

THE FORMALITIES FOR A VALID WILL PRACTICAL PROBLEMS

CAPE TOWN

6 SEPTEMBER 2012

Section 2(1)(a)

No will executed on or after 1 January 1954 shall be valid unless-

- (i) the will is **signed at the end thereof** by the testator or by some other person in his presence and by his direction; and
 - (ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, **in the presence of two or more competent witnesses** present at the same time; and
 - (iii) such **witnesses attest and sign** the will **in the presence of the testator and of each other** and, if the will is signed by such other person, in the presence also of such other person; and
 - (iv) if the will consists of more than one page, **each page other than the page on which it ends, is also so signed** by the testator or by such other person anywhere on the page;
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Section 2(1)(a)

(v) if the will is signed by the testator by the **making of a mark** or by some other person in the presence and by the direction of the testator, a **commissioner of oaths certifies** that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator, and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies.

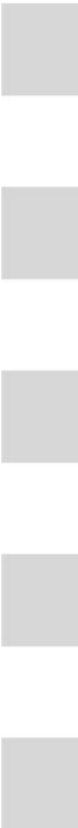
Provided that –

(aa) the will is **signed in the presence of the commissioner** of oaths in terms of subparagraphs (i), (iii) and (iv) and the certificate concerned is made as soon as possible after the will has been so signed; and

Section 2(1)(a)

(Provided)

- (bb) if the testator dies after the will has been signed in terms of subparagraphs (i), (iii) and (iv) but before the commissioner of oaths has made the certificate concerned, the commissioner of oaths shall as soon **as possible thereafter** make or complete his certificate, and sign each page of the will, excluding the page on which his certificate appears.



Section 2(1)(b)

No amendment made in a will executed on or after the said date and made after the execution thereof shall be valid unless:-

- (i) the amendment is identified by the **signature of the testator** or by the signature of some other person made in his presence and by his direction; and
 - (ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, **in the presence of two or more competent witnesses present at the same time**; and
 - (iii) the amendment is further **identified by the signatures of such witnesses made in the presence of the testator and of each other** and, if the amendment has been identified by the signature of such other person, in the presence also of such other person; and
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Section 2(1)(b)

(iv) if the amendment is identified by the **mark of the testator** or the signature of some other person made in his presence and by his direction, the **commissioner of oaths certified** on the will that he has satisfied himself as to the identity of the testator and that the amendments has been made by or at the request of the testator:

Provided that:-

- (aa) the amendment is identified **in the presence of the commissioner of oaths** in terms of subparagraphs (i) and (iii) and the **certificate concerned is made as soon as possible after the** amendment has been so identified; and
 - (bb) if the testator dies after the amendment has been identified in terms of subparagraphs (i) and (iii) but before the commissioner of oaths has made the certificate concerned, the commissioner of oaths shall **as soon as possible thereafter** make or complete his certificate.
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Other relevant sections

Section 2(2)

Any amendment made in a will executed after the said date shall for the purposes of subsection (1) be presumed, unless the contrary is provided, to have been made after the will was executed.

Section 4A

(1) Any person who attests and signs a will as a **witness**, or who signs a will in the presence and by direction of the testator or who **writes out** the will or any part thereof in his own handwriting, and the person who is the **spouse** of such person at the time of the execution of the will, shall be **disqualified** from receiving any benefit from that will.

Section 4A

- (2) **Notwithstanding** the provisions of subsection (1) –
- (a) A **court** may declare a person or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court was satisfied that that person or his spouse **did not defraud or unduly influence** the testator in the execution of the will;
 - (b) A person or his spouse who in terms of the law relating to **intestate succession** would have been entitled to inherit from the testator if that testator has dies intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse receive, shall not exceed the value of the share to which that person or his spouse would have been entitled in terms of the law relating to intestate succession;
 - (c) A person or his spouse who attested and signed a will as a witness shall not be thus disqualified from receiving a benefit from that will if the will concerned had been attested and signed by **at least two other competent witnesses** who will not receive any benefit form the will concerned.
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Section 1 Definitions

Amendment means a deletion, addition, alteration of interlineation

Deletion means a deletion, cancellation or obliteration in whatever manner effected, excluding a deletion, cancellation or obliteration that contemplates the revocation of the entire will

Sign includes the making of initials and, only in the case of a testator, the making of a mark, and “signature” has a corresponding meaning

Will includes a codicil and any other testamentary writing

Execute?

