INTRODUCTION AND HISTORY

- This is the branch of the law that deals with inheritance.
- The law of succession seeks to ensure that the rightful claimants inherit the property of a deceased person.
- It also provides the procedure by which such rightful claimants accede to the estate of the deceased person.
- Before 1st July 1981, when the LSA came into force, each socio-cultural group had its own body of succession law.

The law applying to Africans

- Before colonialism - African customary law.
- Each tribe had its own customary law of succession.
- With colonialism came the introduction of other systems of succession law.
- The East Africa Order in. Council 1897 is credited with establishing the modern Kenyan legal system which provided that African customary law was to apply to Africans as long as it was not repugnant to justice and morality.
- African Christians were governed by the law that governed Indian Christians on matters affecting personal status, eg. mariage, divorce and succession.
    - Ths was clarified in 1902, because after contracting a statutory marriage, an African was presumed to have discarded the traditional African way of life.
- In 1904, the 1902 Ordinance was repealed, thereby subjecting all Africans to the customary law of succession.
- This remained the position until 1961 when the African Wills Act was passed, which brought Africans under testate succession.
- This remained in pace until 1981, when the LSA came into force.

The law applying to Muslims

- The Native Courts Regulations 1897 gave recognition to the application of Islamic law.
- The 1907 Ordinance then established Islamic courts applying Islamic law in matters of personal law and succession.
- Where there was a conflict between African customary law and Islamic law, Islamic law took priority.
- In 1981, the LSA repealed all existing laws on succession, and applied to all persons domiciled in Kenya regardless of religion. Muslims were not happy with this.
- In 1990, the Amendment Act disapplie the LSA to persons who were Muslim at the the time of death.
- The Kadhis courts had jurisdiction for succession matters relating to Muslims.

- Art 170 of the Consitutution reiterates this by providing that Kadhis courts jurisdiction shall be limited to questions of personal status, marriage, divorce or inheritance proceedings where all parties profess the Muslim religion.

The law applying to Hindus

- The Hindu Wills Act was applied in Kenya to provide for testate succession for Hindus in Kenya.
- With regard to intestate succession, no law had been specified as being applicable to Hindus in Kenya, so Hindu customary law was applied and this was confirmed by the Hindu Marriage, Divorce & Succession Act.
- This remained in force until 1981, when the LSA repealed all existing laws.

Europeans

- The English law of succession governed the Europeans in Kenya.

The Law of Succession came into force in 1981

- There were conflicts with the other succession laws with the diverse groups with their different rules and customs.

Conflict between the LSA and the Marriage Act

- There was confusion with regard to women married to men who had already entered into statutory monogamous marriages.
- Section 37 of the Marriage Act states that a person who marries under statute loses the capacity to enter into a valid customary marriage.
- ***Re Ruenji's Estate 1977***
    - Relying on s 37 of the Marriage Act, the court held that women married under customary law, subsequent to a statutory marriage, are not wives and their children are not children for the purpose of succession, and therefore not entitled to a share in the estate of the deceased.
    - LSA had been passed, but was not operational when the decision was made.
- ***Re Ogola's Estate 1978***
    - Same as Ruenji.
    - A man married under statute is statute-barred from contracting other marriages during the pendency of the statutory marriage, and any marriages so contracted are null and void, and the woman so married are not entitled, together with their children, to inherit on the intestacy of the deceased man.
    - LSA had been passed, but was not operational when the decision was made.
- The Law of succession Act was not operational until 1st July 1981 thus in the two cases the courts relied solely on Section 37 of the Marriage Act to determine whether the

deceased person's were capable of having other wives in addition to their statutory wives.

- In 1981 parliament added paragraph (5) to section 3 of the law of LSA. This was intended to reverse the position taken by the courts in the cases of ***Re Ruenji's Estate (1977) and Re Ogola's Estate (1978).***
- Section 3(5) LSA: "A woman married under a system of law that permits polygamy, is where her huband has contracted a previous or subsequent monogamous marriage, a wife for the purposes of the Act and in particular s 29 and s 40, and her children are children within the meaning of this Act." - this section is still part of the LSA.
- This section was directly in issue in the case of ***In the matter of the Estate of Reuben Nzioka Mutua(deceased)***
    - The deceased entered into a statutory marriage with Teresia in 1961.
    - He then purported to enter into a customary marriage with Josephine in 1980.
    - He died testate but did not provide for Josephine and their children.
    - She made an application under Section 26 of the Act for reasonable provisions as a dependent together with her children, relying on Section 3(5).
    - The court held that having contracted a statutory marriage, the lacked capacity to enter into a customary marriage, and that she was not a wife for purposes of the succession.
    - This case has since been overturned as it was inconsistent with s 3(5).
- ***Irene Macharia v Margaret Njomo & Patrick Harrison***
    - Overturned the Mutua case and held that s 3(5) is meant to protect women who under customary law marry men who are already married or who subsequently enter into a statutory marriage.
    - The woman married under customary law is regarded as a wife for succession purposes notwithstanding that by virtue of s37 of the Marriage Act, such a man has no capacity to marry.
    - Joah Njogu entered into a statutory marriage with the appellant in 1978 and they separated in 1989.
    - He started to cohabit with the 1st respondent and they had a daughter, Jackline Njogu.
    - He died in 1990.
    - The HC held that for purposes of the LSA, the 1st respondent was not a wife and therefore not entitled to inherit anything.
    - The Court of Appeal stated that the decisions in Ruenji and Ogolla were right at the time because the LSA had not yet been operational.
    - The dispute was how the property was to be shared between the appellant (the first wife) and Jackline (the child)

- The court did not comment on whether the first respondent and the deceased had been married.
- The land that the deceased and first wife had jointly owned went to her by operation of law.
- The assets remaining after the house was money, Kshs 186,000. The HC had given this to the child and the first wife appealed sayin she was entitled to inherit this as his widow. The court agreed that she was entitled to inherit, but disagreed that this took away the judge's power to weigh the conflicting needs.
- But for the purpose of not disinheriting a widow, out of the Kshs 186,000 available for distribution, they gave her Kshs and the rest to the child.

PROPERTY EXEMPTED FROM THE LAW OF SUCCESSION

Property under Islamic Law

- Property under Islamis Law is exempted from the substantive provisions of the LSA by virtue of s 2(3) and (4) of the LSA.
- Section 2(3): This Act shall not apply to testamentary or intestate succession of the estate of any person who was Muslim at the time of their death, the devolution of their estate will be governed by Muslim law.

Co-ownership of property / Survivorship

- Where a co-owner of property is a beneficial joint tenant of the property, the interest will automatically pass on to the surviving joint tenant(s) on their death by virtue of the principle of survivorship (jus accrescendi).
- Eg. where a matrimonial home is held by husband and wife as joint tenants and husband predeceases the wife, the house shall pass to the wife through survivorship.
- The principle of survivorship therefore removes jointly owned property from the operations of the LSA. Such property does not form part of the deceased spouse's estate and cannot be passed by will.
- NB: This is different from tenancy in common, where the interests of common tenants are clear and distinct. The beneficial share of a common tenant can be passed under their will.
- Section 43 LSA: For the purposes of determining survivorship in the event of 2 or more persons dying simultaneously, it shall be presumed that the younger person survived the older person, but with spouses it shall be presumed that they died simultaneously.
- In the case of non spouses, such property should devolve to different people so it becomes necessary to determine who died first, but with spouses, it goes to their children or the same dependents and therefore it is not necessary to determine who died first.

- Section 91(3) Land Registration Act: Instrument made in favour of 2 or more persons will show whether joint tenancy or tenancy in common, and if tenancy in common, the share of each.
- Section 91(4) Land Registration Act: If land is occupied jointly, no tenant is entitled to a separate share and on the death of one, their interest will vest in the surviving tenant.

Nomination

- A nomination is a direction by a person, the nominator, to another who is holding investment on their behalf, to pay the funds on the nominator's death to a third party, the nominee.
- The direction is made by the nominator during their lifetime, but like a will, only takes effect upon their death.
- Classified into:
    - Statutory nominations
    - Nominations under a discretionary pension scheme.
- Property that is the subject of a statutory nomination does not form part of the nominator's estate, and therefore cannot pass under a will, and does not vest in the personal representative of the deceased,
- The payer therefore does not need a grant or letters of administration to pay the nominee,
- The nominee does not have an interest in the nominated funds during the nominator's lifetime.
- Nomination may be revoked by
    - A later nomination
    - Subsequent marriage of nominator.
    - Death of nominee prior to nominator's death.
    - It cannot be revoked by subsequent will or codicil.

Donatio mortis causa - Section 31 LSA

- **Gift in contemplation of death.**
- This is a gift made by a person during their lifetime, and is conditional upon their death.
- It cannot be revoked by a subsequent will and the subject matter does not form part of the deceased's estate upon death.
- The subject matter of the gift is delivered to the donee during the donor's lifetime, but the gift takes place after the donor's death.
- NB* There is a difference between gift in contemplation of death and gift inter vivos.
    - A gift in contemplation of death is where the giver is contemplating dying.
    - On the other hand, a gift inter vivos is a gift without any conditions (an ordinary gift).

- The requirements are set out in ***Cain v Moon***

1. **It must be a gift in contemplation of death**
    - Person making the gift must be contemplating the possibility of death due to present illness or present or imminent danger.
    - Generally irrelevant if they die from a cause other than the one contemplated, as long as the contemplated condition continued up to the date of their death.
    - Section 31(e) provides that the gift is valid if the person dies from any cause without having survived the illness or danger.
    - Section 31(f) - The condition is not satisfied where the person contemplates their own death by suicide and where they commit suicide.
    - Contemplation of death may be expressed or implied by the circumstances.
2. **It must be conditional on the donor's death**
    - If the donor does not die, the gift will not take effect and the donor is entitled to recover possession from the donee.
    - A gift can expressly be stated to be conditional upon death, or it can be implied.
    - Courts are likely to imply that it is conditional upon death if made in the last few days of illness.
    - However, where a gift in these circumstances is made in writing as opposed to orally, it is presumed not to be a donatio mortis causa, but either an attempted lifetime gift or a failed testamentary gift (***Edward v Jones)***
    - It is different from on oral will, in that an oral will is not usually made in contemplation of death.
    - Section 31(d): Valid if the donor makes the git in such circumstances as to show that they intended it to revert should they survive.
    - Section 31(f) it is revocable. The donor may at any time before their death lawfully request the donee to return the gift.
3. **It must be delivered the donee**
    - The donor must have handed it over to the donee or to the agent.
    - Section 31(c) - Valid if there is delivery of the possession of the property or of the means of possession or of documents or other evidence of title.
4. **Must be capable of making the subject matter of a donatio mortis cause**
    - Should be capable of being donated.
    - Section 31(b) - Valid if the donor gifts movable property that they could otherwise dispose of by a will.
    - Property that cannot be disposed of by will cannot be donated.
    - Cheques and promissory notes cannot be donatio mortis causa.
5. **Donee must survive the donor**
    - Section 31(f) - If the donee predeceases the donor, their estate has no cause of action in the donor's estate.

TESTATE SUCCESSION - Section 5 - Section 31 of the LSA

- A will is the legal declaration by a person of their wishes regarding the disposition of their property after their death.

CAPACITY - SECTION 5

- A will is valid if made by person
    - Of majority; and
    - Of sound mind
- Section 5(1) embodies the principle of testamentary freedom; provides that a person is capable of disposing of their property by will provided they are of sound mind and not a minor.
- **Age**
    - A person must be of majority age (18+)
    - A will made by a minor is invalid, unless they re-execute it upon reaching majority or make a new will or codicil confirming it.
    - When a minor dies, their estate should pass according to the rules of intestacy.
- **Soundness of mind**
    - Section 5(3) makes the presumption that a person making a will is of sound mind until the contrary is proved.
    - The burden of proof that a testator was at the time of making the will not of sound mind is on the person who so alleges.
    - If a person makes a will during a lucid moment, then the will is valid.
    - It is governed by three things: ***Banks v Goodfellow*** test
        i. Sound mind enabling them to understand the nature of the business in which they are engaged, ie. understanding that they are making a will.
        ii. Sound memory enabling them to recollect the property they have means to dispose of.
        iii. Sound understanding and memory of persons who have a moral claim to their estate.
    - These three elements must exist concurrently, if one of them is missing soundness of mind will be absent.

Factors affecting soundness of mind

1. **Disease**
    - A disease affecting the testator's mind such that it touches any of the three elements mentioned above, will be a ground for lack of capacity and will invalidate a will.

- ***Harwood v Baker:***
    - The testator executed his will on his deathbed and left everything to his second wife, at the exclusion of everyone else. The will was challenged.
    - It was proven that the testator was suffering from a disease that affected his mind, such that he could not recall the other beneficiaries.
    - The question is whether the testator was at the time capable of recollecting beneficiaries, understanding their moral claims and deliberately forming an intelligent purpose of excluding them.
    - The testator must at least be aware of the existence of persons who might be considered to have a moral claim on his estate - whether friends or relatives - even if he chooses not to benefit them
    - The will was declared invalid.

2. Insane Delusions

- A person suffering from insane delusions can make a valid will when they are lucid. The exception to insane delusions is lucid moments.
- If a person makes a will during his lucid moments, the will is valid.
- For delusions to be material in the testamentary context, there must be a connection between the delusions and the will (***Vaghella v Vaghella)***
- ***Banks v Goodfellow:***
    - A soldier came from war claiming he was being haunted by his friend who had died at war.
    - He made a will that was challenged.
    - It was proven that the will met all the requirements of a valid will, and it was created during his lucid moments and was therefore valid.
    - The testator in question had in the past been confined to a 'lunatic asylum' and remained subject to certain delusions. At the time he made his will, he experienced certain delusions. However, the delusions could not be connected with any dispositions in the Will. The testator was still capable of having the required knowledge and appreciation of the facts in relation to the making of a Will disposing of his property
- **For Probate, you don't have to know details for cases. You can use one or two cases per concept, don't have to internalise all cases in the course outline)

<u>APPOINTMENT OF AN EXECUTOR - SECTION 6</u>

- An executor must be appointed under a valid will.

KNOWLEDGE AND APPROVAL - SECTION 7 **** OQ**

- Section 7: A will caused by fraud, coercion, importunity or mistake is vod.
- In addition to testamentary capacity, a testator **must know of and approve** of the contents of their will.
- Anything that denies the testator of knowledge and approval will invalidate the will.
- Knowledge: They are aware of and understand the terms of the will. They need not understand the precise legal effect.
- Approval: Executes the will in those terms on their own volition.
- Factors affecting knowledge and approval include
    - Fraud
    - Coercion and persuasion
    - Undue influence
    - Suspicious circumstances
    - Mistake
    - Importunity

Time of knowledge and approval

- The testator must know and approve of the contents of their will at the time of execution.
- Exception: ***Battan Singh*** - The testator knew and approved when they gave instructions to the advocate to draft their will, and the will was then prepared in accordance with those instructions. When executing, the testator knew they were executing a will for which they had earlier given instructions.
- If a testator has given instructions to a solicitor at a time when he was able to appreciate what he was doing in all its relevant bearings, and if the solicitor prepares the will in accordance with these instructions, the will will stand good, though at the time of execution the testator is capable only of understanding that he is executing the will which he has instructed, but is no longer capable of understanding the instructions themselves or the clauses in the will which give effect to them.

