RESEARCH ARTICLE

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DOI: https://dx.doi.org/10.18820/24150517/JJS47.i2.1

ISSN 0258-252X (Print)
ISSN 2415-0517 (Online)

Journal for Juridical Science
2022:47(2):1-25

Date Published:
2 December 2022

# 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*

SUMMARY[*]

While the fate of assets upon death is generally decided under the law of succession, it does not have to be. In addition to a valid will (testate succession), succession could also be governed by contract, in terms of a valid *pactum successorium* (currently either a *donatio mortis causa* or an antenuptial contract containing succession clauses). (Intestate succession, although a third option, is put aside for present purposes.) Both testate and contractual succession require an expression of intention in the form of a legally recognised act. The dispositive act in these two instances shares certain features. In both, the act involves a disposition of property intended to apply upon death and is obligationary. The vesting of rights in both can also only occur upon death, while assets are transferred by the appointed executor who administers the estate. Yet the essence of the dispositive act renders these two forms of succession fundamentally different. Contractual succession, with an agreement as the dispositive act, operates under the law of contract. Since the disposition is contractual, it needs to comply with the requirements for a valid contract, with *animus contrahendi* as the defining form of intention. Testate succession is governed by the law of succession, with *animus testandi* being the required intention. *Animus testandi* turns the dispositive act into an act of testation, which, in turn, renders the document in which it is embodied a will. Although this distinction seems straightforward enough, South African law is yet to reflect it. This shortcoming results in legal uncertainty, which creates new challenges in light of the court's power of condonation. This article focuses on the different dispositive acts to shed light on the intention associated with each and, specifically, to clearly distinguish between *animus contrahendi* and *animus donandi* in a contractual disposition, and

[*]I am grateful to Professor François Du Toit (University of the Western Cape) for his valuable contribution and guidance with this article.

Published by the UFS
http://journals.ufs.ac.za/index.php/jjs

*animus testandi*. Ultimately, a clear distinction between the intentions will enable a better understanding of the applicable act of disposition. Admittedly, the intention will probably remain central in the event of uncertainty, and the surrounding circumstances will still be decisive in determining it. However, it is suggested that an added focus on the act – assessing it in terms of its essence and associated form of intention – will make for a considerably easier investigation than a sole focus on intention.

## 1. INTRODUCTION

The law of succession is typically described as the totality of legal rules that regulate the inheritance of assets among beneficiaries when a person dies.[1] However, even though the fate of assets upon death is generally decided within the parameters of the law of succession, it does not have to be.[2] Succession could occur in three ways: through intestate succession,[3] in terms of the deceased's valid and executable will (testate succession),[4] and under a contract – a valid *pactum successorium*[5] (contractual succession or succession by contract).[6]

Both the law of testate succession and contractual succession require an expression of intention – in the form of a legally recognised act – on the part of the legal subject for such intention to be relevant in law.[7] But while the dispositive act in the law of succession and the law of contract – with reference to the disposal of property that is to take effect upon death – might

1 Corbett *et al.* 2001:1; Van der Merwe & Rowland 1990:1; Du Toit 2001:1; Cronjé *et al.* 1996:1, 73.

2 Corbett *et al.* 2001:1, 33; De Waal 2007:1.

3 In terms of the *Intestate Succession Act* 81/1987.

4 Van der Merwe & Rowland 1990:3-4.

5 *Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk* 1976 (3) SA 488 (A) 501. In principle, the *pactum successorium* is not tolerated in South African law, as it undermines the principle of freedom of testation, and negates the testamentary formality requirements. However, two forms of the *pactum successorium* are recognised, namely the *donatio mortis causa* and succession clauses contained in an antenuptial contract. See Corbett *et al.* 2001:36; Van der Merwe & Rowland 1990:3-4, 585-586; De Waal & Schoeman-Malan 2015:211-212.

6 In *McAlpine v McAlpine* 1997 (1) SA 736 (A) 747H, the court distinguished between a direct and an indirect *pactum successorium.* The former refers to a contract in which the parties agree to include a specific bequest in a will, while the latter is a contract in which the parties provide for a post-mortem disposition in the contract itself. See De Waal & Schoeman-Malan 2015:211-212.

7 Cronjé *et al.* 1996:11; De Waal & Schoeman-Malan 2015:219; Van Zyl & Van der Vyver 1982:2-3; Van Huyssteen *et al.* 2020:8, 60-61, 325-326.

correspond in certain respects, the act of testation (testamentary act)[8] and the act of disposing of assets embodied in a contract are fundamentally different.[9] Corbett *et al.*[10] explain:

> The execution of an antenuptial contract, a trust inter vivos, or a donatio mortis causa containing provisions in relation to the disposal of property to take effect upon the testator's death are not testamentary acts and a document embodying any one of these transactions will not constitute a will or codicil.[11]

Despite this clear guideline, South African law appears to lack a clear distinction between these different provisions or, more specifically, between the various acts of disposition and their associated forms of intention. This flaw results in legal uncertainty.[12] This uncertainty is particularly evident from our courts' *modus operandi* in several older cases, where they primarily relied on the relevant intention of the testator/contractant to determine whether the document in question was a will, a contract, or a document without any legal effect (such as instructions for the drafting of a will, a draft, or a mere

8 In a recent contribution, I proposed a processual act-based approach to conceptualising wills in South African law. This entails a novel terminological engagement with key concepts in the will-making process. The focus is on the testator's intention, which comprises various elements and are best understood in terms of a proposed "conduct model" that presents a testator's intention as a compounded, multilateral concept, consisting of different forms and facets of intention. Such a processual view – with the focus on the act of testation rather than compliance with a series of requirements – explains properly what a will is, addresses prevailing conceptual confusion in the law of succession, and forms the basis for the introduction of an intent doctrine in the South African law of succession. See Faber 2022:1; 2021a:504; 2021b:740.

9 See *Ladies' Christian Home v SA Association* 1915 CPD 467 471-472; *Meyer v Rudolph's Estate* 1918 AD 70 77. Hutchison 1983:225 also indicates that "no contract can ever constitute a will".

10 2001:35.

11 This also appears to be the position in English law. See, for instance, Kerridge 2016:136, who, in the context of a *donatio mortis causa*, states that "there can be no *donatio mortis causa* if the donor intends to make a gift by will".

