appreciate the consequences of his/her actions.¹⁰¹

The first issue to be addressed in this research is the risk for undue influence that elderly testators face and whether this affects the validity of wills drafted. Although the Wills Act¹⁰² doesn't specifically touch on undue influence, it prescribes formalities which need to be complied with for a will to be valid in terms of section 2(1) of the Wills Act.¹⁰³ Moreover, there are ways in which a will can be contested if for example the testator was unduly influenced or if the testator lacked testamentary capacity. As stated, the Wills Act¹⁰⁴ is aimed at ensuring that the testator's wishes are expressed and not those of the influencer, so risk factors such as a special relationship between the testator and the alleged influencer as well as where the testator is vulnerable due to being impaired, can result in the testator's wishes not being reflected in the will but rather the wishes of a third party.¹⁰⁵

⁹¹ Taylor, S "Testamentary Capacity and Undue Influence in Will Contests" February 2012 website at <https://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/posts/testamentary-capacity-and-undue-influence-in-will-contests> [Accessed 12 September 2022].

⁹² van Deventer 'Under Which Grounds may the Validity of a Will be Challenged?'

⁹³ van Deventer 'Under Which Grounds may the Validity of a Will be Challenged?'

⁹⁴ [1957] (1) SA 539 (A).

⁹⁵ [2004] 4 All SA 545.

⁹⁶ S2 of Act 7 of 1953.

⁹⁷ Schoeman-Malan, M.C "Assisting an ailing testator to sign a will" 2019 *THRHR* (82) 86.

⁹⁸ van Deventer 'Under Which Grounds may the Validity of a Will be Challenged?'

⁹⁹ Schoeman-Malan *Obiter* 410.

¹⁰⁰ S4 of Act 7 of 1953.

¹⁰¹ van Deventer 'Under Which Grounds may the Validity of a Will be Challenged?'

¹⁰² Act 7 of 1953.

¹⁰³ S2(1) of Act 7 of 1953.

¹⁰⁴ Act 7 of 1953.

¹⁰⁵ Peisah et al 'The wills of older people: risk factors for undue influence' 5.

3.2.2 Older Person's Act

The Older Person's Act¹⁰⁶ provides for the rights of older persons and defines an older person as a person who is 60 years old or older.¹⁰⁷ The purpose of the Older Persons Act¹⁰⁸ is to promote, protect and maintain the well-being, status, rights, and security of older persons.¹⁰⁹ It is aimed at combating the abuse of older persons, the preamble to the Older Persons Act¹¹⁰ requires the state to 'create an enabling environment in which the rights in the Bill of Rights must be respected, protected and fulfilled'.¹¹¹ The Older Persons Act,¹¹² provides that in situations where there are decisions or actions which may affect an older person, the older person's rights must be protected, respected and promoted.¹¹³ It also provides that the best interests of the older person must be given preference.¹¹⁴ Moreover, the older person should be treated fairly and equitably and his/her dignity should be respected.¹¹⁵

The rights of older persons are to be the basis for all decisions, actions and proceedings affecting older persons as provided by section 5(2) of the Older Persons Act.¹¹⁶ Important guidelines are given which should be followed in any proceeding in terms of section 5(2) of the Older Persons Act,¹¹⁷ such as any decision or action taken must be to promote, protect, respect and fulfil older person's rights.¹¹⁸ Any decision or action taken must be in the older person's best interest and should respect the dignity of the older person.¹¹⁹ Any decision or action taken, must protect an older person against unfair discrimination and must be fair and equitable.¹²⁰

Although the Older Persons Act¹²¹ aims to create an enabling and supportive environment for older persons. The Older Persons Act¹²² makes no reference to the possibility of limited mental capacity of elderly people when executing their wills and the undue influence that older persons may face as a result of their age. This legislation addresses the issues raised in this research of bringing an awareness of the possible vulnerable position that elderly people may find themselves in and also ensuring that their best interests are looked after.

3.2.3 The Constitution

Section 9 of the Constitution deals with equality and provides that "everyone is equal before the law and has the right to equal protection and benefit of the law." Section 10 of the Constitution deals with human dignity and provides that "everyone has inherent dignity and

¹⁰⁶ Act 13 of 2006.

¹⁰⁷ Act 13 of 2006.

¹⁰⁸ Act 13 of 2006.

¹⁰⁹ South African Human Rights Commission "Human Rights And Older Persons" 2015 at <https://www.sahrc.org.za/home/21/files/FINAL%20Human%20Rights%20and%20Older%20Persons%20Educational%20Booklet.pdf> [Accessed 13 September 2022].

¹¹⁰ Act 13 of 2006.

¹¹¹ Malherbe, K "Older Persons Act: Out with the old and in the with the older?" 2007 *Sabinet African Journal* (11) 25-35 at <https://journals.co.za/doi/pdf/10.10520/EJC60239> [Accessed 13 September 2022].

¹¹² Act 13 of 2006.

¹¹³ Viljoen, S "The rights of the elderly" November 2017 website at <https://regsdiensite.solidariteit.co.za/en/the-rights-of-the-elderly/> [Accessed 13 September 2022].

¹¹⁴ Viljoen 'The rights of the elderly'.

¹¹⁵ Viljoen 'The rights of the elderly'.

¹¹⁶ S5(2) of Act 13 of 2006.

