In Search of an Intent Doctrine in the Law of Wills: A South African Perspective

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This Article explores the fundamental concept of testator's intention, picking up the debate where three American scholars left off in their attempts to untangle this complex issue to establish an intent doctrine in the American law of wills. While the scholars' efforts are commended, the Article highlights the flaws in their reasoning and instead argues for a proposed "act-based" approach to the will-making process that focuses on the act of testation as a juristic act. The act-based approach is presented as the only theoretically sound way to explain the composite, multifaceted concept of testator's intention, which involves various forms or dimensions of intention and offers a solid foundation on which to develop an intent doctrine in the law of wills.

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I. INTRODUCTION

A will represents the testator's voice.[1] Whether written or spoken (if formalities permit),[2] a will essentially expresses the testator's intention (wishes) for how their property should be distributed once they die.[3] Clearly, therefore, the testator's intention should be the focal point of the law of wills.[4] Its universality and significance are plain to see from the following examples from three different jurisdictions. In South Africa's hybrid (mixed) legal system,[5] where the "witnessed will" (also known as the "statutory will" or "underhand will") is the only recognized form of

1. Kenneth Reid, Marius de Waal & Reinhard Zimmermann, *Testamentary Formalities in Historical and Comparative Perspective, in* Kenneth Reid, Marius de Waal & Reinhard Zimmermann (eds.), COMPARATIVE SUCCESSION LAW: TESTAMENTARY FORMALITIES 468 (Oxford University Press, 2011).

2. *Id.* at 434.

3. GYS HOFMEYR & MOHAMED PALEKER, THE LAW OF SUCCESSION IN SOUTH AFRICA 3-4, 53-54 (Cape Town, Juta, 2023); Ronald Scalise, *Testamentary Formalities in the United States of America, in* Kenneth Reid, Marius de Waal & Reinhard Zimmermann (eds.), COMPARATIVE SUCCESSION LAW: TESTAMENTARY FORMALITIES 358-59 (Oxford University Press, 2011); Adam Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2189 (2011). See also Roger Kerridge, *Testamentary Formalities in England and Wales, in* Kenneth Reid, Marius de Waal & Reinhard Zimmermann (eds.), COMPARATIVE SUCCESSION LAW: TESTAMENTARY FORMALITIES 307-08 (Oxford University Press, 2011); Kenneth Reid, *Testamentary Formalities in Scotland, in* Kenneth Reid, Marius de Waal & Reinhard Zimmermann (eds.), COMPARATIVE SUCCESSION LAW: TESTAMENTARY FORMALITIES 429 (Oxford University Press, 2011).

4. "Testator's intention" (or "the intention of the testator" or simply "intention") is used broadly in the context of the law of wills to include all forms of intention attributable to a testator in the making of a will, including, for instance, the intention to dispose of property (the dispositive intention), the intention to revoke a previous will (*animus revocandi*), the intention to sign a will (*animus signandi*), etc.

5. Modern South African common law is a hybrid (or combination) of Roman-Dutch and English law. This is well illustrated in the law of succession: English law has heavily influenced the forms and formalities of wills, while the content of wills still displays a strong Roman law character. Marius de Waal, *Testamentary Formalities in South Africa, in* Kenneth Reid, Marius de Waal & Reinhard Zimmermann (eds.), COMPARATIVE SUCCESSION LAW: TESTAMENTARY FORMALITIES 382 (Oxford University Press, 2011); François du Toit, *Criticism of the Testamentary Undue Influence Doctrine in the United States: Lessons for South Africa?* 6 J. CIV. LAW STUD. 524 (2013); François du Toit, *Succession Law in South Africa—A Historical Perspective, in* Kenneth Reid, Marius de Waal & Reinhard Zimmermann (eds.), EXPLORING THE LAW OF SUCCESSION: STUDIES NATIONAL, HISTORICAL AND COMPARATIVE 67 (Edinburgh University Press, 2007). An important feature of the act-based approach is the clear distinction drawn between the content of a will (no matter the form of will) and execution formalities.

will,[6] De Waal and Schoeman-Malan[7] underscore the importance of testator's intention by stating that it is "the most important aspect of the law of testate succession and runs like a golden thread through this branch of the law." In the context of the American common law system, in turn, Guzman[8] calls intent "indisputably the heart of the will"—a sentiment echoed by the American courts.[9] Finally, in the civil law system of the Netherlands, where the notarial will is the only ordinary[10] form of will available,[11] Kolkman[12] describes intention and its importance as follows:

> The intervention of the notary can be regarded as a sufficient guarantee that the testator's intentions are correctly reflected in the deed . . . in view of the importance of the legal act embodied in a will—in many cases the disposition of all of a person's property—the notary has a vital advisory role to play.[13]

Therefore, no matter which jurisdiction or through which type of will it is conveyed, the testator's intention remains paramount and warrants (if not demands) proper consideration and analysis.

Yet, while most jurisdictions acknowledge intention as an important part of the law of wills, the centrality of the concept tends to be

6. This is also the case in common law systems such as England, Australia, and many states in the United States. Reid, De Waal & Zimmermann, *supra* note 1, at 434, 446, 470. See also De Waal, *supra* note 5, at 384-85.

7. MARIUS DE WAAL & LINDA SCHOEMAN-MALAN, LAW OF SUCCESSION 219 (Durban, LexisNexis Butterworths, 2015).

8. Katheleen Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 309 (2011).

9. See for example Boisseau v. Aldridges, 32 Va. (5 Leigh) 222, 234 (1834), as referred to by Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569 (2016).

10. Ordinary wills include the holograph will and the witnessed will (which are regarded as private wills) as well as the notarial will (being a public will, since a public body or official is involved in making it). Ordinary wills are distinguished from special or extraordinary wills, such as military wills or emergency wills. Reid, De Waal & Zimmermann, *supra* note 1, at 432-35.

11. Wilbert Kolkman, *Testamentary Formalities in the Netherlands, in* Kenneth Reid, Marius de Waal & Reinhard Zimmermann (eds.), COMPARATIVE SUCCESSION LAW: TESTAMENTARY FORMALITIES 147 (Oxford University Press, 2011); Reid, De Waal & Zimmermann, *supra* note 1, at 434, 448, 471.

12. *Id.* at 147-8. See also Reid, De Waal & Zimmermann, *supra* note 1, at 434

13. Book 4 of the new Dutch Civil Code, which took effect on January 1, 2003, regulates inheritance in the Netherlands. Article 4:42 provides that a last will and testament is a unilateral juristic act by which a testator makes a disposition. In the context of this juristic act, the testator's intention is key.

underestimated.[14] Sonnekus[15] argues that the failure to properly consider the concept of testator's intention stems from Roman law times and persists in modern law:

> In Roman law, there was universal acceptance of the principle embedded in the maxim testamentum est voluntatis nostrae iusta sententia, de eo quad quis post mortem suam fieri velit.[16] This presupposed that a person's legally-recognised last wishes would be honoured after his death even although he himself was no longer there to enforce them. There is, however, little discussion in the Roman texts from which the reason for this honouring of the last will can be ascertained, and even in modern times most lawyers seem to accept without a second thought that the last will of the deceased should be adhered to.

It is against this backdrop that this Article sets out to clarify the concept of testator's intention and contribute to the creation of an intent doctrine, as American scholar James Lindgren proposed back in 1992.[17] Even though several American commentators (particularly Lindgren, Guzman, and Glover) have done pioneering work to better frame the concept of intention, there appears to be very little progress towards embedding or establishing a proper, functional intent doctrine. Glover[18] articulates this as follows:

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14. James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1017 (1992); Glover *supra* note 9, at 572, 574-75.

15. Jean Sonnekus, *Freedom of Testation and the Ageing Testator, in* Kenneth Reid, Marius de Waal & Reinhard Zimmermann (eds.), EXPLORING THE LAW OF SUCCESSION: STUDIES NATIONAL, HISTORICAL AND COMPARATIVE 78 (Edinburgh University Press, 2007).

16. In English, this maxim reads: "A will is a legal declaration of a man's intentions, which he wills to be performed after his death." Modestinus D 28 1 1, as referred to and translated by Jean Sonnekus, *"Testeervryheid" as Leidende Beginsel vir die Erfreg—die Reël* Coacta Voluntas . . . *en Probleme weens Verouderende Testateurs, in* Frederik Swennen & Renate Barbaix (eds.), OVER ERVEN LIBER AMICORUM MIEKEN PUELINCKX-COENE 433 (Belgium, Wolters Kluwer, 2006); Sonnekus *supra* note 15, at 78. See also WILLIAM BLACKSTONE, AN ANALYSIS OF THE LAWS OF ENGLAND 72 (Oxford, Clarendon Press, 1758), who uses the same definition of a will. See also Scalise *supra* note 3, at 358-59. This well-known maxim also illustrates the complexity of the concept "intention" from the very outset: It clearly involves two forms of intention, namely the expression of intention ("declaration of a man's intentions") and the underlying intention with which such declaration is made ("which he wills to be performed after his death"). This Article elucidates each of these forms of intention to bring clarity to the concept of "intention."