What happens in practice?

- Client signs with combination of full signature and initials
 - Not all pages are signed
 - Incomplete will is returned (missing pages)
 - Amendments not signed properly or at all
 - Only one witness signs
 - One person signs as witness in the presence of the testator, the other witness signs later (not in testator's presence)
 - Heir (or spouse) signs as witness
 - Heir writes out changes on the will
 - Signatures appear to be different on different pages
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What happens in practice?

- Testator signs testatrix's will and vice versa
 - Testator signs will in foreign country – not according to rules
 - Commissioner of Oaths required but wills drafter not advised – incorrect certificate
 - Commissioner of Oaths signs as witness
 - Will signed by thumbprint or mark, but no certificate
 - Witness signs with thumbprint or mark
 - Not clear whether initial or mark
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Examples

Husband made handwritten alteration to wife's will

Disqualified from inheriting more than intestate portion

Husband wrote out will of spouse – she did not sign

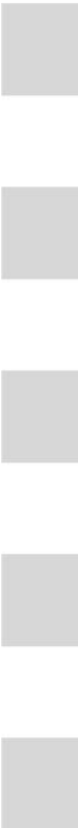
Will not accepted as valid will

Daughter-in-law signed as witness – husband is sole heir

Court application pending

Section 2(3)

If a **court** is satisfied that a document or the amendment of a document drafted or executed by a person who has died since the drafting or execution thereof, was **intended to be his will or an amendment** of his will, the court shall order the Master to accept that document, or that document as amended, for the purposes of the Administration of Estates Act 1965 (Act no. 66 of 1965), as a will, although it does not comply with all the formalities for the execution or amendment of wills referred to in subsection (1).



MacDonald & Others v The Master and Others 2002 (5) SA 64 (O)

Electronic will accepted as will

De Rezke v Maras and Others 2003 (6) SA 676 (C)

Typed document with instruction to attorney to draft a will, signed by client.

Not accepted as a will – not proved that document was intended to be client's will

Smith v Parsons [2010] 4 All SA 74 (SCA)

Written suicide note.

Court order Master to accept it as amendment to will.

Van der Merwe v Master of the High Court & Another [2011] 1 All SA 298 (SCA)

Unsigned document declared as a will.

SM & Others v KNM & Another (2011) JOL 27744 (GSJ)

Will application form signed but will not signed.

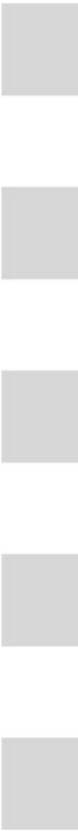
Court ruled that deceased intended it to be her will.

H & Others v M & Another (2012) JOL 29002 (GNP)

Copy of will declared to be last will.

Taylor and Others v Taylor and Others 2012 (3) SA 219

Deceased signed letter of wishes which differed materially from will.
Court did not accept it as valid will but merely guidelines.



Costs

Application to High Court

If minor beneficiaries, curator *ad litem* may be appointed

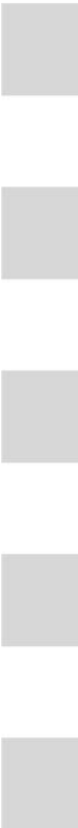
Usually payable by estate

Delay in administration of estate

Husband wrote out spouse's will -19 months

Husband wrote alteration on spouse's will - 12 months

Daughter-in-law signed as witness - already 5 months, no court date yet



Questions?