¹¹⁷ S5(2) of Act 13 of 2006.

¹¹⁸ Malherbe 'Older Persons Act: Out with the old and in the with the older?' 25.

¹¹⁹ Malherbe 'Older Persons Act: Out with the old and in the with the older?' 25.

¹²⁰ Malherbe 'Older Persons Act: Out with the old and in the with the older?' 25.

¹²¹ Act 13 of 2006.

¹²² Act 13 of 2006.

the right to have their dignity respected and protected.” The Constitution speaks of protecting one’s human dignity and equality and the Older Persons Act¹²³ speaks of protecting the rights of older people and having their best interest in situations where they are affected or might be affected. This could possibly mean that in situations where a testator suffers from any impairment or is in a situation where he/she could be vulnerable, the best interests of the testator should be upheld.

3.3 Foreign Statutes

Section 39(1) of the Constitution states that when interpreting the Bill of Rights, a court may consider foreign law. Additional measures are used in other jurisdictions such as the United Kingdom to protect elderly testators.¹²⁴ This is done through the MCA.¹²⁵ The MCA¹²⁶ was formulated to award protection to people which includes elderly testators, this also covers people who are considered to not have capacity to make their own decisions.¹²⁷ The MCA¹²⁸ provides that a golden rule should be followed when dealing with the elderly who are cognitively impaired. This golden rule was criticised by Lawson as it refers to “an aged testator” and does not clearly provide who qualifies as an aged testator.¹²⁹

Sonnekus¹³⁰ also gave his view on the measures that are in place and stated that more should be done in South Africa when dealing with elderly people who are potentially impaired and that, above all, a requirement should be put in place which requires an impartial professional to witness a will of an impaired elderly person. Schoeman¹³¹ has a different view to this and states that adding an additional requirement for invalidating wills of elderly people on the ground of incapacity would be in the way of the principle of freedom of testation. Furthermore, she stated that putting another requirement would have a rather bad effect as it may result in more wills being testators.¹³²

This looks at the issue of whether in South Africa, measures are in place to protect the freedom of testation of elderly testators. As seen above legislations have been put in place such as the Older Persons Act¹³³ as well as the Wills Act¹³⁴ that try to protect the interests of elderly people.

3.4 Conclusion

As seen in chapter three that the statutes discussed does not necessarily provide insight to the risk of undue influence that elderly testators may face when drafting their wills, however, there are formalities prescribed in section 2(1) of the Wills Act¹³⁵ which need to be complied

¹²³ Act 13 of 2006.

¹²⁴ The Society of Trust and Estate Practitioners “Testamentary capacity: some perspectives for 2011” February 2011 website at <https://www.step.org/step-journal/tqr-february-2011/testamentary-capacity-some-perspectives-2011> [Accessed 09 September 2022].

¹²⁵ Act 2005.

¹²⁶ Act 2005.

¹²⁷ The Society of Trust and Estate Practitioners ‘Testamentary capacity: some perspectives for 2011’.

¹²⁸ Act 2005.

¹²⁹ The Society of Trust and Estate Practitioners ‘Testamentary capacity: some perspectives for 2011’.

¹³⁰ Sonnekus & De Waal 2012 *THRHR* 87.

¹³¹ Schoeman-Malan 2015 *Obiter* 433.

¹³² Schoeman-Malan 2015 *Obiter* 433.

¹³³ Act 13 of 2006.

¹³⁴ Act 7 of 1953.

¹³⁵ S2(1) of Act 7 of 1953.

with for a will to be valid. There are also grounds that an individual can rely on when challenging a will and the onus then rests on the individual to prove that the will is invalid.¹³⁶

In the following chapter, the case law that is relevant to the issue(s) will be analysed and how their principles affect or touch on the problem that the research addresses. Chapter four indicates any similarities and also looks at foreign case law on how undue influence is addressed. Measures that courts took to deal with undue influence will be observed and whether these measures can be used in South Africa.

¹³⁶ Jacobs & Lambrechts 'Valid or not? General principles for challenging a will'.

CHAPTER 4: TESTAMENTARY CAPACITY AND UNDUE INFLUENCE IN TERMS OF CASE LAW

4.1 Introduction

This chapter refers to the case law applicable to this study. The purpose of this chapter is to discuss case law that is relevant to the research and how the cases affect the problems that the research aims to address.

4.2 *Katz*¹³⁷

In *Katz*,¹³⁸ the testator had a stroke, during his recovery the testator executed another will which excluded his children.¹³⁹ In *Katz*,¹⁴⁰ the family argued that the testator couldn't understand the nature and effect of drafting the will and that the testator's second wife unduly influenced him in drafting the will which benefited her more.¹⁴¹ The *Katz*¹⁴² case, is particularly important in this research as it highlighted the potential risk of undue influence that can occur due to the testator being dependent on another person.¹⁴³ Although the court in *Katz*¹⁴⁴ ruled that it does not amount to undue influence, the take back here is the potential risk of undue influence that can occur due to the testator being dependent on another person.¹⁴⁵

Another case to consider is the *Du Toit v Van der Merwe*¹⁴⁶ (*Van der Merwe*) in which the seventy-nine-year-old testator who was poor in health, drafted a will which disinherited his three daughters. The court in *Van der Merwe*¹⁴⁷ noted the discord as the cause of the dispute was that the defendant convinced the testator that the three daughters are not his biological children and therefore should not inherit from him.¹⁴⁸ In the *Van der Merwe*¹⁴⁹ case the discord was seen to come from the confidential relationship that existed between the testator and the defendant, which raises a question of whether the testator acted under his own volition or if he acted under influence to not bequeath the farm to his three daughters.¹⁵⁰ The court in *Van der Merwe*¹⁵¹ found that the defendant should have realised that the deceased (elderly testator) by way of following the misperception regarding his three daughters would disinherit them and nominate the defendant as a beneficiary, which would be prejudicial to the three daughters.¹⁵²

¹³⁷ [2004] 4 All SA 545 (C).