Burden of proof

- The LSA is silent on the burden of proof.
- The common law position is that the onus lies on the person alleging lack of knowledge and approval.
- There is a presumption of knowledge and approval where the testator had testamentary capacity.
- ***Karanja v Karanja:*** The burden of proving that a will was caused by fraud or coercion or importunity is on the person alleging the same.

Fraud

- This is the misrepresentation of something that is not true, to be true.
- Knowledge and approval is absent where the testator bequeaths or excludes a person as a result of false statements.
- It denies the testator of knowledge and approval because his judgment is based on a false assumption.
- ***The Estate of Posner***
    - The testator left a will in favour of a woman who had misrepresented herself as his wife. The woman was actually married to another man at that time. The will was challenged.
    - It was held that the woman misrepresented herself as having the capacity to marry the testator which she did not. The will was therefore declared invalid.
- ***Pauline Kinyota Maingi v Raelle Kinyota Maingi***
    - The testator married the first wife under customary law and married the second wife under statutory law.
    - He made a will appointing the second wife as executor and the first wife challenged the will.
    - It was held that the testator had misrepresented himself as having the capacity to enter into a statutory marriage, which he did not.
    - The will was therefore declared invalid.
- ***Wilkinson v Joughin***
    - The testator left his estate to his alleged wife, but he did not know that she was still married to her husband.
    - She deceived the testator and perpetrated the fraud during their relationship, and had the testator been privy to the married status of the lady, chances are he would have acted differently.

Coercion and Undue Influence

- Coercion is where one is pressured to make a will in a certain way, eg. under duress or by way of undue influence.
- This denies them free will, as it does not reflect their true intentions or wishes, but those of the person pressuring them.
- Anything that applies pressure or additional requirements on the testator denies him of the element of free will and hence removes knowledge and approval, and is illegal (Coercion).
- On the other hand, anything that appeals to the emotional connections made does not deny the testator free will and is allowed (Persuasion)

- This normally applies in personal relationships, e.g. spiritual advisor or psychiatrist. Where one of the parties takes advantage of the personal relationship and influences them to make a will in their favour.
- This will deny a testator of knowledge and approval and will invalidate a will.
- **Coercion is illegal, Persuasion is legal.**
- ***Hall v Hall***
    - To make a good will, one must be a free agent.
    - The court stated that anything that applies pressure on the testator to make a will in a certain way denies him of knowledge and approval, and will be considered illegal. Pressure that is exerted so as to overpower the volition of the testator without convincing their judgment will constitute undue influence.
    - On the other hand persuasion appeals to emotional connections made, and does not deny the testator of knowledge and approval and is legal.
- ***Wingrove v Wingrove***
    - It is only when the will of the testator is coerced into doing that which he does not desire to do that it is undue influence or coercion.
    - The coercion may be actual confinement or violence or a person in their last days may be so weak that very little pressure will bring about the desired result.
    - The testator was persuaded by a 'harlot' to make a will in her favour, to the exclusion of his wife and children, which he did and the will was challenged.
    - Held that the harlot had appealed to the emotional connections made and did not coerce the testator.
    - The will was declared valid.
    - If the testator has only been persuaded, even by considerations which you may condemn, it is not undue influence, where they are persuaded really and truly to dispose of their property a certain way.
- The burden of proof lies with the person alleging undue influence.
- ***In the matter of the Estate of James Ngengi Muigai***
    - Undue influence was alleged because it was the eldest son of the deceased who suggested he write a will and then got the family priest to convince the deceased to write a will.
    - The deceased lived with the eldest son and it was alleged that he drove him to make the will in the manner he made it.
    - Court not convinced that undue influence was exercised as the deceased had previously given power of attorney to his son to act on his behalf during his lifetime. The advocate who drafted the will visited the deceased 3 times to discuss it and it was normal for an elderly person to live with their eldest son.

- ***Re Harden***
    - The testator had a spiritual advisor who claimed he had messages from 'the other side' on how she should dispose of her property.
    - The testator left a substantial amount to this advisor. The will was challenged and declared invalid on grounds of undue influence on the part of the spiritual advisor.

<u>Suspicious circumstances</u>

- This is where the person preparing or drafting the will benefits substantially under the will.
- This will be regarded as a suspicious circumstance, and it is on the drafter to prove otherwise.
- ***Tyrell v Painton***
    - Held that it would be a suspicious circumstance if the will is written or prepared by a close relative of a substantial beneficiary.
- ***Wintle v Nye***
    - The testator was an elderly woman with no experience dealing with money.
    - She relied heavily on the family advocate and left most of her sizable estate to him.
    - Held that the circumstances were suspicious and the will was declared invalid.
    - "If you have to deal with a will in which a person who made it himself takes a large benefit, you ought to be satisfied, from evidence calculated to exclude all doubt that the testator not only signed it but that he knew and approved of its contents."
- ***Barry v Butlin***
    - The testator made a will at the advocate's home, in the advocates handwriting and bequeathed a quarter of his property to the advocate and the rest to his friends.
    - The testator's son challenged the will on grounds of suspicious circumstances on the part of the advocate.
    - The advocate managed to prove that the will met all the requirements and that they were in fact two independent witnesses present.
    - Held that on the face of it, circumstances were suspicious but this was dispelled by two factors:
        - ➢ The will was executed before two independent witnesses
        - ➢ The son was excluded because of his criminal conduct
    - The will was therefore declared valid.
- ***Mwathi v Mwathi***
    - The deceased never married and had no children. He was survived by his brother and two sisters.

- Two days before his death, he allegedly made a will bequeathing his property to his brother.
- His brother claimed the deceased dictated his wishes and he wrote them down. The will was then thumb printed by the deceased and witnessed by the brother and his wife among others (according to the brother).
- His sisters sought a revocation of the letters of administration given to their brother on the grounds of suspicious circumstances.
- Shortly before the execution of the will, the brother removed the deceased from his mother's house to his house.
- He exhibited animosity towards his sisters and banned them from entering the house.
- Evidence at the time the deceased was alleged to have dictated the will showed he was quite ill and could not walk without support.
- The brother failed to show that the deceased freely and consciously dictated and executed the alleged will.
- As the author and sole beneficiary of the wil, he had a duty to do everything above board.
- The letters of administration were revoked and the will was declared invald.

Mistake

- Knowledge and approval may be absent because of a mistake on the part of the testator or someone in their employ.
- Mistake is where the true intentions of the testator are not represented in the will.
- A mistake relating to the whole will renders it invalid, while a partial mistake may be corrected or that part of the will revoked.
- ***Goods of Hunt***
  - A woman living with her sister prepared two wills in similar terms for their respective execution.
  - She executed her sister's will instead of her own by mistake.
  - Probate of the will not granted. Held that she would not have executed the will had she known it was not hers.
- ***Re Morris:***
  - A mistake was made in the drafting of a codicil, by which the testator revoked a certain clause in her will.
  - Evidence showed that she never intended to revoke the whole clause, but only a sub clause. (Delete 7(iv) in clause 20, the advocate deleted the whole clause by mistake)
  - The error was that of her advocate in giving effect to her instructions.

- The fact that the will had been read to the testator was not necessarily conclusive proof that the testator approved of the content. The court is not precluded from considering all of the evidence to arrive at the truth.
- It was held that the amendment did not represent the true intentions of the testestrix, and the will was declared invalid.

Importunity

- This is defined as insistent begging by a person to the testator to leave them something in their will. The insistent nature will deny the testator of knowledge and approval.

In the matter of the Estate of GKK

- The deceased was polygamous.
    1. Had been married to the late AW, with 7 children.
    2. Married and then separated with GW, with 2 children.
    3. Married and living with TW at the time of his death, 4 children.
- He was alleged to have died testate, leaving behind a written will dated 10th Sept 2010, another will dated 20th July 2006 and a codicil dated 6th May 2008.
- 2010 will: AWK, JNK and SNK allegedly appointed as executors (referred to as London will).
- 2006 will: SN, AW, JNK and CWA allegedly appointed as executors. (referred to as Kahari will).
- In 2011, AWK and JNK who were named as executors of the London will were given a limited grant to collect, receive, manage and preserve.
- The ones named in the Kahari will also petitioned the court for grant of letters of administration.
- Issue: The validity of the two wills.
- **The children of the 1st marriage supported the London Will.**
- **They alleged that the Kahari will had been vitiated by undue influence, suspicious circumstances and fraud.**
    - The Codicil bequeathing TW most of the valuable assets belonging to the deceased was done shortly after the death of the deceased's first wife at a time when the testator had been prevented from seeing his children with his deceased wife by TW (third wife). The witnesses were illiterate and it was unusual for the testator to pick them as witnesses given his standing in society.
    - There was a disconnect between the deceased's long standing conviction that upon his death his property should not be distributed directly to his children, but to be transferred to a Trust for the benefit of his children and grandchildren raised suspicions.

- **They alleged that although his daughter AW (daughter of 1st wife) had been instrumental in assisting her father prior to and after execution of the London will, it did not amount to undue influence.**
    - Relied on *Wingrove v Wingrove,* stating that not all influences are unlawful, and persuasion may be legitimate. She had been in all the Trust Deeds and had been mentioned in both wills, showing that the deceased trusted her.
    - Stated that he had sound mind, sound memory and sound understanding of all the issues at the time of executing the will. The fact that he was in a medical facility was not sufficient to prove mental incapacity.
- **The children of the 2nd and 3rd marriage supported the Kahari Will.**
- **As to legitimacy of Kahari will:**
    - They claim that the objectors of the Kahari Will failed to lead evidence challenging the capacity of the witnesses. Claimed they were competent since they were neutral and are not beneficiaries to the will.
    - They asserted that at the time of making the Kahari will, the testator had the necessary mental and testamentary capacity to do so. Further that the making of that will was not caused by fraud or coercion or by any circumstances that would take away the free agency of the testator.
- **They questioned the London will:**
    - Alleged that the testator had been abducted and taken to the UK, and therefore had no free will to make the London will.
    - They questioned the presence of AWK (daughter of first wife) when the will was executed. Stated that her being named as one of the executors of the will and the chairlady of the trust was telling.
- **Determination: Kahari Will**
    - Held that the Kahari will and codicil were invalid because of **undue influence.** He had been locked up in Kitisuru all day, and could not see his children from the 1st and second marriage.
    - The codicil favored TW (3rd wife), granting her power of attorney, where previously she had not featured anywhere in his business matters.
    - Wrt competency of the witnesses: Section 3(1) LSA defines a competent witness as a "person of sound mind and full age." Their social standing does not matter and therefore the will did not fail on this ground, the witnesses were competent.
    - But the witnesses only saw the testator sign one page, yet it has more than one signature. Each of the 18 pages bears the signature of the testator but the witnesses signatures appear on the jurat page which is page 12 thereof.
    - What page did the deceased sign in the presence of the witness? When did he sign all the other pages if they saw him sign only one page? Did they really see him sign the jurat page to authenticate the Will?

- **Section 11(c)** provides that the testator's signature must be made in the presence of two witnesses who need not be present at the same time.From a clear reading of **Section 11(c)** of the **Act**, to be present at signing means that the witness must be capable of seeing the testator sign the will and attest to that fact. In *Re Colling* it was held that if a witness left the room before the testator completed the signature, the attestation is invalid.
- Held that he failed to make and execute the will in accordance with section 11.

- **London will**
  - *Banks v Goodfellow Test*
  - The validity of a will derives from the testamentary capacity of the testator and the circumstances attending to its making.
  - Section 5(3) makes the presumption that the person making a will is of sound mind and the burden of proving otherwise is on the person alleging that they were not.
  - The deceased was so ill at Nairobi that he had to be transferred to London for special treatment. How did he get well quickly enough to write a new will.
  - He had been forcefully taken to London, from one captive situation to another.
  - He was blind in one eye, 40% blind in another and semi illiterate. So how did he read and understand without undue influence and make such serious amendments.
  - His daughter AWK was present at all times and was the one instructing the London advocate and she was the one paying his fees.
  - Held that he was influenced to make the London will. The clear beneficiary was AWK and her siblings. She overplayed her hand as his favourite and most trusted child, and drove him to a certain position. His mind was influenced to a level where it cannot be said that he acted of his own volition.
  - London will declared invalid.
- Both wills were declared invalid and he was declared to have died intestate.

TYPES OF WILLS - SECTION 8

- Written Wills
- Oral Wills

ORAL WILLS - SECTION 9

- An oral will is valid when (Section 9(1)):
  i. It is made before 2 or more competent witnesses.
  ii. The testator dies within 3 months of making the will.
- The rationale for the 3 month period is that being oral, there is a danger that some details may be forgotten or misreported and such wills are usually made in a state of panic, fear,

etc. The 3 months gives them time to reconsider the terms and reduce them to writing where possible.

- Kenyan courts have held that where a deceased gave instructions regarding the disposal of their assets and the instructions are reduced into writing, this amounts to an oral will, provided the instructions are given in the presence of 2 or more persons.
- ***Re Estate Rufus Ngethe Munyua***
    - The deceased gave instructions on the disposal of his properties to his wives and children. The person receiving the instructions wrote them on paper and he died a few days later.
    - Held that his instructions being reduced into writing was an oral will.
- **Privileged wills:** There is an exception for people in active service in the armed forces or merchant marine. An oral will made by such a person during active service is valid if the testator dies during the same period of active service, notwithstanding that the will was made more than 3 months before their death.
- **"Active service"** means service with the armed forces or merchant marine on a field of military operations or at sea, or proceeding to or from or such field or sea, or under orders to proceed to such field or sea, or in being in some place for the purpose of proceeding to such field or sea
- A privileged will expires when active service ends or the ship reaches the port.
    - ***The Estate of Ada Stanley***
        - The testestrix, a nurse, received a letter that her services would be required at war. She wrote a letter to her friend stating that if she died at war, all her property was hers (Not attested).
        - She died at war and her family claimed she died intestate, while her friend claimed that the letter was a privileged will.
        - It was held that the letter amounted to a privileged will and it was admitted to probate.
    - ***Gurthward v Knee***
        - A soldier received instructions that he would be going to war and he went to war.
        - While he was at war, he wrote a letter to his friend stating that if he died at war, all his property was his (his friends).
        - He died at war and his father claimed that he died intestate, while his friend claimed that the letter was a privileged will.
        - The letter was considered a privileged will and admitted to probate.