17. Lindgren, *supra* note 14, at 1009.

18. Glover, *supra* note 9, at 569 (abstract). See also Karen Sneddon, *Dead Men (and Women) Should Tell Tales: Narrative, Intent, and the Construction of Wills*, 46 ACTEC L. J. 254-54 (2020).

> Testamentary intent is consistently heralded as the cornerstone of a will. . . . But despite the importance of testamentary intent within the law of wills, a clear and consistent testamentary intent doctrine has failed to develop. . . . The lack of a clearly defined testamentary intent doctrine has caused both practical misapplication and theoretical misunderstanding of various aspects of the law of wills.

Glover's point of view rightly suggests that having a sound intent doctrine in place will not only contribute to the optimal recognition, protection, and fulfilment of testator's intention in the law of wills, but will also safeguard the systems and integrity of this branch of the law of succession.

The Article starts by exploring the concept of intention in American law with a particular focus on the work of the three scholars mentioned above. Their contributions are examined not to present a comprehensive analysis, but merely to identify shared challenges and issues and highlight what are considered underlying flaws in their thinking. The second part of the Article then proposes an intent doctrine that is based on an "act-based" approach to the continuous will-making process, zeroing in on the juristic act of testation. This approach is presented as the only theoretically sound way to explain testator's intention, being a composite, multifaceted concept that comprises various forms and dimensions of intention.

II. TOWARDS AN INTENT DOCTRINE IN THE AMERICAN LAW OF WILLS

A. Testamentary Intent (Animus Testandi) in the American Law of Wills

As far back as 1834, Justice Carr in *Boisseau v. Aldridges* described the notion of intention in American law as "the life and soul of a will."[19] While American courts and legal scholars do not deny that testator's intention takes multiple forms in the law of succession (for instance, the intention for the document to constitute a will, and the testator's intention in terms of disposing of their property), they perceive it within the broader context of "testamentary intent" ("or in its Latin form, *animus testandi*").[20] Glover,[21] for instance, refers to *Boisseau v. Aldridges* in stating that "*intent*, or more specifically *testamentary intent*, is the

19. Boisseau v. Aldridges, 32 Va. (5 Leigh) 222, 234 (1834), as referred to by Glover, *supra* note 9, at 569.

20. Glover, *supra* note 9, at 571. See Glover, *supra* note 9, at 569, citing both *Boisseau* and Prof John Langbein. According to Glover, Langbein explains testamentary intent as involving "two broad issues . . . did the decedent intend to make a will, and if so, what are the terms?" *Id.* at 569-70. See also Lindgren, *supra* note 14, at 1016.

21. *Id.* at 569. Emphasis added.

cornerstone of a will." Yet he also seeks to narrow down this extremely broad view, attempting to define the extent and scope of testamentary intent (*animus testandi*) with reference to both *Boisseau* and the prevailing academic view in American law. He states:

> Both Justice Carr and Professor Langbein include the intent to make a will and the intent to make specific dispositions of property under *the general umbrella of testamentary intent*. But are both properly understood as *elements of testamentary intent*? If so, what is the relationship between the two? Moreover, are these the only *components of testamentary intent*? Or are there more? [22]

Locating and contextualizing all the various forms of intention under the concept of testamentary intent (*animus testandi*) appears to be the biggest challenge in American law. At this point already, it is important to note that just as *animus testandi* carries a specific meaning,[23] each of the other independent forms of intention has theirs, too. Consequently, a clear understanding can only be achieved by identifying each of the forms of intention separately and defining their connection with each of the specific acts in the will-making process as well as to the other elements or "requirements" (such as freedom of testation or testamentary capacity) relevant to the making of a will.

To complicate matters even further, American law[24] offers the following definition of testamentary intent:

> To be a will, the *document* must be executed by the decedent with testamentary intent, i.e. the decedent must *intend the document* to be a

22. *Id.* at 570. Emphasis added.

23. Yet in South African law, too, there is uncertainty as to the precise meaning of *animus testandi*. For an analysis in this regard, see James Faber, *A Conceptual View of the Act of Testation to Elucidate Testator's Intention in the South African Law of Succession: A Proposed "Act-Based Model" as Opposed to the Traditional "Requirements Model" (Part 1)*, 2021(3) TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 504 (2021); James Faber, *A Conceptual View of the Act of Testation to Elucidate Testator's Intention in the South African Law of Succession: A Proposed "Act-Based Model" as Opposed to the Traditional "Requirements Model" (Part 2)*, 2021(4) TYDSKRIF VIR DIE SUID-AFRIKAANSE REG 740 (2021); James Faber, *Uncertainty about the Condonation of Formally Non-Compliant Wills, and the Rectification of Cross-Signed Mirror Wills: Is an Act-Based Model the Solution?* 25 POTCHEFSTROOM ELECTRONIC L. J. 1-21 (2022); James Faber, *Disposing of Property upon Death: Contemplating the Act of Testation Performed with* Animus Testandi *versus a Contractual Disposition in terms of a Valid* Pactum Successorium, 47 J. FOR JURIDICAL SCI. 1-25 (2022).

24. Restatement (Third) of Property, Volume 1, 171 (Am. Law Inst., 1999). Emphasis added.

> will[25] or to become operative at the decedent's death. Whether the decedent executed a document with testamentary intent is a question of fact on which evidence of intention may be considered.

The primary focus, therefore, is the document involved and attempting to understand "testamentary intent" in the context of this document. This approach is also reflected in the Supreme Court of Virginia's 1916 ruling in *Early v. Arnold*,[26] namely that "one may execute a paper with every formality known to the law, and by it devise all of his property, but, unless he intends *that very paper* to take effect as a will, it is no will."[27] I would propose, however, that this insistence on understanding *animus testandi* in the context of a document is problematic and contributes to the conceptual confusion surrounding testamentary intent in American law, as discussed below.

The importance of *animus testandi* is undoubtedly acknowledged by both the courts and legal scholars in America.[28] It ultimately serves as a validity requirement for the establishment of a will in all the American states ("all states mandate that the decedent *execute a will with testamentary intent*").[29] Yet it is shrouded in uncertainty in American law: Lindgren[30] confirms this, stating that "testamentary intent is not well understood or defined," while Guzman[31] calls it "a piece of tricky business" and "an extraordinarily elusive concept." According to Glover,[32] "[d]espite the importance of testamentary intent, a single

25. Of course, the broad definition of a will in American law does not exactly help to alleviate the prevailing uncertainty regarding the meaning of *animus testandi*. A will is defined as "a donative document that transfers property at death, amends, supplements, or revokes a prior will, appoints an executor, nominates a guardian, exercises a testamentary power of appointment, or excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession." Restatement (Third) of Prop., Vol. 1, 168 (Am. Law Inst., 1999). Consequently, *animus testandi* is afforded an equally broad interpretation. The confusion this creates is evident from the efforts of both Guzman and Glover to include the forms of intention relevant to will revocation under *animus testandi*. See Glover, *supra* note 9, at 593-94; Guzman, *supra* note 8, at 319-22.

26. 89 S.E. 900, 901 (Va. 1916). Emphasis added.

27. See Glover, *supra* note 9, at 591.

28. *Id.* at 571, and the authority cited there. Glover refers to a number of cases that make explicit the importance of testamentary intent, stating, for instance, that the "presence of *animus testandi* is the most important will-making requirement; it is a *sine qua non* of will-making" and that a document is not a will "unless it is executed with testamentary intent."

29. *Id.* at 571. Emphasis added.

30. Lindgren, *supra* note 14, at 1017.

31. Guzman, *supra* note 8, at 306.

32. Glover, *supra* note 9, at 569 and abstract.

cohesive understanding of the principle is elusive." He then goes on to offer the following reason for the uncertainty:

> Courts frequently espouse the significance of testamentary intent without explaining what testamentary intent is, and when they do give more detail regarding the meaning of testamentary intent, their explanations are often vague and at times confusing and contradictory. Likewise, legal scholars have done little to untangle the specifics of testamentary intent. The lack of a clearly defined testamentary intent doctrine has caused both practical misapplication and theoretical misunderstanding of various aspects of the law of wills.