¹³⁸ [2004] 4 All SA 545 (C).

¹³⁹ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 542.

¹⁴⁰ [2004] 4 All SA 545 (C).

¹⁴¹ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 542.

¹⁴² [2004] 4 All SA 545 (C).

¹⁴³ Jacobs & Lambrechts 'Valid or not? General principles for challenging a will'.

¹⁴⁴ [2004] 4 All SA 545 (C).

¹⁴⁵ Jacobs & Lambrechts 'Valid or not? General principles for challenging a will'.

¹⁴⁶ [2000] JOL 5920 (NC) 91.

¹⁴⁷ [2000] JOL 5920 (NC) 91.

¹⁴⁸ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 542.

¹⁴⁹ [2000] JOL 5920 (NC) 91.

¹⁵⁰ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 542.

¹⁵¹ [2000] JOL 5920 (NC) 91.

¹⁵² Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 542.

Although the court in *Van der Merwe*¹⁵³ came to a conclusion that the three daughters should have not been disinherited from the will, South African judgements on testamentary undue influence paint a different picture.¹⁵⁴ Although there has been challenges on wills that have been executed earlier, the procurement of wealth as well as the unavailability of family protection services has swayed courts to rule in favour of undue influence.¹⁵⁵

This brings about a question of when, especially looking at elderly testators, would undue influence be considered when dealing with wills. Du Toit¹⁵⁶ is of the view that the doctrine of undue influence is considered were the third party uses power over the testator for the purposes of financial exploitation. Schoeman¹⁵⁷ adds that in practice, conduct claims tend to overlap as the testator's mental ability is very important and relevant to establish the testator's vulnerability to be influenced.

4.3 *Gildenhuys v Gildenhuys*¹⁵⁸ (*Gildenhuys*)

In the *Gildenhuys*¹⁵⁹ case, a criterion was developed to ascertain if the testator had the necessary cognitive abilities that is required for someone to be regarded as having a sound mind.¹⁶⁰ The *Gildenhuys*¹⁶¹ case is necessary in looking at testamentary capacity of the elderly and the validity of wills executed by an elderly testator as it dealt with a testator that is 80 years old.¹⁶² Although section 4 of Wills Act¹⁶³ doesn't specifically provide for the meaning of "not mentally incapable of appreciating the nature and effect of his act."¹⁶⁴ In such cases, this can be understood as a testator not being able to fully understand the act, nature and effect of drafting a will.¹⁶⁵ This means that in cases, the court has to establish if the testator lacks capacity or is unduly influenced as although they are related, however, they are mutually exclusive.¹⁶⁶ This is relevant in addressing the relationship between the testamentary capacity of a testator and the undue influence that he/she may face.

4.4 *Longfellow v BOE Trust Ltd*¹⁶⁷ (*Longfellow*)

The *Longfellow*¹⁶⁸ case considered the intention to make a will as provided by section 2(3) of the Wills Act,¹⁶⁹ mental capacity to make a will as provided by section 4 of the Wills Act,¹⁷⁰ and free testamentary expression.¹⁷¹ Although the court in *Longfellow*¹⁷² case considered the possibility of the testator being unduly influenced, it is observed by Du Toit,¹⁷³ that in most

¹⁵³[2000] JOL 5920 (NC) 91.

¹⁵⁴Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 542.

¹⁵⁵Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 543.

¹⁵⁶Schoeman-Malan 2015 *Obiter* 428.

¹⁵⁷Schoeman-Malan 2015 *Obiter* 428.

¹⁵⁸[2010] ZAWCHC 21.

¹⁵⁹[2010] ZAWCHC 21.

¹⁶⁰Schoeman-Malan 2015 *Obiter* 412.

¹⁶¹[2010] ZAWCHC 21.

¹⁶²Schoeman-Malan 2015 *Obiter* 412.

¹⁶³S4 of Act 7 of 1954.

¹⁶⁴Schoeman-Malan 2015 *Obiter* 412.

¹⁶⁵Schoeman-Malan 2015 *Obiter* 412.

¹⁶⁶Schoeman-Malan 2015 *Obiter* 428.

¹⁶⁷[2010] ZAWCHC 117.

¹⁶⁸[2010] ZAWCHC 117.

¹⁶⁹S 2(3) of Act 7 of 1953.

¹⁷⁰S4 of Act 7 of 1953.

¹⁷¹Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 543.

¹⁷²[2010] ZAWCHC 117.