12 See, for instance, *McAlpine v McAlpine* 1997 (1) SA 736 (A). When the court was asked to determine whether the contract concerned was a *pactum successorium* or a regular commercial contract, Nienaber JA, in his minority judgment, referred to *animus testandi* as the relevant intention among the parties to a *pactum successorium*. See also Jamneck *et al.* 2017:257-258. This stance is diametrically opposed to the view that *animus testandi* is strictly limited to the act of testation and, therefore, to a will *per se*. See discussion below and Faber 2021b:740. See also *Van Aardt v Van Aardt* 2007 (1) SA 53 (E):par. 4, where the court referred to the "testamentary nature" of the *pactum successorium*. Hutchison 1983:225 also states that a *pactum* is "a contract with at least some testamentary character" and defines "testamentary character" as "*(a)* a serious and deliberate intention by the maker to effect a gratuitous post-mortem disposition of an asset in his estate (animus testandi); *(b)* no vesting or divesting of rights in the asset until after the death of the maker; and *(c)* unilateral revocability of the disposition by the maker at any time before his death".

expression of intent).[13] Moreover, the uncertainty shows no sign of being resolved,[14] and is even creating new challenges in light of the court's newly introduced power of condonation.[15]

This article focuses on the different acts involved when a person seeks to dispose of his/her assets upon death. More specifically, the aim is to shed some light on the various forms of intention associated with each act, thereby establishing the link between *animus contrahendi* and *animus donandi* in the context of a contractual disposition, and clearly distinguishing these forms of intention from *animus testandi*. Ultimately, a clear distinction between the different forms of intention will enable a better understanding of the various acts of disposition that might apply upon death.[16]

## 2. THE ACT OF DISPOSING OF ASSETS – A PRIVATE-LAW PERSPECTIVE

To properly understand the different acts of disposition, they must first be viewed from a broader private-law angle. The South African objective law – via private law – governs the relationship between legal subjects *inter se* through the doctrine of subjective rights.[17] A legal subject can have subjective rights, legal duties, and juristic capacities.[18] A subjective right pertains to a legal object, which is anything to which a legal subject may attain and hold a right.[19]

13 In both *Meyer v Rudolph's Estate* 1918 AD 70 and *Ex Parte Saunders* 1927 SWA 122, the court had to establish the status of informal asset dispositions based on the intention with which they were made. In the former, the disposition was embodied in a letter, while in the latter, the document comprised only a few words of a dispositive nature. In both cases, the court focused on the intention with which the provisions were made, in order to establish whether they constituted a will, a *donatio mortis causa*, a *donatio inter vivos* or a mere informal document indicating the "intention to dispose of property in future". In *Ex Parte Saunders*, the court ultimately found in favour of a will rather than a *donatio mortis causa*, albeit "with sonic hesitation". Unfortunately, the court in both instances neglected to clearly distinguish between the different acts at stake – and particularly also the forms of intention associated with each act – which would have enabled a more definite finding. See also Cronjé & Roos 2002:606-607; Jamneck *et al.* 2017:259.

14 See *Smith v Parsons* 2010 (4) SA 378 (SCA), where the Supreme Court of Appeal had to determine whether the document concerned embodied a *donatio mortis causa*, or was testamentary in nature.

15 For instance, opinions vary as to whether a *donatio mortis causa* that does not comply with testamentary formalities could be condoned through the exercise of the court's statutory power of condonation, which allows formal shortcomings in the execution or amendment of wills to be excused in terms of sec. 2(3) of the *Wills Act*. Compare, for example, De Waal 2010:1178 to Rautenbach 1998:656.

16 I have stated previously that *animus contrahendi* and *animus donandi* would serve to exclude *animus testandi*, and that offer and acceptance, as the relevant juristic acts in the multilateral process of concluding a contract, are not afforded sufficient attention as acts. Both these issues will be addressed in this article. See Faber 2021a:506-507; 2021b:741.

17 Van der Vyver & Joubert 1991:8-58; Boezaart 2020:1-3.

18 Van der Vyver & Joubert 1991:38-39; Boezaart 2020:3-4.

19 Horn *et al.* 2021:10-11.

The juristic capacities applicable to a legal subject who wishes to dispose of his/her assets are legal capacity and capacity to act. Legal capacity[20] refers to a legal subject's ability to be a testator or a contractant (a party to a contract),[21] while capacity to act, being the capacity to perform juristic acts, determines the legal subject's ability to make a will or enter into a contract.[22] Testamentary capacity and contractual capacity both form part of capacity to act. Yet they relate to two distinct and specific juristic acts: the unilateral juristic act of making a will and the multilateral juristic act of concluding a contract, respectively.[23] When a juristic act is performed, the objective law attaches to it the same legal effect and consequences as intended by the acting legal subject(s).[24] It is further important to note that private-law notions such as freedom of testation and freedom of contract, as manifestations of private autonomy,[25] represent mere values. Being abstract notions, these values should be concretised by performing or concluding the particular dispositive act. These freedoms become manifest when assets are dealt with, such as by disposing of assets under a contract or through a will (based on the entitlements inherent in each subjective right).[26] It follows, therefore, that the different acts of disposition arise from the exercise of various freedoms and are executed based on different capacities (testamentary or contractual capacity). Thus, not only do the acts of disposition differ, but so do the freedoms and capacities from which they arise and based on which they are executed and protected.[27]

The holder of subjective rights has certain entitlements.[28] On account of these entitlements, a right holder with capacity to act has the power, *inter alia*, to use (*ius utendi*), enjoy (*ius fruendi*), abandon (*ius abutendi*), alienate,

20 Boezaart 2020:8, 129-130.
21 Van Huyssteen *et al.* 2020:320.
22 Sonnekus 2004:450; Van Zyl & Van der Vyver 1982:413-414; Boezaart 2020:8-9, 129-130.
23 Sonnekus 2004:450-451; 2012:1321-1322.
24 Heaton 2012:36; Van der Vyver & Joubert 1991:5.
25 De Waal 2012:3G7; Van Huyssteen *et al.* 2020:12.
26 See discussion below. Lehmann 2014:9 correctly states: "Private property presupposes that individuals can acquire property. Since property is finite, this in turn requires that individuals be able to dispose of property. Freedom of property is meaningless if it does not include the freedom to dispose of property, which must include the power to dispose both in life and on death. … The foundational principle of the law of succession is that property owners have a right to choose to whom to leave their property when they die. This simple proposition, that individuals enjoy freedom of testation, is the lynchpin of the whole of the law of succession." See also Du Toit 2001:3.
27 See also Du Toit *et al.* 2019:34, who highlight the fundamental tenets of South African law, which clearly reveal the distinction between the law of contract and the law of succession: "Our law demands that contracts and wills concluded or executed freely and voluntarily in accordance with all applicable legal prescripts must be abided by and implemented: *pacta sunt servanda* (agreements must be kept) and *voluntas testatoris servanda est* (a testator's wishes must be carried out)."
28 Van der Vyver & Joubert 1991:29.

or dispose of the legal object in a testamentary manner (*ius testandi*).[29] The specific legal consequences envisaged by the right holder depend on the nature of the subjective right in question, any limitations on that right, as well as the juristic act required to facilitate the envisaged consequences. Sonnekus[30] uses the example of a right holder (owner) dumping his Picasso painting in the dustbin (abandoning) as an example of an owner exercising the entitlements encompassed in ownership. Sonnekus then stresses that this act is relevant in law because the act of abandonment – exercised with the necessary *animus derelinquendi* ("intention of abandoning")[31] – is a unilateral juristic act.[32]

If a legal subject wishes to dispose of assets upon death, he or she can do so by way of a testamentary disposition in a will, in which case the act of testation would be the relevant juristic act. Another option is for the legal subject to do so through a contractual disposition, using one of the recognised forms of the *pactum successorium*, where the succession agreement would be the relevant juristic act.[33] It is clear, therefore, that, in order for a beneficiary to succeed to the assets, a dispositive act is required to make provision for the assets to devolve either by inheritance or under the law of contract.[34] Without such act, the rules of the law of intestate succession are triggered.[35]

## 3. SUCCESSION AS A JURIDICAL CONCEPT

A person ceases to be a legal subject upon death,[36] at which point the deceased's subjective rights must devolve to (an)other legal subject(s), as subjective rights need a legal subject to exist. For this reason, the rules

29 Sonnekus 2006:434-436, 442; 2007:79, 85 refers to the capacity or right to testate (*ius testandi*). Also see De Wet & Van Wyk 1978:6.