PROOF OF ORAL WILLS - SECTION 10 (AS DISCUSSED ABOVE)

- Section 10: If there is any conflict in evidence of witnesses as to what was said by the deceased in making an oral will, the oral will shall not be valid except so far as its contents are proved by a competent independent witness.

WRITTEN WILLS - SECTION 11

- No written will shall be valid unless:
    - The testator signs or affixes their mark to the will OR it is signed by someone else in the presence of and by the direction of the testator.
    - It appears that the testator intended by his signature or mark to give effect to the will.
    - The signature is made or acknowledged by the testator in the presence of two or more competent witnesses (adults of sound mind who are not beneficiaries or spouses of beneficiaries)
    - Each witness must sign the will in the presence of the testator, but not necessarily in the presence of the other witnesses (***James Ngengi Muigai)***
- Signature has been widely interpreted to cover any mark of the testator intended as a signature, eg. thumb print, initials, assumed name, rubber stamp with testator's name, etc.
- The acknowledgment of testator's signature means the witness may be called after the document has been signed, in which event the testator needs to acknowledge the signature or mark to the witness.
- Section 11(c) requires that the witness be capable of seeing the signature and understanding what they are doing.

BENEFICIARIES ATTESTING A WILL - SECTION 13

- A beneficiary or their spouse can attest a will, and their attesting of a will does not invalidate the will. However, for it to be valid, there must be two other competent and independent witnesses apart from the beneficiary or their spouse.
- ***The Estate of George Mbugua Ngare***
    - The testator made a will that was witnessed by his two daughters.
    - The will was challenged on grounds of attestation.
    - It was proven that apart from the 2 daughters there were 2 other independent witnesses.
    - The will was therefore declared valid.

EXECUTOR ATTESTING A WILL - SECTION 14

- The fact that a person is an executor of a will does not disqualify them from being a valid witness.

INCORPORATION BY REFERENCE - SECTION 12

- Section 12 allows documents that are referred to in a will or codicil to be considered as part of the will or codicil in which they are referred to.
- That document has to be clearly identified as the one to which the will refers.
- The document has to be in existence at the date on which the will or codicil is executed.

REVOCATION, AlTERATION & REVIVAL OF WILLS - SECTION 18 & 19

- Wills are liable to change by their maker through alteration, revocation or revival where there has been revocation.
- Section 17: A will may be revoked or altered by the maker at any time when they are competent to dispose of their property.
- A person can revive any of their wills at any time during their lifetime (So like revoke one, and revive the previous one)

Revocation

- This is an expression of the freedom of testation. A will can be revoked **voluntarily** or **involuntarily.**
- **Voluntary revocation: Section 18**
- There are three methods
    - Express revocation
    - Implied revocation
    - Revocation by destruction
- These methods require
    i. Mental capacity to the same degree as that of a creator of a will
    ii. Intention to revoke
    iii. Actual destruction of the will
- Actual destruction means:
    - Tearing up of the will into pieces such that you cannot piece it together (if you can piece it back together, they had the intention but failed in actual destruction)
    - Scratching out the signatory part of the will
    - Burning the will

Express revocation

- Section 18(1) provides for the revocation of a will or codicil by another will or codicil declaring an intention to revoke it.
- Usually “I revoke all former wills and testamentary dispositions made by me.”
- “This is my last will and testament: is not an express revocation clause.

Revocation by destruction

- Section 18(1) provides for revocation by the burning, tearing or otherwise destroying of the will with the intention of revoking it or by someone else at the testator's direction.
- Revocation by destruction has two elements
    i. Actual destruction
    ii. Intention to revoke the will
- ***Cheese v Lovejoy:***
    - The testator cancelled his will by striking out its clauses and then writing at the back of the will, "All these are revoked." He then threw the til in the bin. The cleaning lady found it in the dust bin and placed it in the kitchen drawer.
    - 8 years later, the testator died and the will was brought to court to give directions on its validity.
    - It was held that even though the testator had the intention of destroying the will. He did not succeed in actual destruction.
    - The will was therefore held to be valid. The words expressing gifts were still legible and therefore remained valid.
    - "All the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying, there must be the two."
- ***Re Jones:***
    - The testator, an old lady who was in hospital, made a will in favour of her nieces who used to visit and help her.
    - On learning the contents of the will, they stopped visiting her and stopped giving her any support.
    - She decided to revoke her will and informed her lawyer and one other person about her intention, but she died before her instructions could be carried out.
    - On her deathbed, she scratched out the signatory part of the will and mutilated the part of the will where she bequeathed her house and land to her nieces.
    - Held that her actions indicated an absolute intention to revoke the will, and that this was effectively carried out with actual destruction. She was therefore declared to have died intestate.

Implied revocation ** Not sure about this

- A will or codicil is impliedly revoked by a later will or codicil to the extent that the latter is inconsistent with the earlier will or codicil (***Birks v Birks)***
- It is a matter of construction of the will or codicil to decide whether and to what extent a latter will or codicil impliedly revokes an earlier will.
- Extrinsic evidence is admissible for establishing implied revocation.

Doctrine of conditional revocation

- Once an intention to revoke is established, it is necessary to decide whether the intention is absolute or conditional.
- In the case of express revocation, it is a matter of construction.
- Where a testator revokes a will with the intention of making a new one, and for some reason fails to make a new one, the original remains valid.
- This only applies where the court is satisfied that the testator did not intend to revoke the will absolutely, but only as a first step towards making a new will.
- If the intention is absolute, the revocation takes effect immediately.
- If the revocation is conditional, the revocation does not take effect until the condition is fulfilled, e.g. until the new will is made.
- ***In the Estate of Southerden***
    - The testator made a will leaving his estate to his wife.
    - He then revoked his will by destruction under the mistaken belief that under the rules of intestacy his wife would acquire his whole estate.
    - He therefore regarded the will as unnecessary and destroyed it.
    - It was known that the testator had always intended his wife to be the sole beneficiary of his estate. It was therefore held that the condition of revocation was that the testator's widow would take his estate if he died intestate.
    - Held that there was no revocation because the condition had not been fulfilled.

Revocation by marriage - Section 19

- The marriage of a testator automatically revokes a will.
- Except where the will is expressed to be made in contemplation of marriage to a specified person. The will shall not be revoked by the marriage so contemplated.
- Rationale? Marriage constitutes an important change of the testator's circumstances and it is equitable for their estate to devolve to intestacy rather than under a will made before marriage.
- So where a person fails to alter their will after marriage, their estate will devolve on intestacy.
- *** NB: Kenyan law does not recognise revocation by divorce.

Alteration of wills - Section 20

- Section 20(1): An obliteration, interlineation or other alteration made in a written will **after its execution** is invalid unless the alteration is signed and attested in accordance with the s 11 formalities required for the execution of a will, ie.
    - The testator and at least 2 competent witnesses pace their initials in the margin or next to the alteration or they sign at the end of a memorandum contained in the will which refers to the alteration.

- Alterations made after a will is executed are invalid unless they are also attested to and executed in accordance with s 11.
- There is a presumption that alterations have been made after execution unless the alterations are to fill in a blank space in the will.
- So in practice, it is advisable to execute an alteration even if it has been made before the execution of the wil.
- Section 20(2): Where a typewritten or printed will purports to have been executed by the filling in of any blank spaces, there shall be a presumption that the will has been duly executed.

Revival of wills - Section 21

- A will that has been totally revoked can only be revived by re-execution by the testator,
- Where only part of a will has been revoked, that part can be revived by its re-execution or by a subsequent will or codicil showing an intention to revive it.
- The effect of a revival of a will or codicil is to make it speak from the date on which it was revived.

CONSTRUCTION OF WILLS

- **Section 22** - Wills shall be construed in accordance with the **First Schedule.**
- The main objective of the construction of a will is to **ascertain the testator's intentions as expressed in the will.**
- ***Perrin v Morgan:*** The question is not what the testator meant to do when they made the will, but what the written words they use mean in that particular case.
- Where a will uses words or phrases that are capable of two or more meanings and does not show in what way the testator meant to use them, the court can either
    - Declare the will void for uncertainty; or
    - Decide on which of the interpretations is to be given to the disputed clause (the benevolent approach).

The court construes wills, it does not make them

- The court's duty is to interpret the words as used in the will, even if they produce an 'unfair result,' provided that it was the testator's intention.
- Generally, the testator's intention is determined solely from the will itself.
- Even where a testator has not made a provision for their dependants, the court should not interpret the will seeking to make provision for them.
- The court interprets the will as it stands.
- Dependants may apply for reasonable provision under section 26 if they wish to do so.
- The rationale is to guard against the tendency to impute a meaning to a will that was never intended by the testator.

- BUT a mechanical application of this principle can sometimes produce absurd results and obvious injustice. Eg. ***Scale v Rawlins***
    - The testator devised property for his niece for life and if she died without issue then to his nephews. His niece died but left issue. Although it was clear that the testator wanted the niece's issue to take the property, it had not been expressly stated in the will and so partial intestacy occurred.

<u>Words are construed in their ordinary natural sense</u>

The golden rule

- Where a testator executed a will in solemn form, it is assumed that they did not intend to die intestate when they have gone through the form of making a will.
- A will should be read to lead to testacy rather than intestacy.
- BUT the court should not give unnatural meaning to words or rewrite wills to produce a satisfactory result.

The primary meaning

- Words in a will are given their primary meaning, regardless of whether the constitution will produce a capricious (irregular) meaning or lead to an absurd or unreasonable result.

Departing from the general principle

- If on reading the will as a whole or based on the testator's habits it is evident that they used a particular word/phrase in a special sense, the court may interpret it in this special sense, provided that the word/phrase is capable of carrying such a meaning and evidence is tendered to prove the special meaning.
- The general principle can be departed from in two ways
    i. The dictionary principle: Where the testator has set up their own dictionary by defining words that they use in a particular way.
    ii. The surrounding circumstances principle: Where the ordinary meaning does not make sense, a secondary meaning which makes sense can be applied. Where a word has more than one meaning, the court may adopt the meaning it regards as most probable.

<u>The will must be read as a whole</u>

- The meaning of clauses is to be collected from the entire will, and not in isolation.
- The provisions of the will must be construed in relation to each other.

<u>The will must speak for itself</u>

- The courts must ascertain the testator's intention from the will itself.

- ***Perrin v Morgan:*** The question is not what the testator meant to do when they made the will, but what the written words they use mean in that particular case.

Ascertaining the subject matter of gifts

- The First Schedule provides that with regard to property, a will speaks from the date of death (unless a contrary intention appears from the will).
- Except with revival, where the will speaks from the date of revival.
- Therefore a gift of "all my shares" refers to all of the testator's shares at the time of their death, not at the time the will was executed.
- But with regard to specific gifts, the presumption is that the will speaks as at the date of its execution.

Ascertaining the beneficiaries

- References to people are construed to refer to people at the date the will was made, unless there is a contrary intention.
- Eg. A will bequeaths a gift to "the youngest child of my daughter Kanini" and the youngest child at the date the will was executed is Kamau, but Kamau predeceases the testator. The gift will lapse, even if Kanini has other children who are alive at the time of the testator's death.
- With regard to relationships, the presumption is that it refers to blood relatives. Eg. a git to "all my nieces" does not include girl's born to a spouse's sibling.

Perrin v Morgan

- Was concerned with the meaning of the word moneys in the phrase "all moneys shall be shared by my nieces and nephews."
- The testator had stock worth 33,000 pounds and 844 pounds in her account.
- The court adopted a meaning suited to its context to include her stock, rejecting the restricted legal meaning.

Ralph v Carrick

- The testator wrote an ambiguous will.
- A conclusion as to what a testator means by putting yourself in their place is conjecture.
- The facts known to the testator may not be known to the court. Court said not to apply the armchair rule.
- The will was declared invalid.

GIFTS BY WILL AND THEIR FAILURE

Types of gifts

1. **Specific Gifts**
   - This is a gift that forms part of a testator's estate and is distinguished in the will from other property of the same kind. Eg. A gift of a Lamu bed.
   - Specific gifts tend to fail because of ademption.
2. **General gifts**
   - A gift that is not in any way distinguished from property of the same kind.
   - This covers a gift of the entire testator's property of their entire property of a particular type. Eg. "all my real property."
   - Because a general gift is one which is to be provided out of the testator's estate, it does not matter that the property of that description does not form part of the testator's estate at the time of their death.
   - It is to be provided out of the testator's estate.
   - ***Bothamley v Sherson:*** If property of that description does not form part of the testator's estate, the executors "must raise the money or acquire the property."
   - General gifts tend to be pecuniary legacies.
3. **Demonstrative gifts**
   - A gift that is expressed as payable out of a particular fund or property.
   - Usually general in nature, not specific.
   - The gift does not fail for ademption even if the particular fund or property does not form part of the testator's estate at the time of their death.
   - The money to settle the gift has to be raised by the executor's or the property acquired.
   - If the gift is to be satisfied out of a particular fund, then it is a specific gift.
4. **Pecuniary legacies**
   - A gift of money, whether general or demonstrative.
   - It could be specific where money is to be paid out of a particular fund.
5. **Residuary gifts**
   - A gift of the testator's residuary estate, ie. all that is left in the testator's estate after all other valid gifts have been paid.
   - The residuary gift is usually made subject to the payment of pecuniary legacies, all debts and other liabilities of the deceased, and payment of funeral and administration expenses.

Failure of testamentary dispositions - section 23

- Section 23: Testamentary gifts and dispositions shall fail by way of lapse or ademption in the circumstances and manner provided by the Second Schedule.

Principle of lapse

- Generally, if a beneficiary under a will predeceases the testator, the gift or disposition fails, and is said to 'lapse.'
- Section 43: Where 2 or more persons have died in circumstances making it uncertain who survived the other, the deaths shall be presumed to have occurred in seniority, with the younger person having survived the elder.
- With spouses, they are presumed to have died simultaneously.
- Subject to section 43, the burden of proving that the beneficiary survived the testator lies on the person alleging survivorship.
- A statement in the will stating that there will be no lapse, shall have no effect, except where another beneficiary is designated.
- **Exceptions - Set out in the Second Schedule**
    - Where the gift is made in discharge of a moral obligation recognised by the testator. The court will imply that the gift is intended by the testator to pass to the beneficiary to whom the testator owes a moral obligation.
    - Where the will contains a gift to a child or other issue of the deceased, and the intended beneficiary dies before the testator upon leaving issue and that issue is living at the time of the testator's death. (issue means children, grandchildren, etc). The gift takes effect as a gift to the issue living at the time of testator's death.
    - Where a gift is in favour of a class of persons, the gift will not lapse so long as there is a surviving member of the class.
    - If a gift is made to beneficiaries as joint tenants, that gift will not lapse unless all the joint tenants predeceased the testator. The surviving joint tenant takes the share of a deceased joint tenant by survivorship.
    - But if a ift is made to beneficiaries as tenants in common, the share of a beneficiary who predeceases the testator will lapse (Because tenants in common have a distinct share in the property).
- Effect of lapse
    - If a gift lapses, the property or interest will fall into the residuary estate.
    - If the gift is a residuary gift, the property or interest will pass according to the rules of intestacy.

