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Your will - a legacy of love or a deluge of destruction?

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***A good Will is not that it will stand up in court,
but that it will not need to go to court at all***



On 1 June 2012 five judges of the Supreme Court of Appeal said:

"It is a never-ending source of amazement that so many people rely on untrained advisors when preparing their wills, one of the most important documents they are ever likely to sign. This is by no means a recent phenomena

...the courts continue all too often to be called on to deal with disputed wills which are the product of shoddy drafting or incompetent advice"

(Raubenheimer v Raubenheimer (560/2011) [2012] ZASCA 97 (1June 2012))

And the estate goes to

●●● my Chihuahua!



Trouble

Annie's birthday fell on Christmas day. She confided in a friend that she felt cheated out of a real birthday. She was pleasantly surprised to be included in the friend's Will. As part of his last wishes he left her his own birthday of November 13!



Trying to control the future from the grave



'As a long believer in reincarnation I hereby direct that my estate be vested in the administrators appointed by this Will, to be administered until my return to earth'

Myths

- South Africans die with or without a Will
- Dying without a Will complicates and delays the administration of an estate
- If you do NOT have a Will your estate is paid to the State
- Wills are for the DYING



Too late ...

- You really meant to get around to updating your will after your divorce ... the birth of your child ... your big move ... the start of your now-blossoming business, but you just haven't found the time. The right time is now
- One of the most common mistakes people make when considering a Will is assuming that their estates are not worth enough to warrant a Will. We work so hard to accumulate a *nest-egg* for our near and dear ones when we are no longer here to provide for them but leave the distribution of one's hard-earned wealth when it really counts, to chance
- The truth is, even though certain property is not in your estate, it still may be dutiable. Assets such as life insurance proceeds, accrual claims, foreign assets, usufructs and fiduciary interests are included in your estate for the calculation of estate duty

The Will

- You have spent your life accumulating a ***nest egg*** to ensure that your near and dear ones may be cared for when you are no longer here
- You have meticulously attended to your financial affairs during your lifetime
- Your Will is the document that:
 - gives dignity to your financial affairs; and
 - determines the orderly distribution of your estate,when you are no longer here to do so

- Formal requirements
- The rescue provision
- Unconstitutional, immoral or vague clauses
- Parties excluded from benefiting
- Renunciation by descendants
- Class of beneficiary
- Failure to update Will (divorce, change of status)
- Failure to locate Will
- Jus accrescendi
- Word alert
- More specific – less dynamic
- Golden rule of interpretation
- Collation
- Funeral directions
- Living Wills

A Will is a letter of gratitude and should leave a legacy of love

Wills Act 7 of 1953

Who can make a will

- Anyone who is 16 years or older unless at the time of making the Will he is mentally incapable of appreciating the consequence of his actions **(Section 4)**

Who can witness a will

- Anyone who is 14 years or older who at the time he witnesses the Will is not incompetent to give evidence in a court of law
- A beneficiary named in a Will should not sign as a witness, as he *may* be disqualified from receiving any benefit from the Will. The Will however remains valid **(Section 4A.(1))**
- **"Benefit"** is not limited to the nomination as an heir or legatee but includes nomination as executor, trustee or guardian **(Section 4A.(3))**

The formal requirements to validate a Will



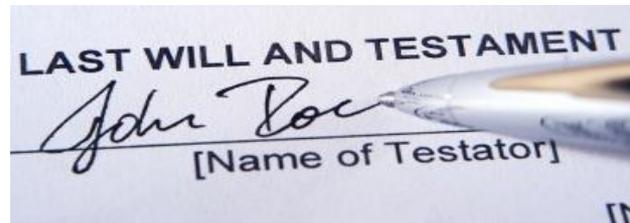
(Section 2 of the Wills Act)

- The Will must be in writing - by hand, typed or printed
- The maker of the Will (testator) must sign the Will at the **end** of the Will
- The testator must sign all other pages of the Will anywhere on the pages other than the page on which it ends
- The testator must sign the Will in the presence of two competent witnesses
- The competent witnesses must sign the Will anywhere on the last page of the Will in the presence of the testator and of each other

(The definition of '**sign**' includes initials and, only in the case of a testator, a mark)

Strict compliance with the Act

For a Will to be valid, there must be absolute compliance with the requirements of the Wills Act and failing this it will be rejected by the Master which may lead to a High Court Application to rectify what you should have done correctly in the first place



The Master may only accept an original Will that complies with the formal requirements of the Act

The rescue provision

Section 2(3) permits a court to direct the Master to accept a Will or an amendment to a Will which does not comply with the requirements of the Wills Act but which a High Court is satisfied was drawn by the testator and clearly reflects the testator's intention to be his last Will or an amendment thereto



CNA Wills



- Your Will should be a practical document in simple language which records **your intention** and is easy to understand and execute
- “***Do it yourself cheapies***” are really not adequate and often end up costing a lot more than the imaginary saving leading to difficulties, delays and the expense of court cases
- A Will is a “***Letter of Gratitude***”. Do not compromise on this gift

Unconstitutional, immoral or vague clauses

- 'I bequeath an amount of R1m to the Boys Town School Choir Bursary Fund for an annual bursary for white males of British descent directing that no females, midgets and gypsies may qualify for any benefit whatsoever from this bursary fund'
- 'I bequeath my entire estate to my daughter subject to the condition that she divorces that good for nothing *S.O.B.* that I have despised from the first moment I set eyes on him'
- 'I bequeath an amount of R1,000 to Billy Bunter on condition he "*sorts out*" the class bully John Bruiser'

Parties excluded from benefiting

- A witness to a Will or a person who signs the Will on behalf of the testator or a person who writes the Will or any part thereof in his own handwriting (manuscript) and any person who is the spouse of such person at the time of execution may be precluded from receiving any benefit from the Will

(Section 4A.(1) and (2))

- Where a witness to a properly executed Will is also named as a beneficiary in the Will, **the Will remains valid** but the witness may be precluded from inheriting

Renunciation by descendants

Section 2C.