30 2006:434; 2007:78-79.

31 Hiemstra & Gonin 1992:157.

32 Sonnekus 2007:78-79, 85; 2006:434-435. The term "disposition" also seems to be used more widely, serving as an umbrella term for the other entitlements. The legal subject could, for instance, dispose of his or her asset by selling or abandoning it. Of course, one could also simply say that the legal subject sells or abandons his or her asset, omitting the term "dispose". See also De Wet & Van Wyk 1978:6.

33 Van der Merwe & Rowland 1990:585; De Waal & Schoeman-Malan 2015:2-3; Jamneck *et al.* 2017:251.

34 Although "dispose" and "alienate" operate as synonyms, they do seem to differ fundamentally in terms of their meaning as well as the entitlements associated with each ("entitlement to dispose" and "entitlement to alienate", respectively). This distinction is particularly important considering that the term "alienate" is readily used in the context of the law of contract. And since succession may also be governed by contract, this raises the question as to the potential existence and function of "entitlement to alienate" in contractual succession. See Boezaart 2020:3; Van der Vyver & Joubert 1991:29-30. Yet this complex issue will not be addressed in this instance because, irrespective of what exactly "entitlement to alienate" entails, the contract in the context of contractual succession relates exclusively to the devolution of rights in accordance with the obligationary agreement (the contract). See discussion below.

35 De Waal & Schoeman-Malan 2015:13 read with 36 and 219.

36 Boezaart 2020:164; Horn *et al.* 2021:200.

governing how an estate should be dealt with following a legal subject's death constitute an integral part of any legal system that acknowledges the doctrine of subjective rights.[37] The rules of succession serve this purpose in South African law. Moreover, although succession normally occurs within the ambit of the law of succession, it may also be contractual in so far as the South African common law affords limited recognition to the *pactum successorium*. As a result, succession may occur both within and outside the parameters of the law of succession.[38]

Corbett *et al.*[39] explain succession as follows: "Upon the death of a person, others may acquire rights to the property of the deceased and are commonly said to succeed to such property."[40] As mentioned earlier, there are three accepted ways for succession to occur in contemporary South African law, namely based on:

- the unilateral wishes of the testator as contained in a will – in other words, succession in accordance with the norms of the law of testate succession;
- an agreement governing succession (a *pactum successorium* or *pactum de succedendo*) – in other words, contractual succession, and
- the rules of intestate succession if no valid or executable expression of intention exists.[41]

Note, also, that these three are not mutually exclusive.

In modern South African law, succession is regarded as an obligationary fact and not a way of acquiring property.[42] Consequently, a beneficiary can only gain ownership of a testator's assets through both the devolution (or passing) of the right to inherit the assets, and the transfer of the assets. To shed more light on this, the following paragraphs focus on succession under the law of succession (testamentary succession) and by contract (contractual succession), respectively, before the different acts of disposition are addressed.

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37 Corbett *et al.* 2001:33; Cronjé *et al.* 1996:73; Van der Merwe & Rowland 1996:8; Sonnekus 2012:1319; Du Toit 2001:1, 3; De Waal & Schoeman-Malan 2015:2.

38 See Corbett *et al.* 2001:1. Should a person agree to leave his or her entire estate to a spouse in his or her antenuptial contract (as one of the two recognised forms of the *pactum successorium*), succession would be governed contractually, although the rules of the law of succession would still apply to the administration of the estate. Van der Merwe & Rowland 1996:585. Schoeman 1994:159-160 points out that the *donatio mortis causa* (the other recognised form of the *pactum successorium*) is sometimes intentionally used to circumvent the rules of the (substantive) law of succession.

39 Corbett *et al.* 2001:33.

40 In the context of the law of succession, De Waal & Schoeman-Malan 2015:1, 129 state that "assets pass by inheritance" and "inheritance devolves". Thus, an asset "is inherited", and the beneficiary "inherits". Corbett *et al.* 2001:1 use similar terminology in the context of contractual succession: "*Property may pass* under the law of contract" (own emphasis).

41 Corbett *et al.* 2001:1; Cronjé *et al.* 1996:10-11; Van der Merwe & Rowland 1990:3-4.

42 Sonnekus 2000:794; Van der Merwe & Rowland 1990:11.

## 3.1 Succession under the law of succession

In Roman and Roman-Dutch law, the system of universal succession portrayed succession as a way of acquiring property.[43] Modern South African law, on the other hand, has replaced universal succession with an English-inspired estate administration system, turning succession into a mere obligationary fact.[44]

As a result, the law of succession relates only to the devolution of rights to assets upon the testator's death,[45] which entails identifying beneficiaries and their benefits. The transfer of any asset included in the inheritance, on the other hand, occurs by following the applicable rules of the property law as part of the estate administration process.[46] Therefore, the norms of the law of succession merely serve to identify the testator's beneficiaries and determine the extent of their benefits, or put differently, to govern the disposition of assets.[47]

Thus, in order for a beneficiary to inherit, two distinct moments need to occur:

- First, the obligationary moment, meaning the devolution of the right to inherit,[48] affording the beneficiary a right to succeed to the deceased's property.[49] In terms of devolution in the law of succession, it is certain that the norms of the law of succession afford the legal beneficiary a subjective right, namely a personal right (also called a claim). The object of this right entails a performance in the form of the transfer of assets by the administrator of the estate.[50] The right holder compels the administrator of the estate to transfer the assets (perform) at the appropriate stage of the estate administration process (*i.e.*, at the so-called *dies venit*).[51]

43 In 1915, the appeal court in *Receiver of Revenue v Hancke* 1915 AD 64 confirmed that "heirs acquire *dominium* of the property bequeathed without transfer to them", as pointed out by Meyerowitz 2010:18.12.

44 De Waal 2007:24; 1989: 315 states that universal succession was never expressly abolished. Instead, it was indirectly disposed of as a result of the incompatibility of the two systems.

45 See Cronjé *et al.* 1996:9-10; De Waal & Schoeman-Malan 2015:1.

46 Since the administrator of the estate transfers the rights to the beneficiaries, the devolution of property still constitutes a form of derivative acquisition of ownership. Horn *et al.* 2021:155-156, 176.

47 At this point, it is important to note that the term "law of succession" may be interpreted in both a narrow and a broad sense. In the narrow sense, it exclusively pertains to the rules governing the devolution of assets to beneficiaries (the issues of who gets what), while, understood more broadly, it also includes the process of administering the estate – thus encompassing both the devolution and transfer of assets. Compare, for instance, Van der Merwe & Rowland 1990:4 and Sonnekus 2000:793; 2006:441 to Corbett *et al.* 2001:1, 33 and Jamneck *et al.* 2017:1-2.

