SECTION 2(3) OF THE WILLS ACT 7 OF 1953: A PRACTICAL PROBLEM IN LITIGATION

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Summary

When considering applications in terms of section 2(3) of the *Wills Act* 7 of 1953, one is confronted with the practical problem that a document may be accepted as a will in terms of section 2(3) but from the facts it may appear that the deceased may not have had the necessary testamentary capacity or free will to make a will. One option to approach this problem would be for the respondent in a section 2(3) application to bring a counter-application on the grounds of the deceased's lack of capacity or his lack of free will. Another option would be to consider the deceased's capacity before considering the section 2(3) requirements, but one cannot consider capacity before one has a valid will, and the court's interpretation of section 2(3) in *Bekker v Naudé* 2003 5 SA 173 (CC) prevents this route. A third option would be for the court to *mero motu* consider the deceased's capacity to make a will when faced with a section 2(3) application. This approach would be in accordance with public policy. If all of these approaches are unsatisfactory, the legislature should consider an amendment to the Act.

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