¹⁷³Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 544.

cases, the South Africa courts rather opt to resolve challenges of wills on other grounds such as capacity rather than on undue influence. The reason for this is because of the difficulty in meeting the burden of proof and the difficulty of getting sufficient evidence to prove that indeed undue influence occurred.¹⁷⁴ Although South Africa has a limited engagement with testamentary undue influence, it is clear that article 4A(2)(b) acts as a family protection device.¹⁷⁵

4.5 *BOE Trust Ltd*

The court in *BOE*¹⁷⁶ stated that freedom of testation enjoys protection under section 25 of the Constitution and also in terms of the founding constitutional value of dignity.¹⁷⁷ The court in *BOE*¹⁷⁸ stated that the right to dignity also permits the dying and the living the peace of mind knowing that the individual's wishes will be respected once the person becomes deceased.¹⁷⁹ Moreover, dignity, like the right to equality is a core value of our Constitution. The Constitution recognises that the testator still retains his/her freedom to dispose the property that he/she wishes.¹⁸⁰ Although the concept of freedom of testation may be of importance, however, it is not absolute.¹⁸¹ In most cases, courts have interfered with exercising the right, which limited it in terms of the provisions of the Constitution i.e., section 36 of the Constitution.¹⁸²

Furthermore, in *Scott v Master of the High Court*¹⁸³ (*Scott*) the court held that in order for one to be successful in challenging the validity of a will, the individual must prove that the person who drafted the will, was not able to understand and appreciate the nature and effect of his/her act as provided by section 4A(1) of the Wills Act.¹⁸⁴ The onus of proof is on the person alleging that the testator lacked capacity, the proof required is that the person must have been mentally incapable when making the will therefore making it invalid.¹⁸⁵ The onus rests on the person alleging that the will is invalid as a will that is complete is presumed to be valid until it is proven invalid.¹⁸⁶ The *Kunzs v Swart*¹⁸⁷ case stated that the standard of proof is on a balance of probabilities, and that unless the testator's wishes are written down in testamentary form then they are nought, and it would not be easy for the allegor to dispute.¹⁸⁸

4.6 Conclusion

From the discussion it is clear that courts have a discretion when dealing with undue influence matters, what is important is ensuring that the testator's true intentions are observed.

¹⁷⁴ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 545.

¹⁷⁵ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 546.

¹⁷⁶ [2013] (3) SA 236 (SCA) 26-29.

¹⁷⁷ Schoeman-Malan 2015 *Obiter* 444.

¹⁷⁸ [2013] (3) SA 236 (SCA) 26-29.

¹⁷⁹ Schoeman-Malan 2015 *Obiter* 444.

¹⁸⁰ Schoeman-Malan 2015 *Obiter* 444.

¹⁸¹ Schoeman-Malan 2015 *Obiter* 444.

¹⁸² Schoeman-Malan 2015 *Obiter* 444.

¹⁸³ [2012] ZAFSHC 190.

¹⁸⁴ S4(1)(A) of Act 7 of 1953.

¹⁸⁵ Schoeman-Malan 2015 *Obiter* 444.

¹⁸⁶ Jacobs & Lambrechts 'Valid or not? General principles for challenging a will'.

¹⁸⁷ [1924] AD 618.

¹⁸⁸ Jacobs & Lambrechts 'Valid or not? General principles for challenging a will'.

Chapter three and four focused on the relevant legislation and case law and how it addresses and doesn't address the issues as well as the relevant cases. The following chapter serves as a reflection of the research up to this point before the conclusion to the research.

CHAPTER 5: ANALYSIS OF AUTHORITATIVE SOURCES

5.1 Introduction

As outlined in chapter one, that the purpose of this research is to provide an overview of the possible undue influence which elderly people face, as a result of being vulnerable because of their age or other impairments. Below is a discussion of chapter five, which will provide an analysis of the authoritative sources and the legal position as well as to reconcile the research questions identified in this research and to highlight any gaps which may exist in the legislation and/or case law. This chapter will tie the findings with viewpoints expressed in chapter three and four.

5.2 Findings regarding the legal position as established by applicable legislation, case law and other available sources

It is evident that testamentary capacity is regulated by the Wills Act,¹⁸⁹ whereas South African common law to a greater extent governs testamentary undue influence.¹⁹⁰ Section 2(1) of the Wills Act¹⁹¹ provides the formalities which need to be complied with in order for a will to be valid and there are ways as explained in chapter three that can be used to contest a will, namely if the testator was unduly influenced and if he/she lacked testamentary capacity.¹⁹²

Section 4 of the Wills Act,¹⁹³ does not provide the meaning of the words “not mentally capable to appreciate the nature and effect of his/her act,” these words are understood to mean that the testator is unable or not capable of having an understanding of the act, the nature of the act and the effect of the act.¹⁹⁴ This understanding was referred to in *Vermeulen v Vermeulen*¹⁹⁵ (*Vermeulen*) where the court stated that to conclude that the deceased lacked testamentary capacity to draft a will, evidence must be given that the deceased failed to understand the nature and effect of his act when drafting the will or that the deceased in drafting the will was not aware of the nature and extend of excluding certain people from inheriting from his possessions.¹⁹⁶ According to Du Toit,¹⁹⁷ the Wills Act’s¹⁹⁸ engagement with testamentary undue influence yields protection through article 4A(2)(b) of the Wills Act.¹⁹⁹ Article 4A(2)(b) of the Wills Act,²⁰⁰ provides relatives of the deceased protection against wealth loss on condition that they did not unduly influence the testator when he/she executed the will and they are not disqualified from inheriting from the testator.²⁰¹

The condition that the relative must have not unduly influenced the deceased ties with the *Van der Merwe*²⁰² case, which was discussed in chapter four, in which the daughters of the deceased successfully invoked undue influence against the deceased’s wife. The *Van der*

¹⁸⁹ Act 7 of 1953.