In the following Subpart, I examine the general approach to "testamentary intent" (*animus testandi*) in American law with a particular focus on the contributions of Lindgren, Guzman, and Glover. Rather than offering a full analysis, I merely highlight shared challenges and questions, identifying and briefly addressing what may be viewed as flaws in their reasonings.

B. Attempts at Clarity: James Lindgren, Katheleen Guzman, and Mark Glover

As indicated above, most American courts and legal scholars go only so far as to confirm the importance of *animus testandi*. They fail to provide a proper definition or explanation of the concept, and attempts to do so are characterized by divergent and often conflicting opinions.

Glover[33] identifies the following divergent approaches in the courts' understanding of and engagement with *animus testandi*: to some, "testamentary intent" means that the decedent intended for the document to be a will. Others understand it as the decedent's intention for the document to operate as a will (i.e. to express their testamentary wishes, irrespective of whether the decedent was aware that they were making a will). Moreover, some regard the decedent as having intended to make a disposition of his/her property employing the specific document ("the very paper itself"). Others, such as the New York Court of Appeals,[34] "decline the formalistic view that this [testamentary] intent attaches irrevocably to the document prepared, rather than the testamentary scheme it reflects," thereby interpreting intent based on the estate plan that

33. *Id.* at 572-4.

34. Snide v. Johnson [*In re Snide*], 418 N.E.2d 656, 657 (N.Y. 1981), as referred to by Glover, *supra* note 9, at 573-74.

is expressed in the document's terms.[35] Some courts even require both "the intent that a specific document operate as a will and the intent that specific testamentary gifts be expressed through the terms of the document" to establish testamentary intent.[36]

On the few occasions that they attempt to define testamentary intent, Glover, Guzman, and Lindgren too appear to be struggling. More than thirty years ago, Lindgren[37] tried to give content to testamentary intent (*animus testandi*) by identifying eight subcategories or strands of testamentary intent, namely:

> (1) Channeling Intent—Intent that a document fit into the legal category called "will." . . .
>
> (2) Probative Intent—Intent that isn't limited to passing nonprobate assets. . . .
>
> (3) Ambulatory Intent—Intent that a document take effect at death.[38] …
>
> (4) Delayed Dispositive Intent—Intent that a document transfer property at death . . .
>
> (5) Executory intent—Intent to execute the document.[39] . . .
>
> (6) Nontentative Intent—Intent that the estate planning scheme not be tentative or a sham . . .
>
> (7) Descriptive Intent—Intent that the document describe an estate plan or other testamentary wishes. . . .

35. Glover, *supra* note 9, at 573-74. The concept "estate plan" encompasses all bequests made in a testator's will. See Hirsch, *supra* note 3, at 2219-20; Adam Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 305 (2017).

36. Glover, *supra* note 9, at 574.

37. Lindgren, *supra* note 14, at 1016-18. See also Glover, *supra* note 9, at 575-78.

38. The characteristics of a will should be clearly distinguished from the different forms of intention involved in making a will. A basic characteristic of a will is that it is ambulatory. In terms of the disposition of property, it has no effect until the testator's death. See Jubelius v. Griesel, 1988 (2) SA 619 (C) at 622E-H, citing DALE HUTCHISON, ISOLATING THE PACTUM SUCCESSORIUM 223-24 (Kenwyn, Juta, 1983). See also ROGER KERRIDGE, PARRY AND KERRIDGE: THE LAW OF SUCCESSION 35 (London, Sweet & Maxwell, 2016).

39. This apparently refers to *animus signandi*, which pertains to the performance of the execution acts to comply with the formality requirements. The notion of a will-making process clearly distinguishes between the drafting act, which relates to the content of the will, and the execution acts, which are aimed at satisfying the formality requirements.

> (8) Evidentiary Intent—Intent that the document be used after death as evidence of the estate plan. . . ."[40]

Lindgren then goes on to present an inconsistent and confusing ranking of these subcategories. For instance, he regards channeling intent as "helpful" though not "required," and "neither necessary nor sufficient" as opposed to descriptive intent, which he views as "necessary, but not sufficient." Where *animus testandi* is required, this would necessitate *all* of these components to be present. Lindgren apparently acknowledges this, but explains: "The typical will has all eight and having all eight is sufficient to establish testamentary intent. Lacking one or more attributes may lead to an absence of testamentary intent, or it may not."

Glover[41] raises some well-founded criticism against Lindgren's model and concludes that it "perhaps raises more questions than it answers." In fact, Lindgren himself later called his own contribution "a fumbling attempt to disentangle" the meaning of intent.[42] What Glover does concede, however, is that it is a step in the right direction.

Guzman has also made a stab at defining "testamentary intent." According to Glover,[43] Guzman builds on the foundation laid by Lindgren. However, in contrast with Lindgren's eight subcategories, Guzman opts to focus on the purposes or functions of testamentary intent in her attempt to give more structure to the concept ("the constitutive properties of testamentary intent", as she refers to it). She identifies a primary and a secondary function, which also happen to overlap.

The primary function of testamentary intent, Guzman states, is to distinguish between a testamentary and a non-testamentary document, thereby "driving the original finding of the will." Put differently, "testamentary intent" is the intention for a particular document to be a will. Interestingly, Guzman heavily emphasizes will execution here,[44] attaching significant value to compliance with execution formalities to prove the presence of testamentary intent. Theoretically, however, one

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40. The purpose of the formality requirements should also be distinguished from the different forms of intention involved in making a will. A will offers reliable evidence of the testator's wishes (one of a number of functions performed by the formality requirements), irrespective of the testator's intention. This also leads Lindgren to describe evidentiary intent as "neither necessary nor sufficient." Lindgren, *supra* note 14, at 1018. See also Glover, *supra* note 9, at 577-78.

41. See Glover, *supra* note 9, at 575-78, 581-99.

42. *Id.* at 578.

43. *Id.* at 578-81. See Guzman, *supra* note 8, at 305-74.

44. "A proffered document generally requires two components to qualify as a will: testamentary intent and formalities. Intent is expressed as but half of the equation." Guzman, *supra* note 8, at 310.

document may embody multiple juristic acts. For instance, a testator is free to make both a testamentary disposition and a donation with a view to their death in a single document. Such a document would involve multiple juristic acts, each of which is associated with a specific form of intent. In this respect, Guzman's theory falls short and emphasizes the risk of tying intention to the *document* as opposed to the *act* embodied in the document. Further confirmation of this is found in Guzman's inability to explain the intention to revoke as part of her functions of testamentary intent precisely because she fails to identify the act of revocation as an independent juristic act that can be embodied in the same document (will).[45]

Concerning the secondary function of testamentary intent, Guzman[46] suggests a shift in focus once it has been established that a document is indeed a will. As soon as it has been decided that "the decedent intended the subject document to be a will," the new area of focus is to apply the rules of interpretation and construction to establish the testator's intention regarding the disposition of their property.[47]

Glover's[48] theory, in turn, essentially comprises three subcategories of testamentary intent. The first is "donative testamentary intent," which entails "whether the purported will expresses an intent to make gifts that become effective upon the decedent's death" (or, as Glover later puts it, "whether a particular document expresses an intent to convey property upon death").[49] The second is that "operative testamentary intent" involves "whether the decedent intended a document that expresses the

45. Although Guzman rightly points to the need for both intent and an act to facilitate revocation, she does not offer an explanation for this. *Id.* at 322. Moreover, Glover's main criticism against Guzman's model is the way in which she separates will revocation and will execution, and it proceeds to deal with them under her primary and secondary purposes of testamentary intent respectively. According to Glover, both revocation and execution should fall under Guzman's primary purposes. Sadly, though, Glover's explanation for this raises more questions than answers. Glover, *supra* note 9, at 580, 593-94.

46. Guzman, *supra* note 8, at 319-22. She identifies will composition and will construction and revocation under her secondary purposes.

47. See Glover, *supra* note 9, at 579-80.

48. *Id.* at 581-99.

49. *Id.* at 582, 588-89. Even though there are unquestionably two forms of intention at play here, namely "the intent to make gifts" and "the intent for those wishes to take effect at the decedent's death," Glover later also offers the following narrower definition: "Whereas, the donative strand of testamentary intent relates to whether a purported will describes testamentary gifts, operative testamentary intent relates to whether the decedent intended a purported will to be a legally operative expression of those gifts."

donative testamentary intent to be legally effective."[50] The third subcategory—"substantive testamentary intent"—is dedicated to the interpretation of the will "in a way that results in the distribution of the estate in the manner that the decedent intended."[51] Glover[52] then summarizes these three subcategories by stating:

> Once the court determines both that the purported will expresses testamentary gifts and that the decedent intended the document to be legally effective, the court must turn to the final element of the testament intent doctrine and construe the will in accordance with the decedent's intent.