Doctrine of ademption

- Provided for in section 23 and the Second Schedule.
- Where a specific gift is made, the gift will fail for ademption if the subject matter of the gift does not form part of the testator's estate at the date of his death.
- Eg. where the property is sold, given away or destroyed in the testator's lifetime.
- If the specific gift has been converted into property of a different kind, it is also said to be adeemed. But there has to be substantial change.

- Where it is unclear which happened first, destruction of property or death of the testator, the property is deemed to have perished before the testator so that the gift is adeemed.
- A contract to sell the subject matter of a specific gift will cause a gift to fail for ademption even though the contract is not completed until after the testator's death. But this is not the case where the testator has made a contractor sel the subject matter of the gift before the will was executed. In this case, the beneficiary will be entitled to the proceeds of the sale.
- Where a testator in their lifetime grants a third party an option to purchase property which is the subject matter of a specific gift, the gift will adeem whether or not the option is exercised. But if the option is granted before the execution of the testator's will, the beneficiary will be entitled to the proceeds of the sale if the option is exercised.

Doctrine of election - Section 24 & Third Schedule

- The doctrine applies to circumstances where the testator makes a gift of property that does not belong to them or where they make dual gifts under one instrument, giving their own property and someone else's property.
- So where by the same will, a testator gives property to one beneficiary and purports to give that beneficiary's own property to another beneficiary, the 1st beneficiary will be put to election. They have to choose between taking the gift under the will or against it.
- So if under a will a testator attempts to dispose of property belonging to someone else and also makes a devise to that person, the beneficiary must choose between either keeping the property or accepting the devise.
- For example if the testator under his will says that a farm house at Lamu belonging to B shall go to C and a sum of 10M will go to B. If B accepts the amount of 10M under the Will he has to give up and transfer the property at Lamu to C. He cannot have both and has to elect one of the options.

PROVISION FOR DEPENDANTS

- **Section 26 - Provisions for dependants not adequately provided for by will or on intestacy.**
    - If a dependant has not been provided for adequately by will, by gift in contemplation of death or by intestacy, they can apply to court for reasonable provision.
    - Application can be made on behalf of the dependant.
    - The court may order that such reasonable provision as they deem fit be made out of the deceased's net estate.
- **Section 27 - Discretion of court in making order**
    - The court has complete discretion to order that a specific share of the estate be given to the dependant, or to make other such provisions by way of periodical payments or a lump sum.
- **Section 28 - Circumstances to be taken into account by court in making the order**
    - The amount of the deceased's property.
    - The existing and future means and needs of dependant
    - Any present, past or future income
    - The conduct of the dependant in relation to the deceased
    - The situation and circumstances of the deceased's other dependants and beneficiaries under any will
    - The general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.
- **Section 29: Meaning of dependant**
    - **Section 29(a):** The wife or wives, former wife or wives, and the children of the deceased, whether or not they were maintained by the deceased immediately prior to his death.
    - **Section 29(b):** Provides for persons the deceased was maintaining immediately prior to their death, ie. Parents, step parents, grandparents, grandchildren, step children, children whom the deceased had taken into his family as his own, siblings and half siblings.
    - **Section 29(c):** Where the deceased was a woman, her husband if he was being maintained by her immediately prior to her death.
- **Section 30: Limitation of time**
    - You cannot make an application under section 26 after a grant of representation in respect to that estate has been confirmed as provided for in s 71.

INTESTACY (S 32- 42 LSA)

- This occurs where:
    - Someone dies without having made a will
    - One's will is invalidated
    - One revokes their will and dies without reviving it or making another will.
    - Definition is in Section 34
- Rules of intestacy determine who is entitled to the property of the estate of an intestate.
- Intestacy may be total or partial.
    - Total: No valid will whatsoever.
    - Partial: Person does not include all their property in an otherwise valid will OR part of the will is revoked.
- Only applies to the estate of a person who dies after the LSA came into force, ie. July 1981.

Property excluded from intestacy provisions

- **Section 32:** Agricultural land and crops on such land and livestocks in certain counties are excluded from the intestacy provisions. These counties include
    - West Pokot - Wajir - Samburu
    - Lamu - Turkana - Garissa
    - Isiolo - Kajiado - Marsabit
    - Tana River - Mandera - Narok
- **Section 33:** The law applicable to the property excluded by section 32 is the customary law of the deceased.

Section 35- Where intestate person leaves one surviving spouse and child/children

- The surviving spouse is entitled to:
    - The personal and household effects of the deceased absolutely.
    - A life interest in the whole residue of the net intestate estate (net estate is what's left after all liabilities and expenses have been paid, eg. funeral costs).
- If the surviving spouse is a widow, the life interest will expire when she remarries. (ie. only applies to women, whereas where widower remarries, the life interest does not expire)
- On the death of the surviving spouse, or when a widow remarries, the whole residue of the estate shall devolve upon the surviving children equally.

Section 36 - Where intestate person leaves one surviving spouse but with no children

- The surviving spouse is entitled to:
    - The personal and household effects of the deceased absolutely;

- The first Kshs 10,000 or 20%, of the residue of the net intestate estate, whichever is greater; and
- A life interest in the remaining 80% of the net intestate estate.
- If the surviving spouse is a widow, the life interest terminates upon her remarriage.
- On termination of life interest, i.e. death of surviving spouse or where widow remarries, the estate shall devolve in the order of priority set out in section 39. Ie.
  - ➢ Father, if dead
  - ➢ Mother, if dead
  - ➢ Brothers and sisters, and any children of the deceased's siblings, in equal shares, if none
  - ➢ Half siblings and any children of the deceased's half siblings, in equal shares, if none (*Half siblings, not step siblings)
  - ➢ Relatives who are in the nearest degree of consanguinity up to and including the 6th degree in equal shares.
    - Consanguinity - where one is a descendant of the other, or they share a common ancestor.
- If none of the above are there, then the estate shall devolve upon the state and be paid into the consolidated fund.

Section 37 - Powers of a surviving spouse in the life interest

- A life interest only entitles the surviving spouse to the use and utility of the property.
- Section 37 allows them, **with either the consent of all the co-trustees and adult children OR with the consent of the court**, to sell any of the property that is subject to that life interest if it is necessary for their maintenance.
- However in the case of immovable property, they must acquire consent from the court.

Section 38 - Where intestate leaves behind a child/children but no spouse

- The entire net intestate estate will be divided equally among the surviving children.
- Eg. where one is a single parent or both parents die.
- ***In the matter of the Estate of Mary Wanjiru***
  - A son and 6 daughters survived a single parent. Son attempted to inherit the entire estate. His application was rejected.

Section 39 - Where intestate has left no surviving spouse & no surviving children

- The entire net intestate estate shall devolve upon the kindred in the following order of priority;
  - Father, if dead
  - Mother, if dead

    - Brothers and sisters, and any children of the deceased's siblings, in equal shares, if none
    - Half siblings and any children of the deceased's half siblings, in equal shares, if none (*Half siblings, not step siblings)
    - Relatives who are in the nearest degree of consanguinity up to and including the 6th degree in equal shares.
        - Consanguinity - where one is a descendant of the other, or they share a common ancestor.
- If none of the above are there, then the estate shall devolve upon the state and be paid into the consolidated fund.

Section 40 - Where intestate was polygamous

- Where an intestate person has married more than once uder any system of law that permits polygamy:
    - His personal and household effects and the residue of the net intestate estate shall be divided among the houses according to the number of children in each house. The surviving spouse is counted as an additional unit to the house, ie. Each child is a unit, a wife is a unit.
- Distribution within each house shall follow the rules set out in section 35 and 38.

Rono v Rono

- The deceased married under polygamy and was survived by two widows.
    - 1st widow: 3 sons, 2 daughters.
    - 2nd widow: 4 daughters.
- First house wanted the estate to devolve according to customary law, which meant the second house was entitled to a smaller share since daughters would get married and leave the home and girls have no right to inheritance.
- Second house proposed a 50/50 share of the land in contention.
- The Court of Appeal held that customary did not apply. The deceased was from Uasin Gishu, which is not one of the excluded places. The LSA applied.
- The HC judge was of the view that ***section 27*** of the Act donates unfettered discretion to the court in the sharing of the estate considering the definition of "*dependant*" in ***section 29*** to include the *"wife and the children of the deceased"*. It is in exercise of that discretion that the learned Judge disregarded consideration of the sharing proposed by the parties altogether and made her *"own independent distribution"*. It was also pursuant to that discretion that she based her decision to allocate minimal shares to the daughters on the basis that they would get married.
- Judge of appeal

    - Wrt section 40: My understanding of that section is that while the net intestate estate is to be distributed according to houses, each house being treated as a unit, yet the Judge doing the distribution still has a discretion to take into account or consider the number of children in each house.
    - Nor do I see any provision in the Act that each child must receive the same or equal portion. That would clearly work an injustice particularly in case of a young child who is still to be maintained, educated and generally seen through life. If such a child, whether a girl or a boy, were to get an equal inheritance with another who is already working and for whom no school fees and things like that were to be provided, such equality would work an injustice and for my part, I am satisfied the Act does not provide for that kind of equality.
- In the circumstances of this particular case, there was no reasonable factual basis for drawing a distinction between the sons on the one hand and the daughters on the other hand. The fact that the girls would one day get married was not a determining factor when it came to the distribution of the net estate of the deceased. (gender equality)

In the matter of the Estate of Benson Ndirangu

- The deceased was survived by 2 widows
    - 1st widow: 4 children
    - 2nd widow: 6 children
- The court stated that the 1st house had 5 units and the 2nd house had 7 units.
- The land available for distribution was 40 acres which was divided by the court into 12 units, with 5 units going to the 1st house and 7 units going to the 2nd.

In the matter of the Estate of Mwangi Giture

- Deceased was survived by 2 widows
    - 1st widow: 4 daughters
    - 2nd widow: 8 children
- 1st house argued for equal distribution in accordance with customary law, the 2nd house for distribution according to section 40.
- Section 2(1) LSA: **"Except as otherwise expressly provided in this Act or any other written Law, the provisions of this Act shall constitute the Law of Kenya in respect of, and shall have universal application to all cases of intestate or testamentary Succession to the estate of deceased persons dying after the commencement of this Act and to the administration of the Estates of those persons."**
- Held that the court had no discretion in the matter and was bound to follow section 40 of the Act, which provides that the estate be divided between the houses taking into account the number of children in each house.

- The court however decried the unfairness of the provision of the widows who are treated the same as the children.

****NB: Reference to children does not discriminate between sons and daughters, neither it there a distinction between married and unmarried daughters.**

Children include children born out of wedlock. Marriage is not a factor in determining a child's right to inherit.

Section 41: Property devolving upon minor children to be held in trust

- The share of the estate to which minor children are entitled is held on statutory trust til they turn 18 when the property reverts to them.

Section 42: Previous benefits to be brought into account

- Where an intestate has in their lifetime or by will paid, given or settled any property to or for a child, grandchild or house OR property has been given under section 36 or 35, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.

Section 43 - Survivorship

- For the purposes of determining survivorship in the event of 2 or more persons dying simultaneously, it shall be presumed that the younger person survived the older person, but with spouses it shall be presumed that they died simultaneously.
- In the case of non spouses, such property should devolve to different people so it becomes necessary to determine who died first, but with spouses, it goes to their children or the same dependents and therefore it is not necessary to determine who died first.

Advice for cohabitees and mistresses with children

- You need to tell them what the law provided for previously and what it provides for now.
- Previously, under s 3(5) of the Law of Succession Act, marriage by assumption was recognized. This meant that even though a woman might not have been married to the deceased, she could apply to the court to be assumed to be a widow based on s 3(5).
- Upon application, the court would consider several factors before assuming the applicant as a widow. Some of these include:
    - Whether they had children.
    - How long they lived continuously together.
    - If the applicant and the deceased had bought property together.
    - Whether people around them assumed they were husband and wife.

- If the court was satisfied, the applicant was declared a widow, and her and her child(ren) were then considered in the succession.
- ***Re Ogolla case***
- Currently s 3(5) of the Law of Succession Act was repealed by the Marriage Act, s 6 and 9.
- There is no longer marriage by assumption identified under the law.
- There are only 5 types of marriages, and marriage by assumption is not one of them.
- Currently, the mistress/ cohabitee cannot apply to the court to be recognised as a widow, so they get nothing.
- However, her child, if proved to be the child of the deceased, will inherit from the estate on equal footing with the other children.
- She would therefore approach the court under s 26 for reasonable provision for her child.
- Case Law: ***Ken Okoth Case*** etc**.**

PROTECTION OF ESTATES

- Following a person's death, it often happens that those who should obtain representation to the deceased's estate do not take immediate steps, thus exposing the estate to wastage or haphazard administration by either the beneficiaries or unauthorised persons.
- **Section 45** provides that no person should take possession, dispose of or otherwise intermeddle with the free property of a deceased person, unless authorised by law or grant of representation.
- It is a criminal offence to intermeddle with an estate without legal authorisation, payable by fine, imprisonment or both.
- ***Gitau v Wandai***
    - Held that the act of one of the parties to the suit entering into an agreement before grant of representation had been obtained amounted to intermeddling.

DRAFTING A WILL

Content of will (I CREW BP WAS)

I - Identity (Of the testator, ID no, Name, Address, etc)
C - Capacity (Adult of sound mind)
R - Revocation (Revoke all previous wills)
E - Executor ((Appoint an executor and give their details, ID No, Name, Address, etc)
W - Wishes & Expressions (What will happen to the body when they die)
B - Bequeathment (Gift given to the different beneficiaries)
P - Preemptive clauses (State what will happen if beneficiary dies before testator)
W - Witnesses (Two or more who are not beneficiaries or spouses of beneficiaries)
A - Attestation (Explain the circumstances under which the will was signed & witnessed)
S - Signature (Witnesses and testator sign the will)

From Class*

- 1st paragraph - Identification of the testator
- 2nd paragraph - Identification of the spouse(s) and children etc
- 3rd paragraph - Revocation of previous wills and codicils
- 4th paragraph - Appointment of an executor
- 5th paragraph onwards - I bequeath the following assets to the following people
- Question: Do you identify everyone you bequest in paragraph 2?

Codicil

- This is a document that explains, gives further directions or bequeaths certain things in a will.
- It cannot exist on its own, it is a supplementary document to the will.
- It must be dated and witnessed.
- When drafting a codicil, always remember it is expanding on one of the clauses in the will.