48 As opposed to a mere *spes* or a hope to inherit before the vesting of rights (*dies cedit*). De Waal & Schoeman-Malan 2015:7-8.

49 Corbett *et al.* 1996:33.

50 Sonnekus 2000:793-795, 800.

51 Cronjé *et al.* 1996:72-73.

- Secondly, the moment of transfer of the bequeathed assets takes the form of a juristic act of transfer by the administrator of the estate as part of the administration process.[52] Transfer satisfies the personal right, and the beneficiary becomes the owner of the bequeathed asset (the bearer of the proprietary rights in the assets).[53]

The norms of the law of testate succession afford the beneficiaries their legal claim based on the testator's expression of intention as an act embodied in a valid will.[54] In the context of dispositive acts, the right of disposition, with the capacity (or power) to dispose as entitlement, includes the capacity to dispose of assets by way of a will. Disposition under the law of succession thus involves a testamentary disposition. The dispositive act embodied in a will is traditionally termed a "bequest" (which, in essence, represents the act of testation), being the juristic act that must be carried out in law. In short, a person who wishes to dispose of his or her assets upon death has the option of doing so by way of a will.[55]

### 3.1.1 The act of testation and *animus testandi*

In previous contributions, I have explained the concepts "act of testation" and "*animus testandi*" in detail.[56] For purposes of this discussion, the following summary will suffice:[57]

> The act of testation is the written manifestation of the testator's dispositive intention and *animus testandi*. The dispositive intention is expressed in a dispositive act, which is primarily aimed at disposing of assets (in simple terms, it prescribes who inherits what). To qualify as an

52 De Waal & Schoeman-Malan 2015:11; Van der Merwe & Rowland 1990:6-7, 585. In *Greenberg v Estate Greenberg* 1955 (3) SA 361 (A), the then appeal court confirmed that a beneficiary under the modern-day system of estate administration does not become the right holder to the bequeathed asset upon the testator's death, but only once the relevant asset has been transferred in the appropriate way, such as registration of immovables, delivery of movables, or cession of rights. See De Waal & Schoeman-Malan 2015:11; Meyerowitz 2010:18.12; Cronjé *et al.* 1996:73.

53 Cronjé *et al.* 1996:72-73. While it is clear that a beneficiary does not become the owner of the assets as soon as the testator dies, it is, unfortunately, less clear who owns the assets between the testator's death and the transfer of the proprietary rights from the executor to the beneficiary (considering that no right can exist without a legal subject, and legal subjectivity is terminated by death). The most logical position, according to Cronjé *et al.* 1996:73, is that the proprietary rights pass to the master *ex lege* upon the testator's death, and from the master to the executor upon his or her appointment by the master *ex lege*. See also Horn *et al.* 2021:200. See, however, Jamneck 2020:1061-1098 and Sonnekus 1996:240-254; 2014:130-146.

54 *Estate Smith v Estate Follet* 1942 AD 364 383; Sonnekus 2000:794. Therefore, the legal claim (personal right) arises *ex lege*: Because a testator has made a valid testamentary disposition, the beneficiaries upon *delatio* obtain a legal claim to the assets so bequeathed.

55 De Waal & Schoeman-Malan 2015:2, 36, 128, 211.

56 See Faber 2022:1; 2021a:504; 2021b:740.

57 Faber 2022:2-3.

> act of testation, the dispositive act must be complete: all the elements of a testamentary disposition must be present. [The three essential elements identified for a testamentary disposition are a bequest of assets, the extent of the interest being bequeathed, and the identity of the beneficiaries.] *Animus testandi*, in turn, represents the intention for the testamentary dispositions to be given legal effect upon the testator's death. Therefore, a will is the documentary expression of this act of testation, but could, at the same time, also embody other acts with associated intentions (such as the act of revocation) and govern other matters (such as the nomination of an executor and the appointment of a guardian). Finally, the document must also be validly executed, which requires compliance with all the statutory formality prescripts in terms of the *Wills Act* for the document to have legal force as a will.

However, since the making of a will is traditionally viewed as the relevant juristic act[58] ("one will, one juristic act"),[59] the traditional view of *animus testandi* as being "the intention to make a will"[60] needs to be examined in more detail (particularly since the concept *animus contrahendi* is, at times, also defined more broadly as "the intention to make a contract").[61] In this regard, Kerridge[62] provides valuable insights against the backdrop of the English law of succession. He explains *animus testandi* as follows:

> A will is the expression by a person of wishes which he intends to take effect only at his death. In order to make a valid will, a testator must have a testamentary intention (or *animus testandi*), i.e. he must intend the wishes to which he gives deliberate expression to take effect only at his death. *It is not, however, necessary that the testator should intend to make, or be aware that he is making, a will.*

From this citation, we can conclude that a will established *animo testandi* has been executed with the intention for it to be given effect as soon as the testator dies, at least concerning the dispositions it contains. Yet Kerridge[63] makes another, somewhat controversial statement. He states that the testator does not need to have the intention to make a will, or even be aware that he or she is making one (which, of course, is misaligned with the traditional view of *animus testandi* in South African law as "the intention to make a will"). He neglects to explain this statement, and simply opts to cross-refer to a later discussion of privileged wills. Under that discussion, he offers the following explanation of his earlier statement, which also serves to elucidate the concept of *animus testandi* further:

> The testator can make a will without any formalities whatever. It may be written, whether signed or witnessed or not, or it may be nuncupative, i.e. oral. The testator must, however, intend deliberately to give

58 The making of the whole (entire) will (document) as opposed to the act of testation only.

59 *The Leprosy Mission v The Master of the Supreme Court* 1972 (4) SA 173 (C) 183. See also Boezaart 2020:129-130.

60 See, for instance, Jamneck *et al.* 2017:11, 49; De Waal & Schoeman-Malan 2015:46.

61 Hutchison *et al.* 2012:514.

62 Kerridge 2016:1, 35, 41. Own emphasis.

63 Kerridge 2016:35.

> expression to his wishes in the event of his death, although he need not know that he is making a will: in this respect there is no difference between a formal will and an informal will.

To support his view, Kerridge[64] relies on the judgment of *Re Knibbs*.[65] In the case of *Knibbs*, the court had to determine whether the words "If anything ever happens to me, Iris will get anything I have got", as expressed by the testator in the course of a conversation, constituted "words … to be propounded as a will" and, therefore, represented a nuncupative will.[66] The court found:

> There is no question that words just as informal as the words used in this case are capable of being admitted to probate; no special formality is required. The question is whether these words … constituted a testamentary act on the part of the deceased. The fundamental principle applicable to this question is contained in the speech of Lord Selborne L.C. in *Whyte v. Pollok*, in which he said: "In the first place, I lay it down that it is, in my judgment, a proposition universally true that nothing can receive probate which was not intended to be a testamentary act by the testator."