Glover's biggest challenge—and evidently, the primary flaw in his reasoning—appears to be his attempts to arrange his theory to accommodate his fellow scholars' proposals, which merely exposes his theory to the same criticism that was leveled against theirs.[53]

His struggle to elucidate testator's intention without placing the focus on the relevant acts involved is obvious. This is particularly evident from his explanation of the operation of a revocatory clause in a will in the context of *animus testandi*. Although Glover rightly identifies *animus revocandi* as the required intention for an act of revocation, he then says: "[T]o revoke a previous will by executing a new will, the testator must possess operative testamentary intent with respect to the new will and therefore must not possess operative testamentary intent with respect to the previous will."[54] Following this reasoning, therefore, a lack of operative testamentary intent (as a strand of *animus testandi*) is required

50. There is clear overlap between Glover's donative and operative testamentary intent—something Glover himself later confirms by stating that these two strands are "closely related." *Id.* at 594.

51. *Id.* at 595.

52. *Id.* at 595.

53. Although, for instance, Glover rightly points out that Lindgren's "probative intent" does not form part of testamentary intent, he still tries to accommodate as many of his fellow scholars' suggestions in his theory. *Id.* at 575-76, 578, 588. For example, he locates Lindgren's "ambulatory intent" and "delayed dispositive intent" under not only his own "donative testamentary intent" strand, but also under Guzman's primary function of testamentary intent. He includes Lindgren's "executory intent," "nontentative intent," and "evidentiary intent" as components of his "operative testamentary intent" strand, and further indicates that both Guzman's functions are applicable here. Lastly, while pointing out Lindgren's failure to provide for substantive testamentary intent in his framework, Glover credits Guzman for doing so by providing for "interpretation and construction of wills" under her functions. See Glover, *supra* note 9, at 582, 592-94, 599.

54. *Id.* at 592, footnote 159.

for the previous will to be revoked. Glover[55] goes on to confirm this by stating:

> [A]s previously explained, will-execution and will-revocation both deal with the same question: Did the decedent intend a purported will to be legally effective? Will-execution focuses on the presence of this intent, while will-revocation focuses on the absence of this intent, but both involve the issue of operative testamentary intent.[56]

The presence and absence of the same form of intent in respect of two different wills seems convoluted, and in Glover's own words, "adds potentially confusing complexity."[57]

If nothing else, the preceding theoretical engagement with the concept of testator's intention underscores that testator's intention is anything but one-dimensional. Glover, Guzman, and Lindgren all agree that testator's intention is a composite, multifaceted concept that involves multiple forms and dimensions of intention. I propose, however, that the three scholars' views are open to criticism because they perceive testator's intention within the broad context of *animus testandi*. As such, they fail not only to identify the various (independent) forms of intention involved in the will-making process, but also to contextualize how these all connect and interact. In addition, they neglect to draw an explicit connection between the testator's intention and the act of testation. In essence, they regard testator's intention *in abstracto* without clearly relating it to the different acts or any of the other elements or requirements relevant to the will-making process (such as testamentary capacity).[58] In the following

55. *Id.* at 593-94.

56. Earlier on, he puts it as follows:

> However, will-revocation, like will-execution, relates to the determination of what constitutes a will. In the context of will-execution, the court's task is to identify the presence of testamentary intent. Conversely, in the context of will-revocation, the court's task is to identify the absence of testamentary intent. In either context, testamentary intent refers to the intent that the document constitute a will.

Id. at 580.

57. *Id.* at 593.

58. In fact, Lindgren seems hesitant to include these elements or requirements under testamentary intent, saying: "One could also include other substantive doctrines within testamentary intent (perhaps capacity, fraud, duress, and undue influence), but these doctrines have their own law and their own logic." Lindgren, *supra* note 14 at 1018. An act-based approach to the will-making process is opposed to this very idea of viewing different elements or aspects of will-making as separate or independent. It is important to identify each element's place and function and to determine how they all interact. The result of viewing these components of will-making outside the context of an act-based approach is evident from Guzman and Glover's struggle to locate the different requirements in their intent models. Guzman tries to cover most of

Part, I address these concerns from a South African perspective to contribute to an intent doctrine in the law of wills.

III. A PROPOSED INTENT DOCTRINE IN THE SOUTH AFRICAN LAW OF WILLS[59]

A legal system that recognizes the right to private property and other proprietary rights necessarily also needs to provide for the devolution of any remaining assets upon the right-holder's death.[60] This, then, is the primary function of the law of succession—to identify a deceased's beneficiaries and the assets assigned to them. Hence, the law of succession is defined as the totality of the legal rules that controls the transfer of those assets of the deceased that are subject to distribution among qualifying beneficiaries.[61] The law of succession is subdivided into the law of testate succession (the law of wills) and the law of intestate succession (intestacy law). In the law of wills, inheritance occurs per the testator's *intention as expressed in a will*.[62]

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them under her secondary purposes of testamentary intent, which Glover then criticizes by arguing that "Guzman improperly separates various rules and doctrines." Guzman, *supra* note 8, at 319; Glover, *supra* note 9, at 593. See also Guzman's recent contribution where she explains why the different parts of a will take effect at different times. Katheleen Guzman, *Wills Speak*, 85 BROOK. L. REV. 647 (2020).

59. In recent contributions, I have proposed a processual act-based approach to conceptualizing wills in the South African law of succession. In the paragraphs that follow, I present the key points from those articles to argue for the act-based approach as a solid foundation for an intent doctrine in the law of wills. See Faber, *supra* note 23.

60. Hofmeyr & Paleker, *supra* note 3, at 3-4, 53-54; Jean Sonnekus, *Privaatoutonomie en Testeerbevoegdheid as Grondwetlik Beskermde Bates, in* Alain-Laurent Verbeke, Jens Scherpe, Charlotte Declerck, Tobias Helms & Patrick Senaeve (eds.) CONFRONTING THE FRONTIERS OF FAMILY AND SUCCESSION LAW: LIBER AMICORUM WALTER PINTENS 1319 (Belgium, Intersentia, 2012); François du Toit, *'n Verdere Perspektief op die Sosiale en Ekonomiese Grondslae van die Erfreg*, 26 J. FOR JURIDICAL SCI. 3 (2001); De Waal & Schoeman-Malan, *supra* note 7, at 1-2; Karin Lehmann, *Testamentary Freedom versus Testamentary Duty: In Search of a Better Balance*, 2014(1) ACTA JURIDICA 9-10 (2014). This position is also confirmed by American legal scholars. See Hirsch, *supra* note 3, at 2189.

61. Hofmeyr & Paleker, *supra* note 3, at 3-4; NICOLAAS VAN DER MERWE & C.J. ROWLAND, DIE SUID-AFRIKAANSE ERFREG 1 (Pretoria, JP van der Walt & Sons, 1990); Du Toit, *supra* note 60, at 1; D.S.P. CRONJÉ, JEAN SONNEKUS, P. DE W. VAN DER SPUY & I. VORSTER, WORKBOOK FOR THE LAW OF SUCCESSION 73 (Durban, Butterworths, 1996).

62. Cronjé, Sonnekus, Van der Spuy & Vorster, *supra* note 61, at 17; JUANITA JAMNECK (ED.), CHRISTA RAUTENBACH (ED.), MOHAMED PALEKER, ANTON VAN DER LINDE & MICHAEL WOOD-BODLEY, THE LAW OF SUCCESSION IN SOUTH AFRICA 55 (South Africa, Oxford University Press, 2023); Van der Merwe & Rowland, *supra* note 61, at 115. This appears to be the position in American law as well. Scalise puts it as follows: "The purpose of will-making may seem obvious—to transmit voluntarily one's property at death to certain specified individuals." Scalise,

An "act-based" approach is concerned with this *intention as expressed in a will*, representing the act of testation—a legal expression of wishes that lends juridical relevance to the testator's intention. To better understand the act of testation, one needs to consider it within the context of the will-making process, where it should be distinguished, on the one hand, from other acts and matters that may be contained in a will (such as the act of revocation), and on the other, from other acts that form part of the will-making process (such as the acts of execution to comply with the formality requirements). An act-based approach to the continuous will-making process is the only theoretically sound way to explain testator's intention as a composite, multifaceted concept that involves various forms or dimensions of intention.

A. Proposing an "Act-Based" Approach: The Act of Testation as a Juristic Act

Viewing a will as a juristic act is not an unfamiliar notion in South African law,[63] and the concept of the "act of testation" (or "testamentary act") has cropped up a few times in the South African law of succession.[64] Unfortunately, these concepts are neither used consistently and uniformly nor properly related to one another[65]—at least not in the way envisaged by the act-based approach, which seeks to focus on every act in the will-making process.