GRANTS OF REPRESENTATION

- A grant of representation is an order issued by the court to confirm that a particular person is to act as the personal representative of the deceased. It gives the personal representative (executor/administrator) authority to act with respect to the estate of the deceased.
- There are two forms of grants under s 53 LSA
    i. Grant of probate: Where there is a valid will with a named executor.
    ii. Grants of letters of administration: Where deceased died intestate or with a will that does not name an executor, or those appointed are unwilling or unable to act.
- Grants can further be divided into:
    i. Unlimited grants (Permanent)
    ii. Limited grants (Temporary)

Executors and administrators

- The personal representative steps into the shoes of the deceased in the sense that they are able to lawfully do such things as the deceased may have done if they were alive.
- A personal representative appointed under a will is called an executor, as they execute the wishes of the deceased. The executor derives their authority from the will, and the grant of probate merely confirms their authority.
- A personal representative appointed by the court in the state of intestacy or in testate cases where there is no executor is called an administrator. The grant of letters of administration is the source of the administrator's authority.
- A grant may be made either to a single person (including the Public Trustee and a trust corporation) or jointly to 2 or more persons, but not exceeding 4.
- Remember: Minimum of 2 administrators where there is a minority or life interest.
- Capacity
    - A minor, a person of unsound mind and a bankrupt do not have the capacity to take out a grant of representation.
    - A grant of representation may be made to a body corporate.
    - But with grants of letters of administration, section 56(2) LSA states that none should be made to a body corporate other than the Public Trustee or a trust corporation

Appointment of executors

- They are expressly appointed by the will.
- The appointment of executors is not a mandatory requirement of a will, but in practice a will is considered incomplete or badly drafted if it does not appoint an executor.
- Persons qualified for appointment:
    - **Spouses -** Advisable to also appoint a co-executor, eg. one of the grown children.

- **Advocates** - Normally where they are involved in the management of the estate, eg. family lawyer.
- **Banks** - Most suitable where the will creates trusts that are likely to continue for many years, banks can remain executor for longer than a mortal executor.
- **Friends**
- **Public Trustee** - Office in the AG's chambers

Executor De Son Tort

- This refers to a person who acts as executor or administrator without the authority to do so.
- Someone who is not the deceased's personal representative, but who is acting as if they are.
- In intestate succession, this may be someone entitled to a grant, but before obtaining the grant, they do not have the authority to act.
- The acts complained of must not be of humanity or necessity.

LIMITED GRANTS * ALWAYS EXAMINED**

- A limited grant is a grant that DOES NOT give the personal representative authority to act with respect to the entire estate.
- It is a RESTRICTED grant. It may be limited/restricted to
  - A special purpose
  - Property
  - Time
  - May be one of the special types
- The main feature of limited grants is that **there is no requirement for advertisement except with the *grant de bonis non administratis*.** (ie. this is the only one that is advertised).
- Types of limited grants:

1. Grant ad colligenda bona de functi

- *Ad colligenda* means collecting
- *Ad colligenda bona de functi* means collecting the goods of the deceased.
- This type of grant is limited as to purpose and gives the administrator powers to only collect and preserve the grant estate, pending making of a full grant.
- Normally made where the assets of the estate are perishable or precarious in nature and need quick attention.
- This grant **can only be issued by the High Court.**
- Some of the duties an administrator with this grant would perform include
  - Renewing of leases

- Payment of licenses, rents and rates
- Collecting rental income etc.

- Rule 36(1) explains what this grant is and it says "Where owing to special circumstances, the urgency of the matter is so great that it would be impossible for the court to make a full grant of representation, to the person who by law is entitled to meet the necessities of the estate, the person can apply to court to give a grant of administration ad colligenda bona defuncti of the estate of the deceased (obtaining a grant usually takes 6 months).
- Does not include the right to institute an action or suit.
- **Application**
  - The applicant will fill form **Probate and Administration (P&A) 85** which is the petition and form **P&A 19**, which is the affidavit.
  - Details to be included are
    - ➢ Name and address of the petitioner

    Domicile of the deceased
    - ➢ Date of death of the deceased (Death Certificate)
    - ➢ Relationship of the petitioner with the deceased
    - ➢ Assets and liabilities of the deceased
    - ➢ Names and ages of other dependants
    - ➢ Consent of other beneficiaries
    - ➢ Letter from the chief clearly highlighting beneficiaries of the deceased
  - Once the petition is filed, the Deputy Registrar goes through the documents and if they are in order, the file is placed before a judge for issuance of the grant.
  - There is **no need for the petitioner to appear before the judge.**

2. <u>Grant ad litem</u>

- This type of grant is limited as to purpose. It enables the representative of the estate to sue on behalf of the estate or defend a suit where the estate has been sued.
- It is sought where it is necessary to make an estate a party to a suit and is usually taken out where a third party wishes to make the estate a defendant in an action and no person entitled to a grant has taken one out.
- Application:
  - The applicant fills form **P&A 90B** which is the petition and form **P&A 19** which is the affidavit.
  - Issued by the High Court.
  - Details which should be included are:
    - ➢ Name and address of the petitioner
    - ➢ Domicile of the deceased
    - ➢ Relationship of the petitioner with the deceased
    - ➢ Letter from the chief highlighting beneficiaries of the deceased

        - ➢ Name of the person to be sued should be clearly stated
        - ➢ Where possible, evidence of the cause of action should be provided.
    - Once the petition is filed, the Deputy Registrar goes through the documents and if they are in order, the file is placed before a judge for issuance of the grant.
    - There is **no need for the petitioner to appear before the judge.**

***3. <u>Grant of administration pendente lite</u>* <u>(pending litigation)</u>**

- This type of grant is limited as to purpose and time. It is given to a person appointed by the court simply to administer the estate during litigation. Eg. If the will of the deceased is being contested, the court may appoint a petitioner *pendente lite* to administer the estate so that it is not wasted.
- The holder has no power to distribute the estate and the grant is terminated upon conclusion of the pending proceedings.
- Application:
    - The applicant fills in form **P&A 90** which is the petition, and form **P&A 19** which is the affidavit.
    - Details which should be included are
        - ➢ Name and address of the petitioner
        - ➢ Relationship of the petitioner with the deceased.
    - With this type of grant, the **petitioner may be required to appear before the judge** in person.

4. <u>Grant de bonis non administratis</u>

- This type of grant is limited as to purpose. This is granted where the personal representative has not completed the administration of the estate either because he has died or for some other reason has left part of the estate unadministered.
- A grant limited to the purpose of administering the unadministered part of the estate may be issued.
- Application:
    - The applicant will fill in form **P&A 86** if the deceased died intestate, and form **P&A 87** if they died testate, which is the application and form **P&A 19** which is the affidavit.
    - Details to include are:
        - ➢ Name of the petitioner
        - ➢ Relationship of the petitioner with the deceased
        - ➢ Domicile of the deceased
        - ➢ Date of death of the deceased (Death certificate)
        - ➢ Date letters of administration were issued
        - ➢ Name of the administrator sought to be replaced

        - ➢ Consent of other beneficiaries
    - Once the papers are filed, the Deputy Registrar goes through the documents and the **matter proceeds for gazettement. If no objection is filed**, the letters of administration are issued.
    - The **petitioner might be required to appear before the judge** in person.

5. <u>Special limited grant</u>

- The special limited grant is made in special circumstances where the urgency of the matter is so great that it would be impossible for the court to make a full grant to meet the needs of the estate (Remember the full grant usually takes about 6 months, so given where it cannot wait).
- The petition should clearly state the special circumstances and evidence of the special circumstances must be provided in an affidavit.
- It should also be evident which necessities of the estate areto be covered by issuance of the grant.
- A special limited grant can be for school fees, medical reasons etc. (These are the most common reasons for KSL purposes). Whatever is used is then considered during distribution.
- Application:
    - Applicant fills form **P&A 85** which is the petition and form **P&A 19** which is the affidavit.
    - Details to be included are:
        - ➢ Name and address of the petitioner
        - ➢ Relationship of the petitioner with the deceased
        - ➢ Domicile of the deceased
        - ➢ Date of death of the deceased (Death certificate)
        - ➢ Letter from the chief highlighting beneficiaries of the deceased
        - ➢ Consent of other beneficiaries
        - ➢ Assets and liabilities of the deceased
        - ➢ Names and ages of other dependants
    - Once the papers are filed, the Deputy Registrar goes through the documents and if they are in order, the file is placed before a judge for issuance of the grant.
    - For special limited grants, the **applicants MUST appear before the judge.**

6. Other limited grants

- The court may make other limited grants provided for by section 54 of the Law of Succession Act.

- These grants are:
    - Grants limited in duration such as is the case when a personal representative is out of the country.
    - Where the deceased had made a will but the will has been misplaced or lost, a limited grant may be given until the original will or authentic copy is availed. (If not found, then intestate)
- For other limited grants, there could be instances where there are no prescribed forms to fill during application. In this instance Rule 70 of the first schedule will be invoked.

SO:

- Ad colligenda: P&A Form 85 and 19
- Special limited grant: P&A Form 85 and 19
- De bonis non administratis: P&A Form 86/87 and 19
- Pendente lite: P&A Form 90 and 19
- Ad litem: P&A Form 90B and 19

Process of applying for a grant

- The following persons are entitled to apply for a grant
    1. Executor(s) named in a will.
    2. Any adult person of sound mind who is not bankrupt and in the case of someone who died intestate, the court has wide discretion on who to appoint as administrator. The court will however be guided by section 66 of the Law of Succession Act which gives the order of preference which is as follows:
        - Spouse(s)
        - Children
        - Father
        - Mother
        - Brother & sisters, and any child of deceased brothers and sisters
        - Relatives in the nearest degree of relation including the 6th degree
        - Public trustee
        - Creditors
    3. In event that a deceased has died intestate, the law allows a MAXIMUM OF FOUR applicants.
    4. In cases where the deceased had minor children, there MUST BE AT LEAST TWO applicants.
- The applicants are required to give the following information
    1. Full names, date and place of death of the deceased
    2. Deceased's last place of residence
    3. Deceased's domicile at time of death

4. Full names and postal address of the applicants
5. Original will and codicil if any
6. Two copies of the will
7. True and complete record of oral will
8. Full inventory of assets and liabilities of the deceased at the time of death
9. Estimate values of assets and liabilities of the deceased
10. Names and addresses of executors named in the will
11. Death certificate, original copy or certified copy
12. Names, ages, addresses, description and marital status of all surviving spouse(s) and children
    - Relationship of the applicants to the deceased
    - Consent from all other beneficiaries.

UNLIMITED/ PERMANENT GRANTS

- Types
    - Grant of probate
    - Grant of letters of administration with will annexed
    - Grant of probate of proof of oral will
    - Grant of letters of administration intestate
    - Resealing of grant

GRANT OF PROBATE

- This is where the deceased died having **written a will and named the executor.**
- The executor is supposed to apply for the grant of probate unless he refuses or declines to do so.
- The grant of probate confirms the executor's authority to act, the authority itself derives from the will.
- ***Otieno v Ouga:*** Under s 80(1) of the LSA "A grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such." So an executor can perform most of the acs pertaining to his office before the grant of probate because they derive authority from the will and the executor's title dates from the death of the deceased. Once a grant of probate is issued, all the intermediate acts they will have undertaken before it was issued will be validated.
- A grant of probate can only be applied for and issued to an executor appointed under the will. Where a will appoints more than one, grant of probate may be issued to them simultaneously or at different times.

- Any executor who decides not to take out a grant of probate has the right to renounce their right.
- **Forms to fill:**
    - The executor files **Form P&A 78**, which is the **petition**
    - Form **P&A 3**, which is the **affidavit**.
    - The **original will plus two photocopies** of the will.
    - The **original death certificate**
- **Procedure**
    - If all the documents are in order, the file is placed before the judge by the Deputy Registrar.
    - Orders are then given to have the matter advertised in the Kenya gazette, if no objections are raised after 30 days, letters of grant of probate are issued.
    - The grant is issued by court through **Form P&A 45.**
    - Such letters normally have the copy of the will attached. The grant of letters will have three copies of the will attached duly sealed with ribbons.
    - After a period of 6 months, the parties come in to confirm the said grant.
    - A party may apply for confirmation of grant within 3 months.
    - Any accounts should be filed within 6 months after the confirmation of grant.

<u>GRANT OF LETTERS OF ADMINISTRATION WITH WILL ANNEXED</u>

- This is where the deceased **leaves behind a valid will but does not appoint an executor, or the executor is unable or unwilling,** by virtue of having predeceased the deceased, renounced executorship, failed to apply within the time given to them by a citation or are otherwise unwilling or unable.
- A person has no authority in relation to the deceased's estate prior to the grant. And a grant of letters of administration have no retrospective effect (like the grant of probate does).
- **Any of the beneficiaries can apply** for grant of letters of administration with the will annexed.
- **Forms**
    - The executor files form **P&A 79** which is the **petition**.
    - Form **P&A 3** which is the **affidavit**.
    - An **original will** with **2 copies of the will.**
    - **Death certificate.**
- **Procedure**
    - The same as grant of probate.
    - If all the documents are in order, the file is placed before the judge by the Deputy Registrar.

- Orders are then given to have the matter advertised in the Kenya gazette, if no objections are raised after 30 days, letters of grant of probate are issued.
- The grant is issued by court through **Form P&A 43.**
- Such letters normally have the copy of the will attached. The grant of letters will have three copies of the will attached duly sealed with ribbons.
- After a period of 6 months, the parties come in to confirm the said grant.
- A party may apply for confirmation of grant within 3 months.
- Any accounts should be filed within 6 months after the confirmation of grant.

GRANT OF PROBATE OF PROOF OF ORAL WILL

- This has never been examined.
- Where a **person under customary law gives an oral will and dies within 3 months**, the beneficiary can apply for grant of probate of proof of oral will.