Having emphasised *animus testandi* in this way, the court proceeded to make the following important statement, which not only correctly contextualised the act of testation, but also succinctly captured the gist of its connection with *animus testandi*:

> A testamentary act does not have to be a document or act of any sort attended by any particular formalities. Indeed, an act may be testamentary in this sense, even though the speaker did not know that he was making a will, or even that he was capable of making a will at the time when he uttered the words in issue. That has been the law ever since *In re Stable, decd*., and is further laid down by Lord Sterndale M.R. in *In the Estate of Beech, decd*. Although, however, a testamentary act may be one not recognised by the testator to be an actual will, *it must be an act which is intended to operate so far as possible as a disposition of his property after his death.*

Therefore, a testator does not need to intend to make a will or even be aware that he or she is making one. More importantly, the testator needs to perform the act of disposing of his or her assets with the necessary intention, namely *animus testandi*. According to the court in *Re Knibbs*, this entails the intention for the act "to operate … as a disposition of … property after … death". Although the *Knibbs* matter involved a nuncupative will, it seems that its shape or form is irrelevant even where a written document is concerned.[67] In *Re Berger*,[68] the English court of appeal later confirmed that an instrument could only be deemed a will if it concerns the disposition of assets, and if the drafter had *animus testandi*. The court made it clear that where a

64 Kerridge 2016:61.
65 *Re Knibbs* [1962] 1 WLR 852.
66 The testator was a "mariner at sea", which entitled him to make a privileged will in terms of sec. 11 of the English *Wills Act*, 1837.
67 Kerridge 2016:35-36.
68 *Re Berger* [1990] Ch. 118.

document – irrespective of its format – satisfies these two requirements, it constitutes a will and needs to be properly executed through compliance with the formality requirements.

In summary, *animus testandi* represents the intention with which the testator's will regarding the disposal of his or her assets must be expressed, and is not merely a broad or general intention for a document (in its entirety) to operate as a will. Thus, *animus testandi* may be defined as the "serious and deliberate" intention on a testator's part that the expression of his or her will would result in a disposition upon his or her death, with the disposition being given legal effect through the post-mortem distribution of estate assets among beneficiaries.[69] The concept *animus* does, after all, denote an "intention directed to the achievement of a certain purpose at law".[70]

*Animus testandi*, however, is limited to the act of testation, being the relevant juristic act pertaining to the disposal of assets under the law of testate succession. It is, therefore, also important to consider the different forms of intention at stake in the context of contractual succession, and to establish how they differ from *animus testandi*.

## 3.2 Succession by contract

As mentioned earlier, a testator's final will may gain legal relevance by testamentary means or by way of a *pactum successorium.* In *Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk*,[71] the appeal court defined a *pactum successorium* as follows:

> *Pactum successorium* (or *pactum de succedendo*) is, in brief, an agreement governing the devolution (*successio*) of the estate of one or more of the parties (or part of such estate, or any particular property included in it) upon their death (*mortis causa*).

In the case of contractual succession,[72] a person concludes a binding agreement (contract) during his or her lifetime (*inter vivos*) to leave certain assets to a beneficiary (*i.e.*, post-mortem disposition of their property). Therefore, assets devolve *ex contractu* instead of *ex testamentu* upon death,[73]

69 Beinart 1959:200.

70 Kaser 1984:56.

71 *Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk* 1976 (3) SA 488 (A) 501. Free translation of Afrikaans judgment. See also Rautenbach & Van der Linde 2012:22.

72 *McAlpine v McAlpine* 1997 (1) SA 736 (A); Cronjé *et al.* 1996:11. The English term "succession" has no appropriate synonym that would allow "succession" to be used exclusively in the context of testate succession (under the law of succession) – hence the distinction between "succession under the law of succession" and "succession by contract" in this contribution. While the result is the same – with the beneficiaries ending up with the deceased's assets – the assets reach the beneficiaries in vastly different ways. For further conceptual clarity, the term *pactum successorium* could even be clarified as *contractus dispositionem proprietatis mortis* (contract for disposition of property upon death).

73 Cronjé *et al.* 1996:163.

with the contract – as the obligationary agreement – constituting the basis for succession.[74]

In the law of contract, the will theory, being the primary basis of contractual liability, states that correspondence between the contracting parties' intentions forms the basis of the contract.[75] Yet mere corresponding intentions are not enough. Consensus is only possible if the parties are aware that they have reached consensus. The nature of the contract as a juristic act requires that this conscious agreement or consensus between the parties be made known externally to gain relevance in law.[76] In this regard, Hutchison *et al.*[77] state: "Consensus is achieved through a process of communication involving declarations of wills by the parties." The declaration or expression of will must have certain or ascertainable content and be made with the necessary *animus contrahendi*. The agreement between the parties supposes consensus on the consequences that each individual party envisages or intends to take effect.[78] Since this is a juristic act, the law is concerned with the parties' true intention and, therefore, would attach to the juristic act the consequences the parties intended.

It must be noted that, in contractual succession, the contract, being the obligationary agreement, does no more than creating the rights and duties; the contract in itself does not have the effect of transferring the rights.[79] By definition, therefore, the contract is but an obligationary agreement that creates the personal rights and duties between the parties (such as a contract of sale or of donation).[80] The contract does not govern the actual transfer of the rights.[81] The obligationary agreement (contract) is distinguished from the real agreement for the transfer of rights.[82] Although the obligationary agreement is the underlying cause for the transfer, the transfer occurs in terms of the real agreement between the parties, where the intentions to transfer and to

74 Van der Merwe & Rowland 1990:585. An interesting question that arises in this regard is whether the common-law rules regarding lost wills, aimed at preserving the testator's intention, equally apply when an antenuptial contract containing succession clauses goes missing after the death of the party who made the contractual dispositions. Given the process of notarial execution, this does not seem to be a problem in practice. The question is merely raised in order to highlight the broader issue, namely whether the rules and principles of the law of succession apply to the law of contract. A similar issue is raised by Jamneck 2002:532 and Joubert 1954:42 in their discussions of whether sec. 2C of the *Wills Act* or its predecessor (sec. 24 of the *General Law Amendment Act* 32/1952) would also apply to the succession clauses in antenuptial contracts.

75 Van Huyssteen *et al.* 2020:30, 46.

76 Van Huyssteen *et al.* 2020:33, 60-61, 112.

77 Hutchison *et al.* 2017:14, 48-49.

78 See the discussion below regarding the three elements of consensus.

79 Van Huyssteen *et al.* 2020:4-5, 7-8; Bradfield & Lehmann 2013:14-15.

80 The point of vesting would also determine the type of contract at stake. See the ensuing discussion.

81 Van Huyssteen *et al.* 2020:7-9; Hutchison *et al.* 2017:5.

82 Van Huyssteen *et al.* 2020:7.

acquire (*animus transferendi* and *animus acquirendi*) are decisive.[83] While not a contract, the real agreement still needs to comply with the legal requirements to qualify as an agreement.[84]

Under the *pactum successorium*, a testator commits, in terms of the law of obligations, to let the other contracting party or a third party have an asset *mortis causa*, which results in succession.[85] Succession under the law of succession and succession by contract both seem to be mere obligationary facts, and in both instances, the estate administration process governs the transfer of the distributable assets.[86] This, however, is where the similarities end.