¹⁹⁰ Du Toit ‘Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?’ 529.

¹⁹¹ S2(1) of Act 7 of 1953.

¹⁹² van Deventer ‘Under Which Grounds may the Validity of a Will be Challenged?’

¹⁹³ S4 of Act 7 of 1953.

¹⁹⁴ Schoeman-Malan 2015 *Obiter* 412.

¹⁹⁵ [2004] NR 184 (HC) 1901B–C.

¹⁹⁶ Schoeman-Malan 2015 *Obiter* 412.

¹⁹⁷ Du Toit ‘Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?’ 545.

¹⁹⁸ Act 7 of 1953.

¹⁹⁹ Act 7 of 1953.

²⁰⁰ Act 7 of 1953.

²⁰¹ Du Toit ‘Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?’ 546.

²⁰² [2000] JOL 5920 (NC) 91.

*Merwe*²⁰³ case, was decided on the common law ground of testamentary undue influence alone and the court held that the deceased was unduly influenced because of the confidential relationship that existed between the testator and the defendant. It was clear herein that the deceased when drafting the will did not act under his own volition but acted under influence in not bequeathing the farm to his three daughters.²⁰⁴

Although the court came to this conclusion in *Van der Merwe*,²⁰⁵ criticism arose regarding testamentary undue influence in South Africa as most courts have made it secondary and its seen as merely being a safety valve because of the difficulty that challengers of wills face when attempting to prove that a deceased was unduly influenced when drafting his/her will and the onus placed on plaintiffs to prove the undue influence.²⁰⁶ To remedy this situation, a burden shifting was suggested as a possible solution.²⁰⁷ It is important to note that, burden-shifting is not aligned with South African common law position of undue influence, however, South African scholars have suggested that the legislature should depart from the common law to give effect to this burden-shifting.²⁰⁸

Sonnekus being one of the scholars, proposed that the Wills Act²⁰⁹ should be amended especially on the provision of testamentary capacity by placing a burden of proof on the wills' proponents in situations where wills are challenged for their lack of capacity and also if the testator who drafted the will reached the statutorily-determined age.²¹⁰ The statutory determined age proposed by Sonnekus was 75 years.²¹¹ Du Toit,²¹² building on Sonnekus's suggestion, stated that the Wills Act²¹³ can be amended to place the burden of proving undue influence on wills proponents in all cases challenging undue influence of wills executed by testators who exceeded the statutory-determined age. According to Du Toit,²¹⁴ introducing the age-based rule in order to regulate the burden placement is far much better than having a 'suspicious circumstances rule' or 'confidential relationship rule' as this age-based rule does not violate the stance which the common law stands on, that a suspicious relationship or special relationship does not raise a presumption for undue influence.

Spivack²¹⁵ is of a different view than of Sonnekus and Du Toit and states that prevention is better than cure and *ante mortem* mechanisms should be utilised to make sure that the testator has valid and free expression of his/her wishes. Spivack,²¹⁶ also advocates for the abolition of the undue influence doctrine and resolving disputes regarding wills only on testamentary capacity.²¹⁷ According to Spivack,²¹⁸ if elderly people require protection, legislatures should

²⁰³[2000] JOL 5920 (NC) 91.

²⁰⁴Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 542.

²⁰⁵[2000] JOL 5920 (NC) 91.

²⁰⁶Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 548.

²⁰⁷Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 548.

²⁰⁸Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 548.

²⁰⁹Act 7 of 1953.

²¹⁰Sonnekus, JC "Testeerbevoegdheid en Testeervryheid as Grondwetlik Beskermd Bates" 2012 *THRHR* (1) 75.

²¹¹Sonnekus 2012 *THRHR* (1) 75.

²¹²Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 549.

²¹³Act 7 of 1953.

²¹⁴Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 549.

²¹⁵Spivack, C "Why the Testamentary Doctrine of Undue Influence Should Be Abolished" 2010 *Kansas Law Review* (58) 245 at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=159378 [Accessed 22 October 2022].

²¹⁶Spivack 'Why the Testamentary Doctrine of Undue Influence Should Be Abolished' 2010 *Kansas Law Review* 308.

²¹⁷Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 520.

²¹⁸Spivack 'Why the Testamentary Doctrine of Undue Influence Should Be Abolished' 2010 *Kansas Law Review* 308.

enact laws that would grant them protection than relying on a doctrine that is difficult to prove, she also states that this doctrine does not protect testators while they are alive.

In the same light, the Older Person's Act²¹⁹ was enacted to protect elderly people (60 years and above), by giving them certain rights as described under chapter three, however, a limit to this legislation is observed, as it makes no reference to the possibility of limited mental capacity of elderly people when executing their wills and the undue influence that older persons may face as a result of their age.²²⁰

This adds to the stance Du Toit supports, that even though the rules pertaining to testamentary undue influence are very essential and important for the South African testamentary succession, however, these rules can be improved or enhanced so that they can give optimal protection to testators who are vulnerable and have marginal capacity.²²¹

Moreover, findings in terms of the legal position as established by case law.