GRANT OF LETTERS OF ADMINISTRATION INTESTATE ** MOST IMPORTANT**

- Also referred to as grant of simple administration
- NB for project work, the forms should be part of the annexures of firm work, death certificate, marriage certificate if married. (blank forms but for like chief letter you can have a filled in one)
- This is where a person dies not having written a will or dies leaving behind an invalid will.
- Who can apply? Surviving spouses, children, parents, siblings, half siblings and other relatives up to the 6th degree, the Public Trustee or creditors. Section 66, LSA sets out the order of priority of persons entitled to a grant of letters of administration intestate:
  - Surviving spouses
  - Children
  - Parents
  - Siblings and issue of siblings who predeceased the deceased
  - Half siblings
  - Relatives up to the 6th degree
  - Public Trustee
  - Creditors
- A person has no authority in relation to the deceased's estate prior to the grant. And a grant of letters of administration have no retrospective effect (like the grant of probate does).
- Forms: In general situations the following forms should be filed:
  - **P&A 80**, which is the **petition**

    - **P&A 5,** which is the **affidavit**
    - **P&A 12**, which is the **affidavit of means**
    - **Death certificate**
- Where there is a widow/widower with adult children as survivors, the following forms are filled
    - **P&A 80**, which is the **petition**
    - **P&A 5,** which is the **affidavit**
    - **P&A 12**, which is the **affidavit of means**
    - **Death certificate**
    - **The adult children are required to give consent in writing.**
- Where there is a widow/widower with minor children as survivors, the following forms will be filled
    - **P&A 80**, which is the **petition**
    - **P&A 5,** which is the **affidavit**
    - **P&A 12**, which is the **affidavit of means**
    - **P&A 11** which is the **affidavit of justification of proposed suits**
    - **P&A 57** which is the **guarantee of personal sureties**
    - **Death certificate**
- You don't need to know how to draft a P&A form.
- Confirm about whether a chief's letter is necessary.
- In addition to the documents that were given earlier, identifying yourself as the applicant, what is the relationship, etc. *** confirm this.
- Procedure:
    - The same as grant of probate. **The only difference is that where there is a minor, there must be two persons applying for the grant.** This is because there is a trust created as a result of the deceased's death. This trust is known as a **continuing trust.**
    - If all the documents are in order the file is placed before the judge by the Deputy Registrar.
    - Orders are then given to have the matter advertised in the Kenya gazette, if no objections are raised after 30 days, letters of grant of probate are issued.
    - Such letters normally have the copy of the will attached. The grant of letters will have three copies of the will attached duly sealed with ribbons.
    - After a period of 6 months, the parties come in to confirm the said grant.
    - A party may apply for confirmation of grant within 3 months.
    - Any accounts should be filed within 6 months after the confirmation of grant.
    - **In applying for grant of letters of administration intestate, the total number of persons to apply is 4.**
    - **A grant issued by court is through Form P&A 41.**

Resealing of grant ** ORAL QUESTION, EXAM QUESTION**

- This is hidden somewhere in the project work.
- A grant of representation obtained in Kenya only enables the personal representatives to deal with the deceased's property in Kenya.
- Eg. Tom dies in Kenya, he has property in the UK, in order for the beneficiaries to assess the property in the UK, the grant issued in Kenya will have to be resealed in the UK. This means that Tom's beneficiaries will go through the whole 6 month process, after the grant is confirmed, they'll take it to the UK, have it resealed by a court in the UK. Applies vice versa, someone dies in the UK. Same thing goes for suing and being sued.
- Rule 42, Sub Rule 2, Probate and Administration Rules
- Where a foreigner dies abroad but has property in Kenya, a grant is applied for abroad, it is then brought to the HC of Kenya for resealing. This means the foreign grant is filed and the normal procedure of gazettement for 30 days takes place.
- Where a Kenyan dies in Kenya and has property abroad a grant will be applied for in Kenya and after that grant has been confirmed, it will be taken to the HC abroad for resealment.
- Forms to be filled:
    - Form **P&A 81 or 82**, which are the **petition**. Find out what the difference is and see when 81 applies and when 82.
    - Form **P&A 7**, which is the **affidavit.**
    - **Certified copy of the grant issued by the required country.**
- **Procedure**
    - The grant from the foreign country is filed and placed before a judge.
    - If the judge is satisfied an order for gazettement is issued and if there are no objections within the 30 day notice then a resealed grant is issued by the HC of Kenya and the personal representative can now access the property of the estate.
    - Grant issued by court is Form **P&A 81.**
    - **NB:** Jurisdiction only lies with the HC of Kenya at Nairobi and Mombasa to issue this type of grant.
- ******* Oral and Exam question**: X is suffering from a terminal illness, tells wife and child that he has been diagnosed with Cancer advanced stage. He says, don't be concerned, I have an account in the UK, details xxxxx, this will cater for you when I'm gone. How do you deal with that money above in terms of the estate?
    - ANSWER THIS (This is not about just resealment)

Grant process (Unlimited/Permanent Grants) * ORAL QUESTION**

- The personal representative is going to make the application for the grant and if the registrar is satisfied with the documents, they will place it before the judge who is then going to issue a gazettement order.
- A gazette notice is going to be placed for a period of 30 days inviting objections.
- If there are no objections after 30 days, then a temporary grant is issued.
- If any person has an issue against the estate at this point or the application of the grant, they will file an objection.
- The temporary grant issued is valid for 6 months.
- NB: During these 6 months if a person has an issue against the estate or an issue with regard to the temporary grant, they will file a protest.
- After the expiry of the 6 months, the personal representative comes back to court for confirmation of the temporary grant.
- Within special circumstances, you can apply for confirmation within 3 months, at the court's discretion.
- Once the temporary grant has been confirmed, the personal representative can now distribute the estate.
- NB: If a person has an issue with estate or against the confirmed grant, they can apply for a revocation of the grant.
- OQ: Eg. At what stage does a person protest or revoke a grant?

Terms used in grants

Renunciation

- Both executors and administrators may renounce their right to apply for a grant.
- The renunciation should be in writing signed by the person entitled to the grant or declared orally in court.
- A renunciation order can be made before or after the grant is issued.
- Once the renunciation order has been made, it can only be retracted by an order of the court.
- Renunciation cannot be made by one who has inter meddled in the estate of the deceased.

Consents

- A person who has equal or superior entitlement to apply for a grant has to give consent in writing to a person of equal or inferior entitlement to apply for the grant. (Eg. husband dies, leaves wife and 2 kids, the wife and the kids have equal entitlement, an uncle who wishes to apply for the letter of grant would have an inferior entitlement). (If wife is applying, kids have to give their consent) Confirm if this is only for adult children
- Failure to obtain this consent would be a ground for revocation for any grant issued under Rule 26, Probate & Administration Rules ** confirm

Citations

- A citation is a command to a person entitled to apply for a grant ordering them to act within a specified period to apply for the grant.
- The applicant swears an affidavit asking the registry to issue the citation.
- If there are good grounds the registrar signs the citation which is then served to the person cited.
- The person cited must enter appearance within 15 days of service.
- If the time given to the citee expires, the citor may petition the court to make the grant in their favour.
- Examples of circumstances where citation may be used include
    - Where a person either in intestacy or testacy who has an entitlement to a grant prior to the citor delays or declines to apply for a grant, he/she may be cited to accept or refuse a grant (Often used by cohabitees, eg official wife with one child, cohabitee with 2 kids, only after the grant has been issued can the child of the cohabitee inherit something, so if the wife delays her application of the grant, then the administration of the estate will also be delayed. Period for applying for a grant is usually 1 year, so after a year, the cohabitee can cite the wife, if she does not respond within 15 days, then the cohabitee can petition the court to make the grant in their favour).
    - Where a person with **equal priority** has **refused to give his/her consen**t to the taking of a grant by another with equal priority. (e.g. parents die, three brothers, one refuses to issue his consent for one of the brothers to be appointed as admin, if the refusal has no basis, they can cite him to give his consent).
    - Where a beneficiary has refused to give his consent to the mode of distribution of an estate.
    - Where a purchaser or creditor is owed money by the estate.

Notices

- **Section 67 of the Law of Succession** Act states that no grant of representation other than a limited grant shall be made until there has been published notice of the application for the grant inviting objections within a specified period of not less than 30 days from the date of publication.
- This section clearly states that **apart from limited grants, all grants must be advertised including resealing of grants.**
- The registrar or the judicial officer is required to cause publication of the application in the Kenya gazette. The notice should also be exhibited in a conspicuous place in the courthouse.
- The notice informs the general public of the death of the deceased and also identifies the names of the person seeking representation to the estate.

Objections / Protest

- Once a gazette notice is done, a person who has not applied for a grant may lodge an objection within 30 days of the matter appearing in the Kenya gazette.
- According to Kamau Ag.J in In the Matter of the Estate of Hemed Abdalla Kaniki, only a definite class of people is entitled to bring objection proceedings under section 68 of the Law of Succession Act, the class being of the persons set out in section 66 of the Act as entitled to administer an estate, ie.
    - Surviving spouses
    - Children
    - Parents
    - Siblings and issue of siblings who predeceased the deceased
    - Half siblings
    - Relatives up to the 6th degree
    - Public Trustee
    - Creditors
- The court upon receiving the objection notifies the person applying for a grant about the filing of the objection.
- Another notice is sent to the objector requiring him to file an answer to the petition for grant together with a petition by way of cross application.
- An objector may at any time prior to filing his answer in cross application withdraw his objection by filing in the registry a notice of the withdrawal of the objection and serve the same upon the petitioner. In this event the objection will cease to have effect and the objector shall be liable for any costs or expenses which he may have occasioned the applicant.
- If the objection is not withdrawn directions are taken and the matter is fixed for hearing.
- The objection proceedings are meant to deal with preliminary issues such as whether the applicant is the correct person for the grant.
- The courts will make a finding on the preliminary issues and thereafter administration of the estate proceeds in the normal manner.
- ***Aggrey Makanga Wamira Succession Cause No 89 of 1996***
    - The father of the deceased argued that the petitioner as administrators was not okay as his daughter in law was young and inexperienced ***
    - He also said that she was likely to remarry. He further argued that his granddaughter was just a minor.
    - The court overruled him and said that the widow was suited to be appointed as an administrator and the daughter was also of age.

Rectification

- A party may wish to amend his application before a grant is issued.
- He/She will do this by giving notice to the registrar by way of Form P&A 62. No affidavit is required.
- If it is a simple and minor amendment the registrar will amend without notice to the parties.
- If it is complicated then notice will be given.
- Rule 43 of Probate and Administration Rules provides for the rectification of grants and its procedure.
- Where the holder of the grant seeks pursuant to the provision of section 74 of the Act rectification of an error in the grant as to the names or description of any person or something or as to time and place of death of the deceased or in the case of a limited grant, the purpose for which the grant is named, he shall apply by summons in Form 110 for such rectification through the registry and in the course in which the grant was issued.
- Errors that may be rectified
    - Error in the grant concerning the deceased.
        - ➢ The name of the deceased might have been misspelt.
        - ➢ The status of the deceased misstated.
        - ➢ The date or place of death misstated.
    - Error in the grant
        - ➢ Limited grants may have a wrong description of the property to be administered.
    - Errors as to testators
        - ➢ Alterations and descriptions in names can be made in regard to executors and administrators.
    - Other errors
        - ➢ Official errors
        - ➢ Errors in description or character in which a person applied for a grant.
- Procedure for rectification of grant
    - The applicant will first apply for summons using Form 110.
    - The summons must be filed with an affidavit in Form P&A 13. The registrar may dispense with filing of the affidavit.
    - If he does not, the affidavit must contain such information as to enable the court to deal with the matter. The affidavit should be sworn by the applicant.
    - The registrar is thereafter to cause the summons and the affidavit if any to be placed before the court without delay.
    - The court may either grant the application without the attendance of any person or direct that the application be set down for hearing on notice to the applicant and to such other persons as the court may direct.

Revocation

- A grant of representation may be revoked or annulled at any time by the court of its own motion or on application by an interested party under section 76 of the law of succession act.
- It is important to note that after a grant has been confirmed, no objection can be received, it can only be revoked.
- Grounds for which a grant may be revoked include (s 76 LSA)
    - Proceedings were defective in substance for instance where the will was obtained by fraud or undue influence.
    - Where the grant was obtained by the making of a false statement.
    - Where there has been concealment of material fact to the court for instance, deliberately omitting some beneficiaries from the petition.
    - Where the person to whom the grant was made has failed to confirm it within a year.
    - When there has been lack of diligence in administration of the estate such as failure to provide accounts.
- Procedure
    - The applicant will file Form 107 and 14 in the High Court.
    - Upon receiving the application, the registry sends Form 68 to the administrator notifying him of the revocation application and inviting to file an affidavit to oppose the application.
    - Similarly, Form 70 is sent to the applicant informing him to appear before the judge for directions. The directions are then given after which the matter proceeds for hearing.
    - The court may of its own motion revoke a grant and where it does so it must give notice by way of Form 69 and serve it on all persons concerned.

Caveat

- A restriction placed on a matter by a party who wishes to ensure that they shall receive notice of any application either for the making of a grant or confirming of a grant.
- A caveat is lodged by filing Form 28. Once this is lodged, the registrar will send notice to the caveator informing him of the application for grant or confirmation of grant.

Grant

- After publication in the gazette or upon conclusion of objection proceedings and subsequent publications the court will issue a grant after 30 days.
- A grant simply means a grant of representation, whether testate or intestate.
- Once the grant is issued and signed by a judge the holder of the grant is henceforth the personal representative.

Confirmation of a grant

- After the expiry of 6 months, the holder of the grant should apply to court for confirmation of the grant.
- Confirmation of the grant will empower the distribution of the capital assets.
- NB: Where a grant has been issued for a will Form 108 (Application) and Form 8 (Affidavit) are used.
- Where a grant has been issued for letters of administration with will annexed Form 108 and Form 8 are used for confirmation of grants.
- Where the grant is for letters of administration intestate, Form 108 and Form 9 are used.
- Before confirmation of the grant, Rule 40 states that close relatives of the deceased that he supported must be mentioned in the application.
- The assets of the deceased must also be shown and the mode of distribution of the estate must also be outlined.
- All beneficiaries should give consent to the mode of distribution.
- Once the documents are filed and found to be in order, the registrar will send Form 111 to a caveator warning him of the application for confirmation of grant. This will enable the caveator to take appropriate action.
- In the event that there was no caveat, the registrar will give a hearing date for the application for confirmation on which date the judge after being satisfied with the application will confirm the grant.
- In contested cases such as where there is a caveator or where one of the beneficiaries has refused to consent to the application, he/she will be required to file an affidavit of **protest** detailing the grounds for objection.
- Upon the filing of the affidavit for protest the matter will proceed for hearing during which the applicant seeking confirmation, the protestor and any other interested party will be heard.
- ***The Estate of Mary Gachuru Kabogo Succession Cause No 2830 of 2001***
    - In this case, the court set out the procedure for disposing of protests to confirmation hearings. The court clarified that if the dispute is only over certain properties, then the undisputed properties should be confirmed and the disputed properties go to full hearing.

POWERS AND DUTIES OF PERSONAL REPRESENTATIVES

- The Executor or administrator who has received grant of representation should represent the deceased or be the personal representative of the deceased for all purposes of the grant and all the property of the deceased should vest in him as the personal representative (section 79).

- In exercise of their powers and in the discharge of their duties personal representatives should, according to Kamau Ag. J in ***In the Matter of the Estate of David Murage Muchina*** be afforded a freehand.
- ***In the Matter of the Estate of the late James Shiraku Inyundo***, Kuloba J stated that administrators must be left to administer the estate in the best interests of estate and beneficiaries, unless the administrators were committing wrongs to the estate.