There are two recognised forms of the *pactum successorium*, namely the *donatio mortis causa* and the antenuptial contract containing succession clauses. These are examined more closely in the following sections.[87]

### 3.2.1 *Donatio mortis causa*

In essence, a *donatio mortis causa* is a donation agreement. Yet, it still has to meet specific requirements to qualify as such. The transaction, which can be revoked at any time, must be concluded in anticipation of the donor's death and out of pure benevolence. In addition, the *donatio mortis causa* must be in writing and comply with testamentary formalities to be of legal force.[88] This has led De Waal and Schoeman-Malan[89] to question whether the *donatio mortis causa* and a testamentary bequest[90] are not, in fact, one and the same thing. Schoeman[91] regards the distinction between a will and a *donatio mortis causa* as unnecessary, as both are expected to meet the testamentary formality requirements, and both may be revoked unilaterally by the "testator". While Schoeman's view is not without merit, a further distinction needs to be made in

83 Bradfield & Lehmann 2013:14; Van Huyssteen *et al.* 2020:7-8; Hutchison *et al.* 2017:5.

84 Van Huyssteen *et al.* 2020:7-8; Hutchison *et al.* 2017:5; Horn *et al.* 2021:157. The same applies to a novation agreement (that actually effects novation), which is to be distinguished from the obligationary agreement (whereby the parties undertake to effect novation). A novation agreement – whereby an obligation is extinguished and replaced by a new obligationary relationship – must comply with the general requirements imposed by law for the agreement to be legally relevant. "Furthermore, to be effective as a dispositive act the agreement must contain specific elements of novation", with *animus novandi* ("an intention to replace an existing obligation with another") of central importance. Van Huyssteen *et al.* 2020:581-582.

85 Van der Merwe & Rowland 1990:585-586.

86 As such, it remains a form of derivative acquisition of ownership. Van Huyssteen *et al.* 2020:7-9; Hutchison *et al.* 2017:5; Horn *et al.* 2021:155.

87 Van der Merwe & Rowland 1990:3-4, 585-586; De Waal & Schoeman-Malan 2015:222.

88 De Waal & Schoeman-Malan 2015:216; Jamneck *et al.* 2017:251-262; Van der Merwe & Rowland 1990:585-587.

89 De Waal & Schoeman-Malan 2015:227.

90 See also Schoeman 1994:159.

91 Schoeman 1994:164, 166.

terms of the nature of the juristic acts themselves and the intention with which they are performed. After all, Schoeman[92] herself mentioned that "a donation *mortis causa* is an *inter vivos* bilateral juristic act that has consequences in terms of succession". Therefore, should the legal subject decide to bequeath his or her assets by way of a will (*i.e.*, a unilateral juristic act), this would require a testamentary intention[93] (*animus testandi*). *Animus testandi* appears to operate to the exclusion of the intention to be legally bound (*animus contrahendi*), which requires from the donor, in terms of a *donatio mortis causa,* a bilateral or multilateral juristic act. *Animus contrahendi* is not the only form of intention excluded by *animus testandi*; the same applies to other forms of intention such as *animus donandi*, or the intention "[t]o dispose of property in the future".[94] This statement is further elucidated below from the perspective of the law of contract.

Being an obligationary agreement, a *donatio mortis causa* is a contract and requires consensus between the parties. According to Van Huyssteen *et al.*,[95] the three elements of consensus are "agreement on the consequences the parties wish to create, intention to be legally bound (*animus contrahendi*), and awareness of the agreement".

Using the contracts of sale and donation as examples, the parties in both these contracts would typically intend to be legally bound (*animus contrahendi*).[96] The distinction between the two contracts may instead be found in Van Huyssteen and colleagues' first element of consensus – the consequences the parties seek to create. In this regard, consensus is only possible if the parties agree on the obligation they wish to create – in other words, on the performance (being the content of the obligation) and the parties to be bound. This implies consensus on the contract's content (terms or provisions).[97]

These terms create the legal consequences (or obligations) arising from the contract.[98] The content of a contract of sale would typically entail agreement on the subject matter of the sale as well as the price to be paid for it. In addition, the seller must have the intention to sell, and the buyer must have the intention to buy (*animus vendi et empti*). This very intention

92 Schoeman 1994:162. Free translation of Afrikaans source.

93 See Schoeman 1994:165 and her reference to Gauntlett 1977:51.

94 See *Meyer v Rudolph's Estate* 1918 AD 70 and *Ex Parte Saunders* 1927 SWA 122.

95 Van Huyssteen *et al.* 2020:31-33; Hutchison *et al.* 2017:14-15.

96 As in the law of succession, the law of contract also states that *animus contrahendi* would, for instance, be absent in the case of a jocular expression of will "because the joker did not seriously intend to become legally bound". Similarly, a social arrangement cannot result in "legal consensus", as "the parties regard themselves as bound in honour and not in law". Van Huyssteen *et al.* 2020:32; Hutchison *et al.* 2017:4, 50.

97 Van Huyssteen *et al.* 2020:31, 325 explain: "The intention of contractants to create a specific obligation is expressed in the terms or stipulations which they embody in their contract. These terms constitute the content of the contract." See also Hutchison *et al.* 2017:89.

98 Hutchison *et al.* 2017:247.

establishes the contract as a contract of sale. Bradfield and Lehmann[99] describe it as follows:

> The characterisation of the contract as one of sale is fundamentally a question of the parties' true intention as to the nature of their transaction ... a mutual intention on the part of the parties to the contract to sell and buy respectively (*animus vendi et empti*), and it is this intention as to the nature of their contract that ultimately determines its categorisation as one of sale.[100]

The intention, along with other content elements, constitutes the *essentialia* – "the identifying features, or essential elements" – of a contract. *Essentialia* is not a validity requirement, however. Should a document lack the *essentialia* of one type of contract, it may still contain the *essentialia* of another.[101] Therefore, where it is not the contracting party's true intention to sell, but rather to donate the property, the true intention would be *animus donandi*, and not *animus vendi*.

As far as the contract of donation is concerned, the appeal court in *Meyer v Rudolph's Estate*[102] established that *animus donandi*, or "[the] intention to effect a gift", is the relevant intention where a person wishes to make a donation both *inter vivos* and *mortis causa*.[103] The presence of *animus donandi* on the part of the donor renders the contract a contract of donation rather than, for instance, a contract of sale.[104] Yet *animus donandi* is the relevant form of intention in both the *donatio inter vivos* and the *donatio mortis causa*. Distinguishing between these two contracts necessitates a broader perspective of the donor's intention in each.[105] Cronjé *et al.*[106] offer the following explanation:

> The difference can basically only be found in the intention of the donor. Should the facts of the case indicate that the donor intended for the

99 Bradfield & Lehmann 2013:36.

100 Also bear in mind the maxim *plus valet quod agitur quam quod simulate concipitur* ("the real intention carries more weight than a pretence"). In terms of this maxim, the law gives effect to the true agreement as intended by the parties, and not the agreement they pretend to conclude. For instance, should the parties intend to conclude a contract of donation, but pass it off as a contract of sale (a so-called "simulated contract" or simulated juristic act), the law would treat it as a contract of donation, in accordance with the parties' true intention. See Van Huyssteen *et al.* 2020:32; Hutchison *et al.* 2017:89.