There are a lot of cases which dealt with how impairments which affect the mental status of a person influence testamentary capacity. One of the cases is the *Vermeulen*²²² case where the court stated, to conclude that the deceased lacked testamentary capacity to draft a will, evidence must be given that the deceased failed to understand the nature and effect of his act when drafting the will.²²³ The court in *Nicholson v Knaggs*²²⁴ (*Nicholson*) echoed what was held by the court in *Vermeulen*²²⁵ when looking at how a mental diagnosed disease affects testamentary capacity. The deceased in *Nicholson*²²⁶ grew increasingly disabled and had to rely on the support of her friends. The legal issue here was whether, the deceased's mental diagnosis affected her insight, judgement and ability to make decisions.²²⁷ The court in *Nicholson*²²⁸ held that the deceased was not of sound mind when she executed her will, this means she did not appreciate the nature and effect of the act of drafting the will, which is essential when one drafts a will. As a result, the court in *Nicholson*²²⁹ declared the will invalid and set it aside. Schoeman-Malan²³⁰ in support of both court's decision added that the question of whether an elder individual had testamentary capacity to execute a will, will depend on the situation at hand.

As an old person who is placed under curatorship or guardianship or who had a *lucidum intervallum*²³¹ when executing a will can still have testamentary capacity.²³² This is to say that an elderly testator who suffers from any mental illness will not automatically be presumed to lack testamentary capacity, his/her situation will be considered as is to establish if his/her

²¹⁹ Act 13 of 2006.

²²⁰ Schoeman-Malan 2015 *Obiter* 412.

²²¹ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 550-551.

²²² [2004] NR 184 (HC) 1901B-C.

²²³ Schoeman-Malan 2015 *Obiter* 412.

²²⁴ 2009 VSC 64 89A.

²²⁵ [2004] NR 184 (HC) 1901B-C.

²²⁶ 2009 VSC 64 89A.

²²⁷ Schoeman-Malan 2015 *Obiter* 417.

²²⁸ 2009 VSC 64 89A.

²²⁹ 2009 VSC 64 89A.

²³⁰ Schoeman-Malan 2015 *Obiter* 413.

²³¹ This refers to a brief moment in which an individual who otherwise lacked capacity, gains sufficient legal capacity or is of sound mind.

²³² Schoeman-Malan 2015 *Obiter* 413.

illness negatively affects his/her testamentary capacity. Therefore, this means that it needs to be assessed on a case-to-case basis.

Once testamentary capacity has been established, then a court can move on to determine if the testator was unduly influenced.²³³ According to Du Toit,²³⁴ the construct of undue influence can be understood as a concept of an individual using power over another individual with the purpose of financially exploiting the vulnerable individual. This ties with the case of *Katz*²³⁵ which is discussed in chapter four. This *Katz*²³⁶ case highlighted the potential of undue influence, which occurs where an individual (testator) is dependent on another person, i.e., where the testator is ill or sick.

Furthermore, findings in terms of the legal position established by other available sources.

Looking at measures and the analysis that other jurisdictions have put in place to protect elderly testators as discussed in chapter three, comparing these measures to other law scholars' views on whether they agree or disagree.

Measures taken by the United Kingdom to protect elderly testators are found in the MCA.²³⁷ The MCA²³⁸ was enacted with the purpose of protecting individuals such as elderly persons and people who don't have capacity to make their own decisions. The MCA²³⁹ provides that when dealing with elderly people who are cognitively impaired, the rule known as the 'golden rule' should be applied.²⁴⁰ Although this golden rule sought to provide protection to elderly testators, it received criticism from a few law scholars such as Lawson, who argued that the golden rule is not clear in terms of who "an aged testator" refers to or who qualifies as an aged testator.²⁴¹

Other measures such as the Older Person's Act²⁴² were enacted to provide elderly people with protection, through this, elderly's rights, wellbeing and safety is protected. Although the Older Person's Act²⁴³ was enacted as a way to provide elderly people with protection, it is seen to be limited as it does not make reference to the potential limited mental capacity of elderly people when executing their wills. This can be seen as a gap in the law, as it does provide certain protection to elderly people, but the protection is limited. The researcher is therefore of the opinion that further research can be done to develop and assist this gap/area of law.

Sonnekus,²⁴⁴ as discussed in chapter three as well as illustrated in the findings relating to the applicable legislation, provided his views and proposed that South Africa needs more measures or intervention in cases of elderly people who are impaired and that an added requirement should be put in practice that requires an impartial professional to be a witness

²³³ Champine 'A Blueprint for Testamentary Capacity Reform'.

²³⁴ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 512.

²³⁵ [2004] 4 All SA 545 (C).

²³⁶ [2004] 4 All SA 545 (C).

²³⁷ Act 2005.

²³⁸ Act 2005.

²³⁹ Act 2005.

²⁴⁰ The Society of Trust and Estate Practitioners 'Testamentary capacity: some perspectives for 2011'.

²⁴¹ The Society of Trust and Estate Practitioners 'Testamentary capacity: some perspectives for 2011'.

²⁴² Act 13 of 2006.

²⁴³ Act 13 of 2006.