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supra note 3, at 358. He continues: "The American law of wills . . . has always primarily been about transmitting property [dispose of property]." *Id.* at 359.

63. According to Reid and colleagues, the notion of a will as a juristic act is not unfamiliar in Western legal systems. Reid, De Waal & Zimmermann, *supra* note 1, at 433.

64. Hofmeyr & Paleker, *supra* note 3, at 55-56; Ben Beinart, *Some Aspects of Privileged Wills*, 1959(1) ACTA JURIDICA 200 (1959); François du Toit, *Mental Capacity as an Element of Testamentary Capacity*, 122 S. AFR. L. J. 661 (2005); De Waal & Schoeman-Malan, *supra* note 7, at 38-44, along with the authority cited there in relation to testamentary capacity. This also seems to be the position in American law. See Hirsch, *supra* note 35, at 289, 291, 293, 298-300, 305, 347; Guzman (2020), *supra* note 58, at 650, 655, 657-58, 662-63.

65. It is unclear in South African law whether the juristic act encompasses the will in its entirety, or only the disposition of assets (as expressed in a will). The traditional view is that the totality—the executed document along with all its provisions—represents the will, and hence the juristic act—"one will, one juristic act," as articulated by the court in The Leprosy Mission v. The Master of the Supreme Court 1972 (4) SA 173 (C) at 183. See also Linda Schoeman-Malan, *The Requirements and Test to Assess Testamentary Capacity (1)*, 78 TYDSKRIF VIR HEDENDAAGSE ROMEINS-HOLLANDSE REG 614 (2015). However, in other instances (particularly in the context of testamentary capacity), the juristic act of making a will is specifically linked to the act of disposing of property. See Spies v. Smith 1957 (1) SA 539 (A); Sonnekus, *supra* note 60, at 1332, 1325; Jean Sonnekus, *Testeerbevoegdheid, Herroeping van 'n Testament en Kuratele Sorg*, 15 STELLENBOSCH L. REV . 450, 451, 455, 460 (2004); Du Toit, *supra* note 64, at 661.

A proper understanding of these constructs requires a brief look at their private law origins. The South African law of succession forms part of private law and operates on the premise of the subjective law theory. A legal subject is the bearer of subjective rights and is bestowed certain entitlements (powers) on account of these rights, including the entitlement to dispose of assets. The legal subject may exercise the entitlement to dispose of assets through the act of disposal, being a juristic act, which, in turn, is made possible by the legal subject's capacities,[66] particularly legal capacity and the capacity to act.[67]

In the context of the law of succession (which primarily controls the devolution of assets upon death)—and more specifically, the *law of wills* (where this devolution occurs according to the intention of the testator as expressed in a will)—" legal capacity" means the capacity to be a testator. "Capacity to act," in turn, refers to testamentary capacity and therefore the ability to perform the juristic act of making a will. De Waal and Schoeman-Malan put it plainly: "If a testator wishes to dispose of all or some of his or her assets, he or she needs to make a will."[68]

According to the act-based approach, the relevant juristic act to dispose of assets in the law of wills is the act of testation, which takes the form of bequests in a will. The act of testation embodies both the testator's dispositive intention and *animus testandi*. The dispositive intention is expressed in a dispositive act aimed at the disposition of assets upon death (i.e. who inherits what). To qualify as an act of testation, the dispositive act must be complete in that all the elements of a testamentary disposition—a bequest of assets, the extent of the interest being bequeathed, and the identity of the beneficiaries—must be present.[69] *Animus testandi*, in turn, represents the serious, deliberate, and final intention for the testamentary dispositions to be legally effected upon the

66. Sonnekus mentions the extreme example of an owner of a Picasso painting who exercises his entitlement by dumping the painting in the dustbin. The owner—in exercising his entitlement—could have also donated or sold the painting, in which case the relevant juristic act to achieve the desired result would have been the act of abandonment and the act of concluding a contract respectively. Sonnekus, *supra* note 7, at 78-79. See also Faber (2022), *supra* note 23.

67. See TRYNIE BOEZAART, LAW OF PERSONS 1-3 (Cape Town, Juta, 2016).

68. De Waal & Schoeman-Malan, *supra* note 7, at 128.

69. In *Ex parte Estate Davies* 1957 (3) SA 471 (N) 474A-C and Oosthuizen v. Die Weesheer 1974 (2) SA 434 (O) 436C-D, the court identified the three essential elements of a testamentary disposition. It is important to note that a testamentary disposition does not have to be contained in a single document, but that a testator is free to express their wishes on multiple pages. For instance, a testator may choose to take two sheets of paper and write "John" on page one and "inherits my estate" on page two. Note, though, that while this constitutes one testamentary disposition—"John inherits my estate"—there are two testamentary writings, each of which must comply with the formality requirements to be valid.

testator's death.[70] It is distinct from a jocular reference to how assets should be distributed upon death,[71] which also involves an expression of intention but lacks any true resolve for it to be legally implemented.[72] The same applies to a document that contains instructions to a third party to draft a will. While the dispositive intention in terms of the distribution of assets may be abundantly clear, there is no *animus testandi* on the part of the prospective testator.[73]

Therefore, a will is the documentary expression of this act of testation and qualifies as a will because of it.[74] At the same time, however, a will may also embody other acts with associated forms of intention (such as the act of revocation)[75] and govern other matters (such as the nomination of an executor, or funeral and burial arrangements).

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70. To continue with the example above, *animus testandi* would pertain to the testamentary disposition, namely for the beneficiary (John) to inherit the estate, even though the disposition appears over multiple pages. This also illustrates that *animus testandi* relates to the act of testation rather than to the document(s) embodying the act.

71. John Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 514 (1975).

72. From a historical perspective, Kaser points out that *animus* refers to "the intention directed to the achievement of a certain purpose at law." MAX KASER, ROMAN PRIVATE LAW, tr. by Rolf Dannenbring 53-6 (Durban, Butterworths, 1984).

73. Linda Schoeman-Malan, François du Toit, Anton van der Linde & James Faber, *Section 2(3) of the Wills Act 7 of 1953: A Retrospective and Critical Appraisal of Some Unresolved Issues*, 2014(1) ACTA JURIDICA 93 (2014). The matter of *In Re Winter*, (1894) 15 NLR 287 offers a clear illustration of the distinction between dispositive intention and *animus testandi*. In that case, a woman drafted a document headed "Memoranda to give to Mr. H. Bale for my will, which I wish him to draw out for me." Although the document was intended as an instruction to her attorney to draw up a draft will, it contained a list of specific bequests. Her dispositive intention was evident from the dispositive acts embodied in the document on how her assets were to be distributed in the to-be-drafted will. She later changed her mind and decided that the document in question should, in fact, be her will. She proceeded with the execution of the document and also referred to it as her "will." The content of the document and the dispositive intention remained the same throughout this process. What changed, however, was that the woman had now formed the necessary *animus testandi* regarding the bequests, executing the document so that it would have legal force as a will. This case also illustrates that a document qualifies as a will on account of its content and specifically for containing an act of testation, irrespective of the shape or form of the document itself. See François du Toit, *Testamentary Rescue: An Analysis of the Intention Requirement in Australia and South Africa*, 23 AUST. PROP. LAW J. 71-72 (2014).

74. The act of testation may also be separated from the document requirement. Where oral wills are accepted, for instance, the verbal expression of the dispositive intention qualifies as the act, which would be regarded as an act of testation if accompanied by *animus testandi*. Therefore, if the right number of witnesses are present, it would be seen as a valid oral will. See Scalise, *supra* note 3, at 360-61, 373-74; De Waal, *supra* note 5, at 388. See also Lindgren, *supra* note 14, at 1009; Restatement (Third) of Property, Vol. 1, 207 (Am. Law Inst., 1999).

75. As illustrated in Thorn v. Dickens [1906] W.N. 54, the essence of a will is the disposition of assets: The written expression of the testator's dispositive intention, along with the

B. Distinguishing and Delineating the Various Acts (and Their Associated Forms of Intention) in the Continuous Will-Making Process

In the course of the will-making process, various parties perform specific acts with specific associated forms of intention to establish (create) a will.[76] Here, it is important to distinguish between the drafting and the execution of a will. The former involves the content of a will, which pertains to aspects of substantive law, while the latter relates to the necessary compliance with statutory formalities to render a will valid.[77]

The act of testation forms part of the content of a will and takes the form of bequests,[78] whether as legacies or inheritances.[79] The act of testation should be distinguished from other acts or matters that could be governed by means of a will (such as the act of revocation,[80] or the

necessary *animus testandi*, constitutes an act of testation, and the document that embodies this act qualifies as a will. See Kerridge, *supra* note 38, at 45. Conversely, even a validly executed document that does not contain an act of testation does not qualify as a will. In Marais v. The Master 1984 (4) SA 288 (D) at 291G, the court found that a document that complied with the formality requirements, but contained only a revocatory clause (and no testamentary bequests) did not qualify as a will. Also see De Waal & Schoeman-Malan, *supra* note 7, at 96.