101 Yet the contract remains valid. Bradfield & Lehmann 2013:24; Van Huyssteen *et al.* 2020:329-330; Hutchison *et al.* 2017:247.

102 *Meyer v Rudolph's Estate* 1918 AD 70 76, 78, 81.

103 There is no presumption in favour of a donation, in general. It must be clearly proven that the donor did in fact intend to make a donation. Where a donation is proven based on the presence of *animus donandi*, but it is not clear whether it is a donation *inter vivos* or *mortis causa*, there is a presumption in favour of a *donatio inter vivos*. *Meyer v Rudolph's Estate* 1918 AD 70 76 and 78; Cronjé *et al.* 1996:165.

104 Van Huyssteen *et al.* 2017:329-330.

105 Cronjé *et al.* 1996:164.

106 Cronjé *et al.* 1996:164.

> donee in his (the donor's) lifetime to obtain an unconditional right with regard to the gift, it would be a *donatio inter vivos.* In the case of a *donatio mortis causa,* the death of the donor is the c*ausa* of the donation and the donor normally retains the control and ownership of the gift during his lifetime. The donee does not obtain a vested right while the donor lives[107] and the donor can unilaterally revoke the gift at any time before his death.

It would appear, therefore, that the existence of a *donatio mortis causa* is determined by the moment of vesting, the revocability of the donation, and the motive for the donation based on the donor's intention.[108]

The third element of consensus identified by Van Huyssteen *et al.* – awareness of the agreement – could also help resolve the uncertainty of whether the donee's acceptance can occur after the donor's death.[109] This article does not attempt to offer a solution to this uncertainty. However, at least from the perspective of the law of contract, it does seem that for consensus to be present (as a requirement for establishing a contract), the parties must be aware of the agreement. In this respect, Hutchison *et al.* cite Kahn *et al.*, who state: "Our minds are on parallel tracks, but a contract emerges only when the tracks intersect."[110] A contract is a juristic act, which means that the parties' intention must find expression in declarations of intention through offer and acceptance.[111] This position also appears to align with the Supreme Court of Appeal's more recent view in *Smith v Parsons*.[112] In this condonation case, the court found that the suicide note at stake was not intended to operate as a *donatio mortis causa*, in the sense that "[t]he deceased did not have a

107 This also aligns with the vesting test endorsed by the appeal court in *McAlpine v McAlpine* 1997 (1) SA 736 (A), in order to determine whether or not an agreement constitutes a *pactum successorium*. Corbett JA explained the test as follows: "This test is applied by asking in a particular case whether the promise disposing of an asset in favour of another (whether by way of donation or other form of contract) causes the right thereto to vest in the promisee only upon or after the death of the promissor (which points to a *pactum successorium*); or whether vesting takes place prior to the death of the promissor, for instance at the date of the transaction giving rise to the promise (in which case it cannot be a *pactum successorium*)." *McAlpine v McAlpine* 1997 (1) SA 736 (A) 750D. See also De Waal & Schoeman-Malan 2015:212-216; Jamneck *et al*. 2017:255-259, and the discussion below.

108 Van der Merwe & Rowland 1990:586-590.

109 Cronjé *et al.* 1996:164. In *Meyer v Rudolph's Estate* 1918 AD 70 77-78, the appeal court pointed out this uncertainty, but also remarked that "both on principle and authority acceptance would seem to be necessary".

110 Hutchison *et al.* 2017:14.

111 Hutchison *et al.* 2017:14-15. Also see De Waal & Schoeman-Malan 2015:216. An offer is a declaration of will – as an act – that contains the essential and material terms, and is made *animo contrahendi*, in other words with the intention that its acceptance would create a binding contract. Hutchison *et al*. 2017:50; Van Huyssteen *et al*. 2020:62, 64. In terms of acceptance, Joubert 1987:44 points out that it must also be made "with the intention both of accepting the offer and of being bound thereby". He then explains the phrase "being bound thereby" as "the general requirement that the parties must act *animo contrahendi* which is here seen in one of its applications".

112 *Smith v Parsons* 2010 (4) SA 378 (SCA):par. 22.

donation in mind: he was regulating the disposition of the estate in anticipation of death. He did not contemplate a donation that would have to be accepted by the [donee]".

We need to consider that, although a *donatio mortis causa* must be in writing and satisfy the testamentary formality requirements,[113] it is ultimately established through a bilateral or multilateral contractual juristic act,[114] which means that freedom of testation, testamentary capacity, and *animus testandi* do not apply. In essence, a *donatio mortis causa* remains contractual. It arises from the exercise of the freedom of contract and contractual capacity and is done with the intention to conclude a contract (*animus contrahendi*). The consequences of the contract – the obligations – create the right to performance and the corresponding duty to perform.[115] This view is supported by De Waal's[116] opinion that the high court's power of condonation in terms of sec. 2(3) of the *Wills Act* does not apply to a *donatio mortis causa*, as the donation was never intended to be a will (a testamentary bequest).[117] Therefore, I respectfully disagree with De Waal and Schoeman-Malan,[118] as well as with Rautenbach[119] when they argue that a *donatio mortis causa* that does not adhere to the formality requirements could potentially be condoned.

### 3.2.2 Antenuptial contract containing succession clauses

In the second instance, succession by contract could occur through a succession clause in an antenuptial agreement.[120] This raises the question of what precisely this succession clause entails and how it differs from a testamentary provision. On the issue of an antenuptial contract containing succession clauses, Van der Merwe and Rowland[121] emphasise that the *pactum successorium* refers only to the part of an antenuptial contract dealing with succession. Ultimately, the succession clause is a *pactum successorium* (contract of succession) contained in the antenuptial contract. The antenuptial contract is the vehicle that contains and gives effect to the *pactum successorium*. However, the *pactum* appears to be an independent agreement (as is the *donatio mortis causa*) containing all the elements of a contract.[122]

113 Schoeman 1994:162. See also *Jordaan v De Villiers* 1991 (4) SA 396 (C).
114 Van der Merwe & Rowland 1990:588.
115 Van Huyssteen *et al.* 2017:4, 31.
116 De Waal 2010:1178.
117 *Smith v Parsons* 2010 (4) SA 378 (SCA):par. 22.
118 De Waal & Schoeman-Malan 2015:227. Yet they also raise the possibility, based on the *Smith* matter and De Waal 2010:1177-1178, that condonation might in fact not apply to a *donatio mortis causa*.
119 Rautenbach 1998:656.
120 Cronjé *et al.* 1996:175; De Waal & Schoeman-Malan 2015:3, 89; Jamneck *et al.* 2017:273, 281, 286.
121 Rautenbach 1990:586.
122 De Waal & Schoeman-Malan 2015:218; Jamneck *et al.* 2017:261.