²⁴⁴ Sonnekus 2012 *THRHR* (1) 75.

to a will of an elderly impaired person.²⁴⁵ Section 9 of the Constitution as discussed in chapter four, provides that “everyone is equal before the law and has the right to equal protection and benefit of the law.” Moreover, section 10 of the Constitution states that “everyone has inherent dignity and the right to have their dignity respected and protected.” It is clear that the Constitution makes reference to protecting every person’s human dignity and that everyone is equal, while the Older Person’s Act²⁴⁶ speaks of the protection of the older people and upholding their best interests in situation where they are affected or might be affected. A question may arise that in putting an added requirement that an impartial professional needs to witness a will of an elderly testator, would this be acting in the best interests of the elderly testator as required by the Older Person’s Act.²⁴⁷

In answering this Schoeman-Malan’s views will be observed. Schoeman-Malan agrees with the criticism made by Lawson on the golden rule in that adding an age restriction as proposed by Sonnekus, of 75 years, or adding an additional requirement that may disqualify wills on the ground that the testator does not have capacity would seriously interfere with the principles of freedom of testation.²⁴⁸ According to Schoeman-Malan,²⁴⁹ putting in place another statutory requirement for when elderly testators draft wills would result in more wills being challenged. According to Schoeman-Malan,²⁵⁰ the manner in which the courts assess testamentary capacity must be seen as satisfactory. Moreover, she stated that the requirements that are put in place to evaluate the elderly testator’s capacity and to determine if the elderly testator had capacity to dispose of his/her assets in line with his/her wishes are already being used.²⁵¹ In conclusion to her view on this, Schoeman-Malan stated that she sees no need for an elderly testator to be further burdened with more *ante mortem* assessments and that if the court is satisfied that the individual in executing the will and had the necessary testamentary capacity, then the person challenging the will can make use of undue influence to challenge the validity of the will.

5.3 Conclusion

This chapter evaluated different authors views in relation to the topic and how their values are different or agree with each other. The following chapter will provide an overall conclusion on this research, and how the research questions have been answered or not answered by this research.

²⁴⁵ Sonnekus & De Waal 2012 *THRHR* 87.

²⁴⁶ Act 13 of 2006.

²⁴⁷ Act 13 of 2006.

²⁴⁸ Schoeman-Malan 2015 *Obiter* 433.

²⁴⁹ Schoeman-Malan 2015 *Obiter* 433.

²⁵⁰ Schoeman-Malan 2015 *Obiter* 433.

²⁵¹ Schoeman-Malan 2015 *Obiter* 433.

CHAPTER 6: CONCLUSION TO THE RESEARCH

This chapter will provide a reflection of the previous chapters and give an overview and conclusion. It will also indicate to what extent the research question(s) have been answered.

This research is a desktop form of research and was conducted using primary sources like legislation and case law, as well as secondary sources like book, journal articles and web resources. The purpose of this research is to bring about the understanding of the potential undue influence which people who are elderly face, because of being vulnerable due to their age and other impairments. Furthermore, it is also to determine whether when drafting wills, the elderly are protected.

The first research question pertained to the risk for undue influence of elderly testators in South Africa and whether this affects the validity of wills that they drafted. This research questions further looked at the effect that undue influence has on the validity of wills drafted.

Undue influence as discussed above in chapter one was defined in the *Spies*.²⁵² It is a term used to describe when an individual has coerced or forced the testator into drafting a will in which he/she will solely benefit.²⁵³ As understood throughout this research, undue influence occurs mostly in situations where the testator is vulnerable, and he/she relies heavily on the assistance of others.²⁵⁴ Some of the factors -as identified in Chapter two- that a court can use when determining if a testator has been unduly influenced are, i) whether there is a confidential relationship that exists between the testator and the influencer, which has created an opportunity for the testamentary act to be controlled by the influencer and ii) If the influencer made use of the relationship to make sure that changes happen in the will, which would have not happened if not for the undue influence.²⁵⁵ It is clear that any impairment or disruption in the testator freely expressing his/her wishes when executing a will may result in the will being declared invalid.²⁵⁶

As seen in the findings of chapter five as well as expressed in chapter four; because of the undue influence which occurred when the testator drafted his or her will in *Van der Merwe*,²⁵⁷ the will was declared invalid as it disinherited the deceased's daughters, which was not the desire of the deceased and as a result was prejudicial to the daughters of the deceased.

The first research question has been answered in this research as it is clear that there is some form of risk that elderly people face when drafting wills especially if the elderly person is impaired or sick, and the effect of the undue influence when proven, results in the will drafted being invalid.

The second research question pertained to the degree in which the impairments affecting the mental status of older testators in South Africa influence or negate testamentary capacity. As stated in the findings of chapter five, testamentary capacity refers to one's ability to understand

²⁵² [1957] (1) SA 539 (A).

²⁵³ Forbes solicitors "What is Undue Influence in Wills?" 2022 website at <https://www.forbessolicitors.co.uk/personal/contesting-will/undue-influence.htm#:~:text=Undue%20influence%20is%20a%20term,was%20coerced%20into%20doing%20so.> [Accessed 25 October 2022].

²⁵⁴ Hentys 'Contesting a Will on the Grounds of Undue Influence'.

²⁵⁵ Peisah *et al* 'The wills of older people: risk factors for undue influence' 7.

²⁵⁶ Jacobs & Lambrechts 'Valid or not? General principles for challenging a will'.