76. Those involved in the will-making process include the testator, a third party who drafts the will on behalf of the testator, as well as the parties involved in the execution of the will, namely the witnesses, a party who signs on behalf of the testator (*amanuensis*), and a commissioner of oaths.

77. Jamneck, Rautenbach, Pasleker, Van der Linde & Wood-Bodley, *supra* note 7, at 73-74.

78. The will may be drafted by the testator personally, or the testator may instruct a third party to assist with the drafting. This affects *animus testandi*. If the testator self-drafts, *animus testandi* can be present during drafting. However, where a third party assists with the drafting, the testator needs to accept the draft and associate with its content to form the necessary *animus testandi*. A draft becomes a will only once the testator has associated with the content of the document and formed the necessary *animus testandi*. See Back v. The Master of the Supreme Court [1996] 2 All SA 161 (C) at 174A-C; Du Toit, *supra* note 73, at 74.

79. De Waal & Schoeman-Malan, *supra* note 7, at 128-32. American law uses the terms "devise" and "devisee." "A devise is a disposition of property, real or personal, in a will. A devisee is a person who is named in a will to receive real or personal property." Restatement (Third) of Property, Vol. 1, 169 (Am. Law Inst., 1999). Although the terms "devise" and "devisee" used to be reserved for the disposition of land, and "legacy" or "bequest" was used for the disposition of personal property, these terms are used interchangeably in modern American law. In fact, the Uniform Probate Code now defines "devise" as "a testamentary disposition of real or personal property".

80. Although the act of testation and the act of revocation are traditionally embodied in a single will, they remain two separate and independent juristic acts, each underpinned by its own form of intention (*animus testandi* and *animus revocandi* respectively). This distinction is also evident from the fact that the two acts take effect at different times—the act of revocation as soon

nomination of an executor), as each of these acts or matters is associated with its own forms of intention and has different legal consequences.[81]

Proper execution, in turn, is required for a document containing testamentary provisions to be recognized as a will, and it necessitates compliance with all the statutory formality prescripts of the Wills Act.[82] Execution involves a number of parties (including, for instance, the testator and witnesses), each of whom performs a specific execution act in compliance with the formality requirements. Note, however, that the execution acts of these parties do not contribute to the testator's juristic act as such, but only to its formal validity.[83] Even in the execution process, different forms of intention are at play.[84] The testator, for example, must execute the will in their capacity as testator; must intend to execute the will in a specific way (with a signature, initials or a mark); and must perform the execution act with the necessary *animus signandi*.[85]

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as the will is executed and the act of testation only upon the testator's death. Cf. Guzman (2020), *supra* note 58, at 647-51, 657-58, 680-81.

81. The act of testation and the act of revocation are juristic acts that need to be carried out in law. The nomination of an executor, on the other hand, can be done by a testator in their will, although the appointment of the executor is governed by legislation (the Administration of Estates Act 66 of 1965), and the executor derives capacity to act from appointment by the master, and not from the will itself. Also, should a testator have expressed their wishes on funeral and burial arrangements in the will, those stipulations create a mere moral obligation, as opposed to juristic acts, which have legal consequences. The American "ethical will," which may form part of the traditional will, is another good example of stipulations that would most likely have moral implications as opposed to legal consequences. See Scalise, *supra* note 3, at 359.

82. Act 7 of 1953. Section 2(1)(a) specifically states that for a will to be valid, it must comply with the formality requirements.

83. Sonnekus, *supra* note 65, at 451; Beinart, *supra* note 64, at 201; N.J. WIECHERS, TESTAMENTE: 'N KORTBEGRIP 22 (Cape Town, Juta, 1988). From a Dutch law perspective, Kolkman, *supra* note 11, at 170, contends, "Unless the law provides otherwise, juristic acts which do not meet the formal requirements are void."

84. Importantly, a testator should form the necessary *animus testandi* before the execution of the will, as *animus testandi* is required for the act to qualify as an act of testation, which, in turn, is required for the document to qualify as a will. Moreover, *animus testandi* is an independent form of intention, existing separately from the formality requirements. A testator could instruct a third party to sign the will on their behalf after the testator has formed the necessary *animus testandi*. Even though the testator would not be physically involved in the execution of the will, it remains the testator's will on account of *animus testandi* being present in the testator's mind. See the two-part article by Faber (2021), *supra* note 23; Schoeman-Malan, Du Toit, Van der Linde & Faber, *supra* note 73, at 96.

85. *Animus signandi* is defined as the "intention to sign" and accompanies the act of signing. See AARON FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW 33 (New York, Oxford University Press, 2009), André van Staden & Christa Rautenbach, *Enkele Gedagtes oor die Behoefte aan en Toekoms van Elektroniese Testamente*, 39 DE JURE 597 (2006).

C. Testator's Intention: A Composite, Multifaceted Concept that Involves Various Forms or Dimensions of Intention

The basic premise of the act-based approach is that testator's intention passes through a range of phases or facets as the parties involved perform different acts during the will-making process. As such, testator's intention evolves from formation to expression as the will-making process progresses, and ends with implementation upon death, giving legal effect to the testator's formed intention as embodied in a valid will.

With regard to the forms of intention associated with the juristic act of the testamentary disposition of assets, the logical point of departure appears to be the testator's decision to dispose of their estate assets by way of a will. This comprises phase one of the will-making process, called the formation of intention.[86] Yet, as Wood-Bodley rightly points out, the general decision or intention to make a will should not be confused with *animus testandi*.[87]

On its own, an intention or a decision is not enough to be juridically relevant. It should be expressed in an ascertainable and legally recognized way to have legal force,[88] which brings us to phase two of the will-making process, namely expression of intention. In legal terms, the bridge connecting the subjective, unexpressed formed intention and the objective, ascertainable expression of intention is the juristic act.[89] The

86. Here, it is also important to distinguish intention from the motive (*causa*) for the formation of intention. The motive is mostly (yet not entirely) legally irrelevant. See Hofmeyr & Paleker, *supra* note 3, at 162-64, 747-50; François du Toit, *Constitutionalism, Public Policy and Discriminatory Testamentary Bequests—A Good Fit between Common Law and Civil Law in South Africa's Mixed Jurisdiction?* 27 TUL. EUR. & CIV. L.F. 111 (2012). See also Restatement (Third) of Property, Vol. 2, § 6.1 (Am. Law Inst., 1999), where it is indicated that motive "is a complex matter" and should be distinguished from intent.

87. Michael Wood-Bodley, *Can Section 2(3) of the Wills Act 7 of 1953 Properly be Applied to a Mere Instruction to Draft a Will?* Mabika v. Mabika, 130 S. AFR. L. J. 255 (2013). It is generally accepted that the broad intention to make a will is not essential to create a valid will, although its evidentiary value in establishing that a document was indeed intended to be a will is obvious. See also Glover, who indicates that while Lindgren's "channeling intent" and "probative intent" are interconnected, the latter is not a component of testamentary intent. Glover, *supra* note 9, at 575-76, 578, 588. See also Kerridge, *supra* note 38, at 35-36, 242.

88. "A key element in intention is a person's wishes or desire. If a person has not willed or envisaged something, then one cannot speak of an intention. But if a person has made no attempt to convert this intention into an act, then it is almost impossible to determine what he or she intended. In the law of succession, this willed intention is converted into in act when the person (the testator) makes a will. The point of departure here is that *someone who has made a will intends his or her assets to be distributed after his or her death according to the provisions contained in the will*." De Waal & Schoeman-Malan, *supra* note 7, at 219. Emphasis added.

89. Kaser identifies the two elements of a juristic act, namely the true intention, being the internal element, and the expression of intention, as the external element. Kaser, *supra* note 72, at

juristic act, therefore, implies both an intention and its expression, which must be embodied in a valid will to be considered a lawful final expression of intention by testamentary means[90] to which the law then gives effect (constituting phase three of the will-making process, namely consequences).[91]

D. The Act-Based versus the Traditional Requirements Approach to the Will-Making Process

Understanding will-making as a process of acts runs counter to the traditional view that a will is the result of once-off compliance with several set requirements, such as the presence of testamentary capacity or *animus testandi*, to name only two. Nevertheless, by linking the different elements or requirements for making a will to the relevant acts in the will-making process, the act-based approach presents a sound theoretical basis for understanding each component's place and role as well as how they interact (instead of viewing them in isolation).