Upon closer inspection, the succession clauses as a succession agreement seem to pertain only to the disposition of assets.[123] This was confirmed in *Radebe v Sosibo*,[124] where the court was asked to determine whether the "property-exclusion clause in the antenuptial contract constituted some form of testamentary disposition".[125] The court correctly found:[126]

> By excluding the immovable (or any other) asset from the accrual in the antenuptial contract, the late Mrs Sosibo did not give any indication that she divested herself of that asset in favour of her parents or anyone else, nor did she give any indication that she bequeathed that asset to her parents or anyone else upon her death. This is not a divesting or transferring or devolving clause at all.

This citation clarifies two aspects: First, it confirms that a *pactum successorium* deals only with the disposition of assets.[127] Secondly, it establishes that the concept of succession refers to the devolution of assets.

Even though succession can indeed be governed contractually through an antenuptial contract, Kotzé J in *Ladies' Christian Home v SA Association*[128] rightly pointed out that the testamentary and contractual acts of disposition are fundamentally different. For this reason, the presence of a succession clause in an antenuptial contract does not change the nature or essence of the contract:

> By our law an antenuptial contract may contain valid provisions in regard to property which are to take effect upon the death of either of the intended spouses; but such a disposition of property, although it may resemble a testamentary act, does not deprive the antenuptial contract of its character of an agreement between the parties, and does not give it the character of a last will and testament.

Accordingly, since succession clauses in an antenuptial contract do not represent a testamentary disposition, nor render the contract a will,[129] an antenuptial contract does not need to comply with testamentary formalities.[130] This stance enjoys broad support among scholars, except for a few who argue that testamentary formalities should indeed be a validity requirement.[131] In light of the majority view mentioned above, a ruling such as that in *Radebe v*

123 De Waal & Schoeman-Malan 2015:89.
124 *Radebe v Sosibo* 2011 (5) SA 51 (GSJ).
125 Keywords, headnote, and paragraph 29 read together. De Waal 2011(b):1051.
126 Para. 51. See also De Waal 2011(b):1051, who admits that the court's argument was correct.
127 See also De Waal & Schoeman-Malan 2015:89.
128 *Ladies' Christian Home v SA Association* 1915 CPD 467 471-472.
129 De Waal 2011(a):387; 2011(b):1051; Corbett *et al.* 2001:49; Jamneck *et al.* 2017:283-284; Van der Merwe & Rowland 1990:592.
130 However, it needs to be notarially executed in accordance with the *Deeds Registries Act* 47/1937. Cronjé *et al.* 1996:175; De Waal & Schoeman-Malan 2015:60, 228.
131 For a discussion in this regard, see De Waal & Schoeman-Malan 2015:60.

*Sosibo*,[132] where it was found that an antenuptial contract should satisfy the testamentary formality requirements, is clearly incorrect.[133]

It is thus safe to conclude that a succession clause in an antenuptial contract represents a dispositive act, but not a testamentary dispositive act. Thus, the relevant act is dispositive, and the relevant juristic act is a contract – more specifically, a succession agreement.

Since a *pactum successorium* – being an agreement governing the disposition of assets upon the death of one or more parties – represents a succession agreement, it requires consensus. Consensus, in this instance, involves the intention to be legally bound in respect of "a post-mortem disposition of property". Although on the face of it, this *mortis causa* disposition of assets resembles an act of testation, it is not one. Being an *ex contractu* disposition, it is fundamentally different from the disposition *ex testamentu*.[134] The former involves a disposition contained in a contract, as a bilateral juristic act, which requires *animus contrahendi*. The latter, in turn, entails a disposition embodied in a will as a unilateral juristic act, which is performed with the necessary *animus testandi*. To summarise, a disposition may be made using a will or by contract – as the juristic act – and the relevant *animus* would determine the juristic act envisioned. In arriving at this conclusion, I respectfully disagree with Nienaber JA's minority judgment in *McAlpine v McAlpine*,[135] where he held that "[t]he real solvent, in my view, is the *animus testandi of the parties to the agreement*" in distinguishing a *pactum successorium* from other contracts.[136]

## 4. CONCLUSION

This article showed the distinction between the concepts of "law of succession" and "succession", confirming that the latter could also occur outside the norms of the former. Succession outside the ambit of the law of succession is limited to the two recognised forms of the *pactum successorium*, namely the *donatio mortis causa* and the antenuptial contract containing a succession agreement.

Succession under the law of succession and by contract shares certain features. In both, the relevant dispositive act is a "disposition of property to take effect upon death",[137] and both are obligationary, with rights vesting as a result of the dispositive act. In terms of rights, vesting in both can only take

132 *Radebe v Sosibo* 2011 (5) SA 51 (GSJ).

133 De Waal & Schoeman-Malan 2015:228. See also De Waal 2011(b):1050-1052; Jamneck *et al.* 2017:261; Rautenbach & Van der Linde 2012:22.

134 Van der Merwe & Rowland 1990:585, 592-593.

135 *McAlpine v McAlpine* 1997 (1) SA 736 (A) 725. Own emphasis added. See also Jamneck *et al.* 2017:257-258.

136 With regard to the tests applied to distinguish a *pactum successorium* from other agreements (such as the revocability test or the vesting test), Nienaber JA's argument that the parties' intention should be the central focus is supported. In this respect, all the various tests could serve as aids to determine the true intention – the so-called intention test. See Jamneck *et al.* 2017:257-259.

137 Corbett *et al*. 2001:35.

place upon death, and assets are transferred by the appointed executor in terms of the estate administration process.

Nevertheless, the dispositive act also makes these two forms of succession fundamentally different. The difference relates to the substance or essence of the dispositive act in each (namely, the act of testation and the contractual disposition, respectively). Succession by contract – with an agreement as the dispositive act – operates within the realm of the law of contract, where the disposition is contractual in nature and, therefore, needs to comply with the set requirements[138] for a valid contract. In this instance, *animus contrahendi* is the defining form of intention; where *animus contrahendi* is present, a contract is established (while *animus donandi* renders it a contract of donation). On the other hand, testate succession is governed by the rules of the law of succession, with *animus testandi* being the required intention. Ultimately, *animus testandi* is what turns the dispositive act into an act of testation – being the relevant juristic act – which, in turn, renders the document in which it is embodied a will. The act of testation manifests in a will as a bequest, whether as a legacy or as an inheritance. [139]

Admittedly, in the event of uncertainty, the relevant intention will remain central, and the surrounding circumstances will still be decisive in determining it. However, an added focus on the act – assessing it in terms of its associated form of intention, and considering it within the proper context, with particular attention to its essence – will make for a considerably easier investigation than a sole focus on intention in isolation.

138 The current uncertainty in the law of contract can also be ascribed to the fact that the different acts, each with their necessary form of intention, are not afforded sufficient attention in the process of concluding a contract, nor is this process regarded as a contract-making process as such. Instead, it is accepted that a contract is the result of the once-off presence of a number of set requirements (the so-called “requirements model”). See Faber 2021a:505-508.

139 De Waal & Schoeman-Malan 2015:128-132.

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