<u>The powers of the personal representatives are set out in section 82 of the Law of Succession Act.</u>

- There is the power to enforce all causes of action that survive the deceased or arise out of his death for his estate. Case law shows that no person has a right to enforce any cause of action which survives the deceased or arises out of his death without a grant of representation.
    - The Court of Appeal in ***Virginia Edith Wambui Otieno vs. Joash Ougo*** stated that an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of inception.
    - In ***Mary Mbeke Ngovu and another vs. Benard Mutinda Mutisya*** held that the plaintiffs in that matter ought to have procured a grant to administer the estate of the deceased before bringing a suit for trespass.
    - Any suit filed by or against personal representatives must name all the personal representatives as parties.
    - Mwera J in ***John Kasyoki Kieti vs. Tabitha Nzivulu Kieti*** held that the plaintiff in that matter had no capacity to sue in matters relating to his father‟s property without first obtaining a grant of letters of administration. In the circumstances his suit was incompetent for lack of capacity.
    - In ***Peter Maundu Mua vs. Leonard Mutunga*** Mwera J held that where a party to a suit dies and the cause of action survives, Order XXIII rule 3(1) of the Civil Procedure Rules requires that the legal representative of the deceased party be made a party in his place: such legal representative should be a person who has obtained a grant of representation making him the personal representative of the deceased. The court found that the wife and son of the deceased were not competent to continue with a suit commenced by the deceased as they could not be considered the legal representatives of the deceased without first obtaining a grant of representation.
    - Where the deceased is survived by minors, a person seeking to file suit on behalf of the estate must comply with section 58 of the Law of Succession Act by applying for the grant, whether full or limited, jointly with other people. In ***Veronicah Mwikali Mwangangi vs. Daniel Kyalo Musyoka*** a suit commenced by

a single legal representative in respect of an intestate survived by minor children was struck out, because the limited grant giving him the authority to act for the estate did not comply with section 58 of the Act, which requires that the grant in those circumstances should be granted to more than personal representatives.

- With respect to grants of probate the will speaks from the date of death, and the plaintiff does not need to have the grant to commence action. Kasango J in ***Lalitaben Kantilal Shah vs. Southern Credit Banking Corporation Ltd Nairobi Milimani*** stated that under section 80(1) of the Act the executor derives his title from the will and the estate vests in him on the testator‟s death and he can do any act before probate, which is a mere authentication of his title.

- There is also the power to sell all or any part of the assets vested in them – immovable property cannot be sold before the confirmation of grant; to assent, after confirmation of grant, to the vesting of property in the beneficiaries;
- The power to appropriate, after confirmation of grant, any of the assets of the estate vested in them (In the Matter of the Estate of Erastus Njoroge Gitau (deceased) .

<u>The duties are set out in section 83 of the Law of Succession Act</u>

- To provide and pay out of the estate expenses of a reasonable funeral for the deceased
- To get in or collect all free property of deceased, inclusive of debts owing to him and moneys payable to his personal representatives by reason of his death
- To pay out, of the estate, all expenses of obtaining the grant and all other reasonable expenses of administration
- To ascertain and pay out of the estate all the debts of the deceased
- To apply for confirmation of grant within six (6) months from date of grant, the representative must produce to court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of the dealings in respect of the estate
- To distribute or retain in trust (for the minor beneficiaries) all assets remaining; and to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account.
- To distribute the estate, after payment of debts and other liabilities, to the correct beneficiaries according to the deceased‟s will or the rules of intestacy where the latter apply.
- To complete the administration of the estate, after the date of confirmation of grant, in respect of all matters other than continuing trusts.

COMPLAINTS AND DEFENCES AGAINST PERSONAL REPS

- Sometimes things go wrong with administration. When this happens the beneficiaries and creditors look up to the personal representatives for a remedy. The law provides avenues for remedies for beneficiaries and creditors who are aggrieved by the conduct of personal representatives (In the Matter of the Estate of the late James Shiraku Inyundo (deceased).

Offences by Personal Representatives

- Section 94 LSA: When a personal representative neglects to get in any asset forming part of the estate in respect of which representation has been granted to him, or misapplies any such asset, or subjects it to loss or damage, he shall, whether or not also guilty of an offence on that account, be liable to make good any loss or damage so occasioned.
- Section 95 (1) LSA: Any personal representative who, as regards the estate in respect of which representation has been granted to him does any of the following is guilty of an offence, and shall be liable to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding one year, or to both such fine and imprisonment.:
    - wilfully or recklessly neglects to get in any asset forming part of the estate, misapplies any such asset, or subjects any such asset to loss or damage; or
    - wilfully fails to produce to the court any such inventory or account as is required by the provisions of paragraphs (e) and (g) of section 83; or
    - wilfully or recklessly produces any such inventory or account which is false in any material particular; or
    - knowing or having reason to believe that the estate will prove to be insolvent, continues to administer it without petitioning for administration thereof in bankruptcy.
- Section 95 (2) LSA: Any personal representative who, as regards the estate in respect of which representation has been granted to him if at any time there is a continuing trust and he is the sole surviving administrator, wilfully fails to apply to the court within three months in accordance with section 75A for the appointment of further administrators shall be guilty of an offence and shall be liable to a fine not exceeding five thousand shillings.

Remedies through the administration proceedings

- These are provided for under Order 37, Rule 1 of the Civil Procedure Rules, 2010.
- Administration proceedings are intended to ensure that the administration of an estate is properly done.
- Administration proceedings arise out of dispute over the conduct of the PR in administering the estate.
- The proceedings may be commenced by the beneficiaries or creditors unhappy with the PR's conduct over the administration of the estate.

- **They may also be started by PRs who encounter difficulties in administration of the estate, particularly where they are unaware or unsure of the legal position and wish to protect themselves from liability.
- The action is commenced by way of originating summons.
- Where the action is brought by beneficiaries or creditors against the PR on grounds of wrongdoing, the court will normally make an order directing that accounts be drawn up and certain enquiries be made. This could cover:
    - Accounts of property which forms part of the residue of the estate.
    - Accounts of the deceased's debts.
    - Funeral and testamentary expenses.
    - An enquiry as to which part of the estate has not been collected or disposed of and whether such property is subject to any encumbrance.
- Once the accounts and enquiries have been completed, the courts will order payment of any debts, distribution of the assets to the beneficiaries and other relevant orders.
- PRs often seek specific relief to shield them from liability. It is sought in most cases where the PR is unable to carry out administration of the estate or experiences difficulties.
- The specific relief may cover:
    - Construction of wills
    - Determination of beneficiaries
    - Orders directed at PRs requiring them to make accounts.
    - Where there is a dispute as to whether they acted for the benefit of the estate.
    - Orders directing the PR to perform or refrain from performing a particular act.

<u>Action against the Personal Representative</u>

- The personal representatives must preserve and administer an estate with diligence (Re Tankard (1942) Ch 69).
- They must also administer an estate in accordance with the law.
- If a personal representative, in his office as personal representative, commits a breach of duty that results in a loss to the beneficiaries or creditors of the estate, he commits a devastavit (wasting of the assets) for which he will be personally liable. It does not matter that the breach of duty is committed innocently, negligently or fraudulently.
- It has already been explained that there are important differences between personal representatives and trustees, but that it is sometimes difficult to distinguish between when a personal representative is acting as a personal representative and when he is acting as a trustee. It is important to distinguish between a breach of trust and a devastavit. Consequently, where the executors are appointed trustees of trusts arising from a will, it may be important to know in which capacity they are acting.
- Devastavit may be classified into three.

    - Firstly, it relates to misappropriation of assets of the estate by a personal representative, such as where the personal representative uses the estate to pay personal debts or converts the assets to their own use.
    - Secondly, maladministration of the assets of the estate, where the personal representatives distribute the estate to the wrong beneficiaries or pay the wrong creditors, where they incur unjustified expenses in the administration of the estate by selling them at under value or paying debts they are not bound to pay.
    - It will also apply in cases of failure by personal representatives to safeguard the assets of the estate so that they are lost or destroyed through carelessness.
- Where the personal representatives fail to settle amounts due to beneficiaries or at any rate fail to comply with court orders which require them to make certain payments to beneficiaries, the beneficiaries rely on section 47 of the Law of Succession Act and rule 73 of the Probate and Administration Rules, where the court can in exercise of its inherent powers to compel compliance.

<u>Defences available to Personal Representatives</u>

- Where a Personal Representative is personally liable for a devastavit (wasting of the estate), he must replace the loss caused to the estate unless he can avail himself a defence (s 94 LSA).
- There are several defences that may shield the PR:

1. **Defence under s 60 of the Trustees Act**
    - This provision allows the court discretion to relieve a PR, wholly or partially, where they have acted honestly and reasonably and in the opinion of the court ought to be excused.
    - Under this, each case relies on its own facts.
2. **Defence under s 29 of the Trustees Act**
    - This provision protects the PR from liability to a beneficiary or creditor of whose existence they were not aware of.
    - The PR must however have complied with the provisions of s 28 of the Trustee Act concerning the placing of certain statutory advertisements.
3. **Defence of acquaintance in devastavit**
    - This is a common law defence which provides that if a creditor or beneficiary is an accomplice in the devastavit, the PR will not be liable to him.
    - The PR however has the burden of proving that the beneficiary or creditor was fully aware of the devastavit.
4. **Defences under the Limitations of Actions Act**
    - Limitation of Actions Act is to prevent the agitation of stale claims which by reason of the lapse of time would be hard to defend.

Substitution or removal of a PR

- The law of succession act provides for two instances for the removal or substitution of a PR which are under s 71 and s 76 of the LSA.
- Section 71 caters for confirmation of grants.
- Under section 71(2) (b) the court, at the hearing of the application for grant, if not satisfied that the grant was rightly made to the personal representative or that the personal representative was administering or would administer the estate according to the law, may decline to confirm the same and instead issue a confirmed grant of letters in respect of the estate or the unadministered part of the estate to someone else (look up cases on confirmation of grants with respect to this point).
- Under section 71(2) (c) the court may order a personal representative to deliver or transfer all the assets of the estate under his control to the holder of a confirmed grant issued by another court (look up relevant case law on this point from among confirmation decisions).
- The court exercises its discretion under section 71 either on its own motion or upon prompting by a beneficiary or any person who objects to the confirmation of the grant (rules 40(6) (7) (8) and 41(1) of the Probate and Administration Rules). Under rule 41(7) of the Probate and Administration Rules, beneficiaries and creditors have a right to appear and make representations before the court makes final orders relating to confirmation of the grant.
- The revocation or annulment of a grant under section 76 of the Law of Succession Act usually results in the removal or substitution of the personal representatives.
- Although the court may annul a grant on its own motion, in most cases, it acts on the prompting of either a beneficiary or creditor or any person interested in the estate (rule 44(1) of the Probate and Administration Rules).
- The application for revocation may be founded on purely technical grounds (section 76(a) (b) (c) and (e) of the Law of Succession Act), or on grounds related to the misconduct of the personal representatives or general maladministration of the estate by the personal representatives (section 76(d) of the Law of Succession Act). Upon ordering the revocation of the grant the court may issue a confirmed grant to someone else (look for case law on revocation).

** ¾ of the probate exam will come from second term

Usually a 10 mark question

ESTATE ACCOUNTS

- These are accounts kept by executors, administrators and trustees.
- It is a system of keeping records by the personal representatives (executor, administrator or trustee).
- Personal representatives are under an obligation to administer the property in a particular way. The trust accounts must be proper, faithful and accurate.
- The personal representative stands in a fiduciary relationship with relation to the estate and the beneficiaries. If they cannot keep the accounts themselves, then they must employ or avail someone to keep the accounts.
- If a trustee, eg. an advocate, is a trustee for a number of trusts, there must be a separate account for each trust.
- Trust accounts must be up to date because beneficiaries are entitled to require an account of the trust at any time.
- In keeping of the accounts, the obligation of the trustee does not arise only when the estate has assets and liabilities, there is an obligation to render an account even after the estate has been distributed. This is because any claim that may be made on the trust by a beneficiary may so be made 6 years after termination of the trust.

Primary objectives of Estate Accounts

- To ensure that a detailed record of the affairs of the estate is maintained.
- To give information on the estate to the beneficiaries.

Requirements of a Estate Account System

- Must contain a list
- Must give a complete history of all subsequent transactions of both capital and income.
- Must provide a ready means of ascertaining the position of the trust at any time.
- Must show how the estate funds have been distributed.
- Must be as simple as possible.

Rights of a beneficiary

- To inspect the accounts and any other documents pertaining to the trust.
- The inspection may be done personally or through the beneficiary's agents.
- The right to to take copies of ll recorded statements relating to the account but must make the necessary payments **
- The right to investigate the account and make any inquiries regarding the account.
- Entitled to full, accurate and regular information with regard to operations of the account. If any investments are made, the beneficiaries have a right to know the nature of such investments.

- Entitled to seek the opinion of a third party, eg. an advocate regarding the operations of the trust.
- When a personal representative retires or ceases to be a PR, they must hand over all books and accounts to their successor and beneficiaries of the estate have a right to oversee such a hanodover. They have the right to receive accounts in good faith which reflect the PR's obligations in relation to the estate. The accounts should be complete and accurate.

Form of the Estate Account

- Once a personal representative accepts their appointment, their first obligation is to gather information as to the state of the estate as at the date of commencement of their duty.
- Thereafter the trustee/PR must administer the estate in accordance with the law and subsequently distribute the estate to the beneficiaries.
- All accounts prepared by the PR are contained in the estate book. This book contains all the information relating to the estate from inception to distribution.
- The contents of the estate book are intended to inform the beneficiaries and the PR about the position of the estate at any given time.

The Estate Book

- The estate book will contain the following items (these items are referred to as trust accounts)
    1. Documents
    2. Memorandum
    3. Schedule of assets
    4. Schedule of liabilities
    5. Cash accounts
    6. Income accounts
    7. Special income accounts
    8. Investments accounts
    9. Apportionment accounts
    10. Distribution accounts

*** The way trust accounts is usually asked: You have been appointed as administrator, before you distribute, a son comes and says they want to open a law firm and wants some money, reflect that transaction in the trust account.

1. Documents

- All documents relating to the estate must be properly kept and available to the beneficiaries and other interested parties.
- The documents will be the basis of any action taken by the PR and enable him to fulfill the mandate and obligations imposed upon him by the law.
- Examples are
    - The will
    - Any codicil
    - Grant of probate or letters of administration
    - Expert opinions
    - Gazette notices
    - Relevant certificates, eg. death certificate, birth certificate, etc.
    - Any court order
- The aim of keeping documents is that information contained in the documents section of the estate book must be complete and accurate.