For example, testamentary capacity is much more than a requirement to create a will; it relates to a legal subject's capacity to act—the capacity to perform juristic acts. It concerns the testator's ability to have an intention in law, which is expressed through the different acts the testator performs in the will-making process, with the act of testation being the most important.[92]

53-54. According to Davel and colleagues, "[a] juristic act is one to which the law attaches the same consequences as had been contemplated by the acting legal subject". C.J. DAVEL, G.H. FICK & J.A. ROBINSON, WORKBOOK FOR THE LAW OF PERSONS 17 (Durban, LexisNexis Butterworths, 1999).

90. In Wessels v. Die Meester [2007] SCA 17 (RSA) (23/03/2007) at § 13, Judge of Appeal Brand rightly cautions that the testator's intention needs to be contained in a *valid* will to have legal relevance. He refers to *Re Estate Marks* 1921 TPD 180 at 185, where then Judge President Wessels said: "It seems to me that [the Roman Dutch jurists] attached great importance to the real intention of the testator, provided that his *intention was expressed in a testamentary disposition executed with such due solemnity as the law requires*." Emphasis added.

91. This also applies to the other acts and matters that may be governed by testamentary means. For example, if a testator decides to make a will, they can take a blank A4 paper and write the words "Last will and testament" at the top, which would form part of the broad intention to make a will. In addition to the disposition of property, the testator can also decide other matters, such as whether or not to revoke previous wills, as well as burial and funeral arrangements. The consequences of each of these decisions—as they manifest in the will—will be determined by the relevant act and whether it is juristic or not.

92. Section 4 of the Wills Act 7 of 1953 governs testamentary capacity. Testamentary capacity forms part of capacity to act and pertains to the juristic act of making a will—or more specifically, the act of disposing of property. See Katz v. Katz [2004] 4 All SA 545 (C); Spies v. Smith 1957 (1) SA 539 (A); Sonnekus, *supra* note 60, at 1332, 1325; Sonnekus, *supra* note 65, at 450, 451, 455, 460; Du Toit, *supra* note 64, at 661.

Moreover, capacity to act is regarded as a crucial element of private autonomy, as the performance of a juristic act represents an intentional choice to bring about certain legal consequences.[93] In the law of succession, private autonomy manifests as freedom of testation. As a value, freedom of testation ensures that assets can be freely disposed of. When a person resolves to make a will, the principle of freedom of testation dictates that such person—the testator—is free to decide on the content of the will.[94] Since freedom of testation is a mere value and hence an abstract notion, it is concretized by the free disposition of assets (the act of testation).[95]

In reality, therefore, intention does not start with a document but with the testator's capacity to perform the juristic act of testation, which is underpinned by the principle of freedom of testation.[96] Consequently, a testator may make a lawful final expression of intention regarding the disposal of their assets through a will, and any such testamentary inheritance should be recognized if the testator has testamentary capacity and acts in accordance with the principle of freedom of testation.

93. Sonnekus, *supra* note 60, at 1321. See also the American position, namely that the "organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please, either during life or at death." Restatement (Third) of Property, Vol. 1, 3 (Am. Law Inst., 1999). See also Hirsch, *supra* note 3, at 2180 and further.

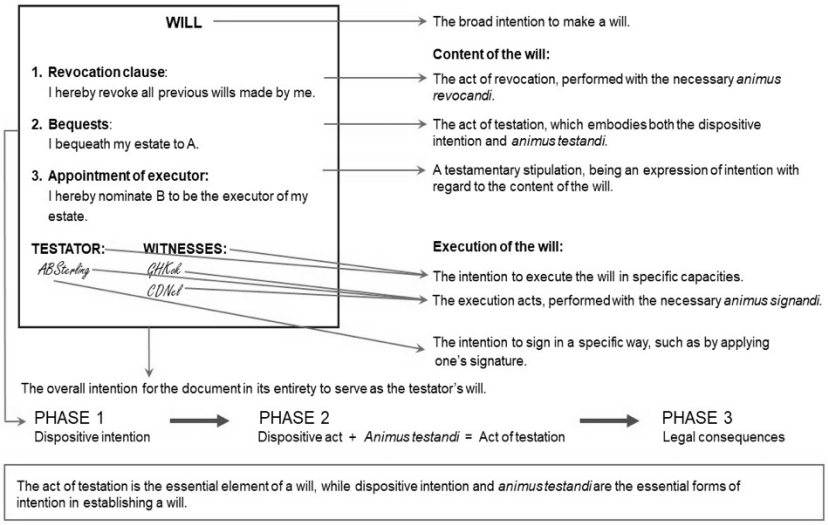
94. *In re BOE Trust* 2013 (3) SA 236 (SCA) at § 26. De Waal articulates it as follows: "The absence of internal formalities regarding the content of wills remains a characteristic of modern South African law. Testators can use any words they want, provided that their intention can be established with reasonable certainty. There are no prescribed formulas." De Waal, *supra* note 5, at 382. For this reason, more informally worded bequests, such as "I leave my estate to Ann", are as acceptable as more formal ones, such as "I bequeath my estate to Ann." Clearly this also serves the principle of freedom of testation.

95. A free disposition of assets simply means that the testator disposes of their property of their own free will. Infringement on a testator's freedom of disposition, such as through coercion or undue influence, causes the testator to dispose of their property against their will. According to Du Toit, the doctrine of undue influence serves as the "guardian of freedom of testation" and appears to be "designed to safeguard free expression of testamentary wishes". See Du Toit, *supra* note 5, at 510, 513, 525. See also Marius de Waal, *The Law of Succession and the Bill of Rights, in* BILL OF RIGHTS COMPENDIUM at § 3G7 (Durban, LexisNexis Butterworths, 2012).

96. Sonnekus points out that freedom of testation is qualified by testamentary capacity, in the sense that the latter is required before the former can apply. Sonnekus, *supra* note 60, at 1341. The position is the same in American law. Hirsch confirms that "testators must possess testamentary capacity before they can exercise freedom of testation." Hirsch, *supra* note 3, at 2220. It follows, therefore, that undue influence, for instance, which affects freedom of testation, would be legally irrelevant in the case of a testator without testamentary capacity. See Cronjé, Sonnekus, Van der Spuy & Vorster, *supra* note 61, at 55.

E. Conceptualizing Wills According to the Act-Based Approach in the South African Law of Wills

The following schematic representation illustrates how a will would be conceptualized in South African law using the act-based approach.



The discussion and analysis in the preceding subparts of this Article bring me to my proposal for an intent doctrine in the law of wills. The point of departure is that a will is the result of a will-making process that involves multiple forms of intention. The intention of the testator (or testator's intention or simply intention) denotes a broad concept that can include all the different forms of intention relevant to the making of a will. However, an intent doctrine demands the identification and explanation of each of the independent forms of intention, not only to gain a better understanding of each but also to properly understand the concept of a will as the carrier of these different forms of intention. The premise of the intent doctrine is therefore to establish that testator's intention is a composite, multifaceted concept that comprises various forms and dimensions of intention that can only be explained in a theoretically sound way following the proposed "act-based" approach to the will-making process that focuses on the act of testation as a juristic act. The intent doctrine emphasizes the various acts performed during the will-making process, focusing on the intention behind each act. It involves identifying and explaining the different acts and accompanying forms of intention involved in the different phases of the will-making process to (1) properly elucidate the facets through which intention passes (from formation to

expression) as well as (2) to link them to the other elements or requirements relevant to the making of a will.