²⁵⁷ [2000] JOL 5920 (NC) 91.

the act, the nature of the act and the effect of the act.²⁵⁸ This concept of testamentary capacity was observed in the *Vermeulen*²⁵⁹ where the court stated, to conclude that the deceased lacked testamentary capacity to draft a will, evidence must be given that the deceased failed to understand the nature and effect of his act when drafting the will.²⁶⁰ The question whether an elder individual had testamentary capacity to execute a will, will depend on the situation at hand.²⁶¹ As an old person who is placed under curatorship or guardianship or who had a *lucidum intervallum*²⁶² when executing a will, can still have testamentary capacity.²⁶³

The second research question has been answered in this research as it is clear that due to a person being old, doesn't necessarily mean that he/she does not have testamentary capacity, it will all depend on the situation at hand. In situations where a person, specifically elderly, is not able to understand his/her act, the nature of the act and the effect of the act, then this will negatively affect his/her testamentary capacity and without testamentary capacity one cannot execute a valid will.²⁶⁴ Case law shows that a cognitive decline due to mental illnesses such as dementia as well as old age, may contribute to incapacity, however, this depends on the seriousness of the disease.²⁶⁵ If it is proven that the testator was of sound mind or had a *lucidum intervallum*²⁶⁶ then it means that he/she in executing the will, was free of anything that might interfere with his/her good judgement and thus it must be assumed that the will is valid.²⁶⁷

The third research question pertained to whether people who are vulnerable due to age and other impairments, enjoy freedom of testation. This question also sought to observe measures taken by other jurisdictions (such as United Kingdom etc.) and if the measures taken by South Africa sufficiently protect the elderly people.

In answering the third research question, the findings above will be observed. As seen in the findings of chapter five as well as expressed in chapter three, the United Kingdom introduced the MCA²⁶⁸ as a way to protect elderly testators in executing their wills.²⁶⁹ Sonnekus as explained above in the findings of chapter five, proposed for the Wills Act²⁷⁰ to be amended as he was of the view that the common law principles are not sufficiently enough.²⁷¹ Sonnekus also proposed implementing a statutory-determined age of 75 years as a way to enhance the rules so that they can give optimal protection to testators who are vulnerable and have marginal capacity.²⁷² Schoeman-Malan²⁷³ disagreed with the views of Sonnekus²⁷⁴ and Du

²⁵⁸ Schoeman-Malan 2015 *Obiter* 412.

²⁵⁹ [2004] NR 184 (HC) 1901B-C.

²⁶⁰ Schoeman-Malan 2015 *Obiter* 412.

²⁶¹ Schoeman-Malan 2015 *Obiter* 413.

²⁶² This refers to a brief moment in which an individual who otherwise lacked capacity, gains sufficient legal capacity.

²⁶³ Schoeman-Malan 2015 *Obiter* 413.

²⁶⁴ Schoeman-Malan 2015 *Obiter* 417.

²⁶⁵ Schoeman-Malan 2015 *Obiter* 418.

²⁶⁶ This refers to a brief moment in which an individual who otherwise lacked capacity, gains sufficient legal capacity.

²⁶⁷ Schoeman-Malan 2015 *Obiter* 418.

²⁶⁸ Act 2005.

²⁶⁹ The Society of Trust and Estate Practitioners 'Testamentary capacity: some perspectives for 2011'.

²⁷⁰ Act 7 of 1953.

²⁷¹ Sonnekus 2012 *THRHR* 75.

²⁷² Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 550-551.

²⁷³ Schoeman-Malan 2015 *Obiter* 433.

²⁷⁴ Sonnekus 2012 *THRHR* 75.

Toit²⁷⁵ and argued that putting an additional requirement for making wills valid would interfere with the principle of freedom of testation.

The researcher is in agreement with Schoeman-Malan's view that adding another requirement would have a bad effect and it may result in more wills of testators being invalidated. However, the researcher also agrees with Du Toit's view for enhancing the rules in order to protect elderly testators. This can be by making provision in the Older Person's Act,²⁷⁶ for the protection of elderly persons when drafting their wills as this legislation already provides rights pertaining to older people. This view is open for further research and can assist in showing how enhancing these rules can do more good than harm in optimising protection of testators who are vulnerable and have marginal capacity.

6.1 Concluding Remarks

In conclusion, this research has succeeded in highlighting the potential undue influence that elderly testators face due to being vulnerable because of age and also providing an understanding of why protection must be given to the elderly when executing their wills. Death is unavoidable, it is inevitable and drafting a will remains the only voice a person can have when they are no longer alive.²⁷⁷ A lot of people are hesitant to draft a will and they shy away from the fact that death is inevitable, these people are mostly old, sick or frail and they realize that their time to execute a will is running out.²⁷⁸ These people are usually vulnerable and they are potentially subject to undue influence, therefore the law should protect them.²⁷⁹ The elderly testators must not be prejudiced or unduly influenced when drafting wills, as a will is supposed to express the free wishes of a testator, so the common law principles should be applied in a way that they ensure that the elderly are protected, while not violating the common law rules.

²⁷⁵ Du Toit 'Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?' 550-551.

²⁷⁶ Act 13 of 2006.

²⁷⁷ Schoeman-Malan 2019 *THRHR* 100.

²⁷⁸ Schoeman-Malan 2019 *THRHR* 100.

²⁷⁹ Schoeman-Malan 2019 *THRHR* 100.

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