2. Memorandum

- The info contained here is of a background nature
- Examples are
    - Details of the deceased
    - Date and place of death
    - Details of the beneficiaries and how they are related to the deceased.
- Objective of the memorandum is to achieve completeness and accuracy.

ESTATE OF M (DECEASED)
MEMORANDUM

NO	DATE	PARTICULARS	REF
1	30/11/2019	On 30th November 2019, Mr M died in Nairobi, domiciled in Kenya, leaving a will dated 10th January 2019.	Certificate of death Will
2	2/07/2020	Deceased was survived by the following people 1. Mrs M (Widow) 2. Son A 3. Daughter B	Certificate of marriage Birth certificate
3	20/12/2020	On 20th December 2020, grant of probate High Court in Nairobi in Succession Cause No 100 of 2019 granted to Executor.	Grant of probate

4	23/01/2021	On 19th January 2021, paid off the balance of the loan at KCB Moi Avenue branch, Nairobi in settlement of the liability recorded in the schedule of liabilities.	See schedule of liabilities
5		On 14 March 2021, closed off the investment accounts, apportionment accounts and distribution accounts having finally distributed the estate to the beneficiaries and having acquired from each of the beneficiaries appropriate receipts and executed letters accounts	Folio for reference for receipt of letters of discharge
6		Having finally closed off all the accounts, the responsibilities of the executor terminates and the records are duly closed.	

3. Schedule of assets

- It records
    - All assets belonging to the deceased at the time of their death, eg. land, chattels, cash, movable assets (motor vehicles, shares, bonds, bills, negotiable instruments, etc.
    - All assets that come into the estate in the course of management or administration of the estate.
- The aim is to ensure that all assets are recorded and their true value given.

ESTATE OF M (DECEASED)
SCHEDULE OF ASSETS

NO	DATE	PARTICULARS	CASH ACCOUNT	REF
1	1/1/96	Freehold parcel of land LR No …….. situated in Nairobi, 2 acres.		Title Deed
2	1/1/96	1000 ordinary shares in ABC Ltd of per value Kshs 20		Share certificate

3	1/1/96	Motor vehicle make P/U Registration No…….		Log book
4	1/1/96	Freehold parcel of land LR No …… situated in Taita Taveta, with 20o coffee bushes.		Title Deed
7	1/1/96	Account No …… at KCB Moi Avenue branch with Kshs 750,000	Opening balance	
8	1/1/96	Cash in hand Kshs 100,000		
16	11/3/96	Collected Kshs 40,000 from Mr W, a debtor of the deceased, deposited at Account No …… at KCB Moi Avenue branch		
20	15/4/96	Paid off the tenant for the first installment of Kshs 35,000		
70		In accordance with the will, freehold in Taita Taveta divided between A, B & C in equal proportion.		

4. Schedule of liabilities

- Also prepared by the trustees upon the death of the testator. It lists all liabilities that may be identified by the trustee as owing by the deceased.
- During the administration of the trust, new liabilities may arise and old ones may be settled, these changes must be reflected in the schedule of liabilities.
- At the end of every trustee's year the schedules of assets and liabilities must be brought up to date by taking into account any *motors in them and the balances carried forward to the subsequent year.

- NB; the lists of assets and liabilities do not in themselves indicate that the trustee has either acquired possession of the assets or has accepted the validity of the listed liabilities. The lists are merely a recognition of their existence, ie of the claim and the asset.
- The legal responsibilities accrue to the trustee, executor, or administrator upon the happening of a specific event to be recorded in the memo.

NO	DATE	PARTICULARS	AMOUNT	CASH ACCOUNT	REF
1	14/4/95	Liabilities as at date of death, loan from EABS mortgaged on LR No …. Dated 1/2/89, interest payable at 16% ½ yearly.	300,000		Charge document Letter of offer
2	30/4/95	Proceeds from life insurance B. Life Policy No ….	1.2M		
3	24/6/95	Loan account at KCB secured on Motor Vehicle ….. Chattel mortgage dated 01/6/93 interest payable at 12% monthly	87,500		
10	12/8/95	Paid off Dr Shah's entire medical bill	450,000		Invoice from hospital
14	1/1/96	Paid off part of the loan owing to EABS	150,000		Explanation

5. Cash accounts

- All the cash transactions of the estate are recorded here.
- Cash balances received by the PR at the date of death or taking appointment are debited in the cash account, followed by cash receipts, whether from sale of assets or accrued income.

- Payments or expenses are recorded similarly on the credit side.
- The balances in the hands of the PR at any particular time are ascertained by totalling the debits and credits and getting the difference.
- On the completion of administration, any cash balance is handed over to the residuary legatee and the entry of this event is on the credit side automatically closes the cash account.
- The cash balance is however posted to the distribution account.
- Unlike the schedule of assets and liabilities the cash account automatically gives rise to legal assets and liabilities for the trustee.
- A debit entry in the cash account is an acknowledgement by the trustee that he has received and is liable for the cash received as recorded.
- Any credit entry is a statement that the trustee has applied the funds of the trust in accordance with his legal obligations.

ESTATE OF M (DECEASED)
CASH ACCOUNT

D - Received **C - Used**

NO	DATE	PARTICULARS OF RECEIPT	AMOUNT	REF	NO	DATE	PARTICULARS OF PAYMENT	AMOUNT	REF
1	1/2/95	Assets Cash in Hand		Schedule of assets	**1**	1/2/95	Liability Payment of outstanding doctor's fees	115,000	Schedule of assets
2		Proceeds from life insurance BA Life Policy No…..	1.2M	Schedule of assets	**2**		Income payment to the tenant for life for monthly rent	Kshs 15,000	Schedule of assets
3		Income Quarterly rent in relation to Hse No …. on LR No …..	60,000	Schedule of asseets	**3**		Advancement to A, a beneficiary		Schedule of assets
4		Liability	10,000						

		Borrowing from ABC to pay medical expenses							
5		Cash at Delphis Bank Current A/C no …..							
6		Capital Proceeds from sale of commercial plot No	125,000						

6. Income accounts

- In relation to matters of an estate, the tenant for life is entitled to income whereas the remainderman is entitled to the capital of the estate.
- The Income Account will record payments made to the tenant for life and the residue in the cash account is distributed to the remainderman.
- The tenant for life is not entitled to the distribution of the capital residue in the cash account.
- In preparing the income account, it will be necessary for the PR to record the entries in the apportionment account.
- Records cash transactions affecting the property, the subject of a life interest, otherwise called a life tenancy.
- It is a specialised cash account limited to the records of receipts that are of an income nature.
- It is supplemental to the cash account, and its format is therefore the same as that of the cash account.
- NB: Only necessary if you have beneficiaries of more than one type, so if both surviving spouse (tenant or life) and children (remainderman) then it is necessary. If only children (remainderman), then not applicable.
- Entry into the Income Account serves two purposes for the PP
    - It is an admission by the PR that he recognises his liability to the tenant for life.
    - It is a record of payment made to the tenant for life and is therefore evidence of discharge of their liability to the tenant for life.

ESTATE OF M (DECEASED)
INCOME ACCOUNT

NO	DATE	PARTICULARS OF RECEIPT	AMOUNT	REF	NO	DATE	PARTICULARS OF PAYMENT	AMOUNT	REF
1	1/2/95	Payments of first installments of quarterly payments on house rented on LR No….	60,000	Schedule of assets Cash account	**1**	1/2/95	Rates	50,000	Schedule of assets Cash account
2		Payment of portion of dividends received from United Farmers Limited for the year ending 31/12/94	8,500	Schedule of assets Cash account	**2**		Payment to tenants for life	100,000	Schedule of assets Cash account
					3		Repairs	20,000	Schedule of assets Cash account

7. Special income accounts

- This is in respect of specific income meant for a beneficiary other than the tenant for life.
- It applies in cases where a testator assigns the income from particular assets to a specific person or class of persons, other than the tenant for life.
- This account records the income that is the specific entitlement of a particular beneficiary as may have been stipulated by the deceased.
- A testator may make a specific provision for income to be paid to someone in addition to the tenant for life and therefore all payment made to such a person would be recorded in a special income account.

8. Investments accounts

- Under common law, a PR is only under duty to govern the estate funds as received.
- The duties may be defined by a will and in cases of intestacy, defined by law.
- Overtime the PR's role has gone beyond stewardship to include application of the estate funds to enhance the benefit of the beneficiaries, both tenant for life and remainderman.
- Section 4 of the Trustees Act Cap 167 provides for the authorised investments that PR can make.
- They may be categorised into 2 broad types
    - Fixed interest investments:
        - A security which under its term of issue bears a fixed rate of interest.
        - A mortgage of immovable property
        - A deposit whether fixed term or otherwise with a bank or financial institution.
    - Wider range investments
        - An investment other than a fixed interest investment.
- Section 4 shows the list of authorised fixed interest investments, eg.
    - Any security issued by Kenya Railways
    - Any security or loan to the Industrial Development Bank Limited
    - The purchase of any immovable property for an estate in fee simple or for a term of years of which not less than forty years.
- Authorised wider range investments
    - Any security the price of which is quoted or a recognised stock exchange in Kenya. Must be a registered company under the Companies Act. whose total issued and paid-up share capital is not less than ten million shillings
    - Any units, or other shares of the investments subject to the trusts, of a unit trust within the meaning of the Unit Trusts Act (Cap. 521) and registered under section 7 of that Act.
    - Any shares of a building society.

Operation of investments

- When a PR decides to invest estate funds, they must divide the investments into 2. Rule 3 of the schedule to the Trust Act provides that:
- A PR may not make or retain any wider range security unless the estate funds have been divided into 2 parts referred to as the fix interest part and the wider range part with the parts being equal in value at the time of division.
- Where such a division has been made, no subsequent division of the estate funds shall be made from one part of the estate fund to the other unless,
    - The transfer is authorised or required by the provisions of the schedule.
    - A compensating transfer is made at the same time.

- These requirements are intended to ensure that the investments made by the PR are safe and that they afford a fair and reasonable benefit to both the tenant for life and the remainder man.
- Fixed interest securities are primarily attractive to the remainderman because of the guarantee given to their value.
- Wider rage securities are primarily attractive to the tenant for life because of the high interest returns, but they are also attractive to the remainderman because of their long term appreciation.

ESTATE OF M (DECEASED)
INVESTMENT ACCOUNT
FIXED INTEREST SECURITIES

NO	DATE	PARTICULARS	AMOUNT	REFERENCE
1	14/03/2021	Fixed deposit in KCB Account, 1 year, fixed interest	2,000,000	Cash memorandum

WIDER RANGE SECURITIES

Number	Date	Particulars	Amount	Reference
1	14/03/2021	Shares	40,000	Cash memorandum

9. Apportionment Account

- Apportionment refers to the need to distribute the proceeds between the various beneficiaries of the estate who have different entitlements under law.
- Apportionment can be analysed under two categories

Statutory apportionment

- This is the allocation of income accruing to the estate to two or more beneficiaries on the basis of time.
- Where there is only one beneficiary, the question of apportionment does not arise.
- Similarly, where there is no dispute as to whether income relates to the period prior to or after the death of the deceased, there will be no need for an apportionment account.

- The personal representative must address two questions in this regard
    - To what period of time does the income relate? (ie, when did it accrue?)
    - When was the income actually received by the estate?
- Once these questions have been answered, the following guidelines apply to apportionment:
- All income received prior to the testator's death will be treated as capital income, irrespective of the period to which it relates. Eg. if the deceased had entered into a tenancy agreement in relation to some property forming part of the estate, for the period of 1st January 2019 to 1st January 2020, at a monthly rent of 10,000 payable in full advance and the money was received on 1st January 2019 and the deceased died on 1st January 2020. All that would be treated as capital income.
    - Money accruing to the estate prior to the deceased's death is treated as capital irrespective of when the cash is actually received.
    - Any money that was due to a person before they died, irrespective of when it is received is capital.
    - Capital remainderman (children), income - tenant for life (spouse).
- Example: Tom enters into a lease agreement covering the period of 1st Jan 2019 to 31st Jan 2020. He agrees with Juma, the lessee, that the monthly rent payable will be Kshs 10,000 per month. Onyango dies in an accident on 4th Jan 2020 and he had appointed you as executor of his will. How do you apportion income in the following situations?
    i. Juma had paid 6 months rent in advance in January 2019. (ie, before the death) The 6 months rent would be considered as capital to go to the remainderman.
    ii. The lease only provided for payment of 1 months rent in advance. All the money received prior to the testator's death (ie. up to 4th Jan) would be treated as capital. The fact that the lease only provided for 1 months rent in advance does not change that.
    iii. 1 months rent was payable in advance, but no rent had been paid at the time of the testator's death. The entire rent is paid on 31st March 2020. This money will be divided into two, all the money from 1st Jan 2019 to 31st Jan 2020 will be treated as capital, then money received from 1st Feb 2020 (ie. after the lease agreement) to 31st March 2020 it will be treated as income.
    iv. The lease agreement is silent as to the time of payment of monthly rent and no payment has been made to date. If the lease agreement is valid, when that money is paid for the period of the lease agreement, it will still be treated as capital. Any money coming after the lease period time will be treated as income.

Equitable apportionment

- Courts of equity have stated that where statutory apportionment does not achieve a fair distribution, equity may intervene to achieve a fair apportionment

- These rules attempt to interpret the best wishes of the deceased that may not have been expressly provided in the instrument appointing the Personal Representative.
- Hasn't been examined.

10. Distribution account

- The personal representative's role:
    i. Secure assets and establish liabilities
    ii. Administer trust funds efficiently and lawfully.
    iii. Distribute the deceased's estate to legitimate beneficiaries in accordance with the applicable law (pay all liabilities and distribute the balance to the rightful beneficiaries).
- Factors to consider:
    - Under s 24 Trustees Act, the personal representative is at liberty to exercise the power of advancement of any part of the estate to any of the remaindermen so long as this will be taken into account at the time of distributing the net estate. This is a statutory recognition of the doctrine of hotchpot. This is an accounting method of distributing properties to persons taking into account property that you had disposed of to them earlier.
    - All accounts in the estate book should be closed and the balances brought to the distribution account.
    - Establish the authenticity of each of the claims and compute their respective entitlements in accordance with the law.
    - The personal representative will seek to have the beneficiaries written agreement on the mode of distribution of the estate. Eg. The beneficiaries may agree to share out the estate in specie and any shortfalls or surpluses of any beneficiary to be offset in cash. (In specie: 3 children, both parents die, they leave a house worth 10M, a car worth 5M and apartments worth 15M, total of 30. To achieve a fair distribution, all the estates are supposed to be sold, liabilities paid then the money is divided equally. One child says they want to take the apartments as they are, this is what is referred to as in specie. They would need to pay 5M back into the estate, since their share is 10 and the apartments are worth 15).

* NB: Trust accounts is a classic resit question, so there is likely going to be at least one trust account question.