The operation of the intent doctrine can be explained through a schematic representation of a simple will as follows. The title of the document identifies it as a will and expresses the broad intention to make a will. Regarding the content of a will, the first provision deals with the revocation of prior wills. For revocation to be valid, the revocatory act (as contained in the revocatory clause) must be accompanied by the necessary intention to revoke, known as *animus revocandi*. This is considered an independent legal act that can be included in a will. The third provision is a stipulation that expresses the testator's intention regarding a matter that may be regulated in a will. The second provision deals with the bequest—as the manifestation of the juristic act of testation—which embodies both the dispositive intention and *animus testandi*.[97] The testator's intention regarding the disposal of assets is formed and expressed in a processual way. In this process, intention progresses (evolves) through several distinguishable phases, which can be explained as follows: the testator's motive underlying their decision on the disposal of assets, goes, procedurally, before the decision itself. The decision, once formed—as the internally formed intention (inner will)—must then be converted into an expression of the decision (intention). This can be done either where the testator personally drafts the will or instructs an expert to draft the will on their behalf (in the latter scenario, the testator must accept the will drafted by the third party as their own). When *animus testandi*—with regard to the content and consequences of the testator's decision—is present, the expression of intention (as the act of disposal) will qualify as the act of testation—as the essential element of a will. Lastly, the act of testation must also be contained in a valid will to be a legally relevant expression of intention, which involves the execution of the will. Regarding the latter, although the execution of the will does not contribute to the testator's juristic act as such but only to its formal validity, there are also different forms of intention at play.[98] All the parties, for example,

97. The will only contains one bequest. Normally a will would embody multiple bequests that collectively constitute the dispositive scheme envisaged by the testator and therefore pertain to yet another form of intention, namely the testator's intention regarding the specific dispositive scheme (the estate plan). See also Lindgren, *supra* note 14, at 1018 concerning his descriptive intent as the testator's intention regarding the estate plan described in a will.

98. With reference to Guzman's theory and her primary function of testamentary intent, clearly compliance with the will formalities is not required in order to create a will. The execution of the will is detached from *animus testandi* in the sense that *animus testandi* must be present before the document will qualify as a will and therefore before execution becomes legally relevant (the execution of the will is required for the will to be valid in law). However, the execution of the

must have the intention to sign the will in a particular capacity (whether as testator, witness or commissioner of oaths); they must have the intention to sign in a particular way (by applying one's signature, initials or a mark); and, they must also perform the act of signing along with the associated intention to sign—the *animus signandi*. The focus remains on the intention of the testator, but now from the context of a processual act-based approach.

South African law departs from the premise that the testator's intention as expressed in a valid will has to be implemented: *voluntas testatoris servanda est*.[99] A document qualifies as a will based on the act of testation it embodies (and not, for instance, on account of the testator's broad intention to make a will). Therefore, the minimum forms of intention required to create a will are dispositive intention and *animus testandi*. In addition, the document embodying the act of testation (in other words, the testamentary document, in the sense that it contains a testamentary disposition) must comply with the statutory formality requirements. The will must be properly executed, which involves adherence to all the formality prescripts stipulated in section 2 of the Wills Act.[100] Once both the testator and all other parties have complied with these formalities, the will gains legal force.[101] The will takes effect upon the testator's death, which is when the testator's intention is ascertained from the will and is carried out. Where the testator's wishes are unclear, the will is subjected to interpretation to ascertain the testator's intention.[102] In this regard, the *Robertson v. Robertson's Executor's*[103] court remarked:

> Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are

will by the testator can serve as a good indication that all the necessary forms of intention (including *animus testandi*) are present. Reid, De Waal & Zimmermann, *supra* note 1, at 455, state it as follows: "to sign is to be bound . . . a testator signs a will because it is final and he intends to be bound by its contents."

99. *Ex parte Jewish Colonial Trust Ltd: In re Estate Nathan*, 1967 (4) SA 397 (N).

100. *In re Jennett*, 1976 (1) SA 580 (A) at 584A.

101. Revocation—being the only way to deprive a valid will of legal force—becomes operative as soon as the will is executed. Hofmeyr & Paleker, *supra* note 3, at 166-67; De Waal & Schoeman-Malan, *supra* note 7, at 89.

102. De Waal & Schoeman-Malan, *supra* note 7, at 128, 219-21. Guzman's theory, too, can be better explained in this context. The focus of her first function is to assess whether both dispositive intention and *animus testandi* are present (i.e. whether an act of testation was performed) so as to ascertain whether the document is indeed a will. If the document is confirmed as a valid will, her second function focuses on establishing what exactly the testator's intention was with regard to the disposition of assets (for which dispositive intention must be determined based on the rules for the interpretation of wills).

103. 1914 AD 503 at 507.

> ascertained, the Court is bound to give effect to them, unless we are prevented by some rule or law from doing so.

If the will contains errors, a court may rectify the document.[104] The testator's estate is then administered following the will, and the will lapses once the estate administration process has run its course, provided that all assets have been distributed and the will has served its purpose.[105]

IV. CONCLUSION

Indeed, the notion of testator's intention is pivotal in the law of wills. But while jurists and scholars globally agree with this statement, most also seem uncertain and confused when delving deeper into the concept. Testator's intention is unquestionably complex, comprising many different and connected parts. However, as this Article suggests, the complexity may be untangled by following an act-based approach to the will-making process. Such an approach provides the necessary framework within which to accurately delineate the concept of intention, and it also serves as a basis for establishing an intent doctrine in the law of wills.

The major challenge in American law appears to be that testator's intention is connected to, and understood from the perspective of, testamentary intent (*animus testandi*).[106] This broad view of *animus testandi*—as an umbrella concept that encompasses all the various forms of intention—is at the expense of the different, independent forms of intention in the will-making process.[107] *Animus testandi*—just like any other form of intention—has a particular meaning, which can only be

104. Interpretation is aimed at determining the testator's intention and comes into play when the words used (expression of intention) create confusion or uncertainty as to the true intention. Rectification, in turn, refers to the correction of errors in a will where the expression of intention appears to be flawed or unsound—in other words, where there is a discrepancy between the testator's *true intention* and the *intention as expressed in the will*. See Henriques v. Giles 2010 (6) SA 51 (SCA) headnote, read with §§ 15-16.

105. Wessels v. Die Meester [2007] SCA 17 (RSA) (23/03/2007) at § 11; De Waal & Schoeman-Malan, *supra* note 7, at 87.

106. Glover, *supra* note 7, at 571; Lindgren, *supra* note 14, at 1016.

107. On occasion, American law does focus on the right aspects of testator's intention, but within the wrong context or from the wrong perspective. Glover, for instance, states the following with reference to the matter of Mallory v. Mallory, 862 S.W.2d 879, 881 (Ky. 1993): "As the Supreme Court of Kentucky explains: 'An expression of testamentary intent has been uniformly held to require (1) a disposing of property (2) which takes effect after death.'" Glover, *supra* note 9, at 582. What the Kentucky court describes, however, is not an "expression of testamentary intent", but the performance of the act of testation, which involves two forms of intention, namely the dispositive intention (1), accompanied by the necessary testamentary intent (*animus testandi*) (2).

understood correctly in the context of the act-based approach to the will-making process. *Animus testandi* exists independently from the document in which it is embodied as well as from compliance with the formality requirements.

Another point of criticism against the position in American law is the failure to explicitly link intention to the specific acts in the will-making process as well as to the other elements or aspects relevant to the making of a will (such as testamentary capacity, and freedom of testation). While alive, a competent testator performs the act of testation based on the principle of freedom of testation to dispose of their assets. The act of testation—as the carrier of the dispositive intention and *animus testandi*—qualifies the document in which it is embodied as a will. Although a will is primarily aimed at disposing of assets in the form of bequests (whether as legacies or inheritances), it may also embody other acts (such as an act of revocation) and govern other matters (such as the nomination of an executor, or funeral arrangements). The will must also be properly executed to gain legal force. And while the testamentary bequests take effect only upon the testator's death, the act of revocation is effective immediately once the will has been validly executed, which confirms that a will comprises different components that operate at different times and bring about different legal consequences.

In terms of the act of testation being the central aspect of a will, the maxim *testamentum est voluntatis nostrae iusta sententia, de eo quod quis post mortem suam fieri velit* contains the universally accepted Roman law principle that "a will is a legal declaration of a man's intentions, which he wills to be performed after his death." This principle illustrates the two forms of intention at play; they can now be labeled: The "declaration of a man's intentions" denotes the dispositive intention, while "which he wills to be performed after his death" signifies *animus testandi.* This is also why the *Thorn v. Dickens*[108] court found the three words "all for mother" to constitute a will—albeit perhaps the shortest one ever made—the act of testation (carrying both dispositive intention and *animus testandi*) is all that is required in order to create a will—*tam facile quam quod*.

Ultimately, testator's intention remains the central focus of the law of wills. What I suggest is that it be viewed from the perspective of an act-based approach to the will-making process (with a particular focus on the act of testation). In this way, a will is not predominantly viewed as a document that results from the once-off compliance with set requirements, but as the product of a process during which various parties

108. [1906] WN 54.

perform specific acts that are associated with specific forms of intention to establish a will. This approach to testator's intention could potentially serve as the foundation for a much-needed intent doctrine in the law of wills. Such a doctrine will help us address the niggling uncertainties of the past; better understand and apply the exciting new intent-saving mechanisms (such as the rescue provisions) of the present; as well as fully embrace developments in the law of succession with a view to the future, not least the rise of electronic wills.