The Wills Act provides for Statutory Succession

- where a deceased is survived by a spouse who together with a descendant is entitled to a benefit and that descendant renounces the benefit due to him, the benefit that would have accrued to that descendant then accrues to the spouse. This occurs even where the Will provides to the contrary
- however, where the deceased is not survived by a spouse or where the descendant is disqualified or predeceases, the benefit that would have accrued to that descendant in this instance accrues to that descendant's descendants but in this instance Statutory Succession is subject to any contrary terms in the Will

Class of beneficiary

Limited to people in the class alive at the date of death or who have been conceived prior to date of death but are subsequently born alive

(Section 2D.(1)(c))



Your Will and your divorce

- A bequest to your ex-spouse in terms of a Will made before your divorce will not necessarily be revoked after your divorce
- If you die within **three months** of the dissolution of your marriage your ex-spouse is deemed to have predeceased the date of dissolution, and therefore will not benefit unless the Will specifically directs to the contrary
- If you die more than three months after the dissolution of your marriage, without changing your Will, your ex-spouse will benefit

(Section 2B.)



Update your Will

- A Will does not have a ***sell-by*** date. It remains operative until it is revoked
- It is imperative that your Will be updated on a periodic basis but especially when there is a change in status

... a **birth**

... a **death**

... a **marriage**

... a **cohabitation**

... a **divorce**

... a **separation**

Poor storage

- If an executor is unable to locate a deceased's Will then the deceased will be deemed to have died intestate. It is important to let your family and executors know where your will is stored, and to keep your Will safe and secure
- The Master may only accept an original or a duplicate original Will
(Section 8 Administration of Estates Act)
- It is advisable to sign and execute two originals of your Will and let your family or executor store the duplicate original
- H & Others v M NO & another [2012] JOL 29002 (GNP)



Jus Accrescendi

- when a bequest or inheritance is left to two or more persons and nothing is said as to how it is to be divided among them the bequest or inheritance will be divided equally among them in equal shares
- where this is the intention of the testator it is unnecessary for the Will to state it expressly as the *jus accrescendi* provides for this
- where however the Will does state 'in equal shares' expressly creating the institution of beneficiaries to separate shares and should one of the beneficiaries die before the vesting of his share, that beneficiary's share will devolve upon intestacy unless the testator has substituted other beneficiaries in his place
- therefore whenever a bequest or inheritance is left to more than one person either in equal or different shares the draftsman must bear in mind the effect of one of them dying before his share vests in him

Word alert

- Children and issue
- Adopted and illegitimate
- Husband and wife
- Investments and cash
- Family
- Furniture and contents
- Personal effects
- Simultaneous death



- **children**

- at Common Law, the term 'children' means descendants in the first degree
- where a testator has children from more than one marriage and appoints his 'children' as the beneficiaries it will be assumed that the testator intended to benefit the children of all his marriages
- where spouses by Joint Will confer benefits on 'our children' where one or both of them have children from former marriages the presumption is that the spouses intend to benefit the children of the former marriages as well as the children from the present marriage

- **issue**

- the term '**issue**' normally means children and further descendants (your ***grandchildren*** are your *issue*)

- **adopted children (section 2D.(1)(a))**

- unless the context of the Will otherwise indicates an adopted child is regarded as being born from his adopted parents and is regarded as the child of his adopted parents and similarly not as the child of his natural parents

- **legitimate children (section 2D.(1)(b))**

- prior to the amendment to the Wills Act in 1992 a bequest to one's children presumed the bequest to be limited only to legitimate children
- illegitimacy is no longer a bar to inherit (**section 2D.(1)(b)**)
- a bequest to a testator's children now includes his illegitimate, adulterous and incestuous children

- **family**

- the words 'family', 'relations' and 'relatives' have no fixed legal connotations. It has a wider meaning than descendants and may include all persons who are related to the testator by blood or marriage
- depending on the context it may mean: the testator's children, the testator's children and grandchildren, all the testator's descendants, the testator's heirs *ab intestato* or the testator's family in the widest sense including children, grandchildren, parents, brothers and sisters and perhaps even uncles and aunts and nephews and nieces

- **death and predeceased**

- Adam bequeaths his estate to his children and in the event of, or after the death of the children, the estate is to devolve to their children
- when does vesting take place
- the presumption is that the testator wished the named heir or legatee to inherit and not to be burdened with the condition of a *fideicommissium*
- the preferred interpretation is an out-and-out bequest to the beneficiary subject to the condition that the beneficiary survives the testator and that the substitution of an heir or legatee is direct and not *fideicommissary*

- **simultaneous death**

- there is no presumption of survivorship
- a Will should address this contingency in order to avoid duplicated fees



- **residue**

- ordinarily means what is left after debts and legacies have been paid

- **furniture / personal effects**

- it has been held that a bequest of 'household furniture and effects' included a motor vehicle but 'furniture and personal effects' did not

More specific ... less dynamic

- 'I bequeath my green VW beetle to my son George'
 - (At time of death the green VW beetle had been sold – George does not inherit the red Ford)



The Golden Rule of Interpretation



- The Golden Rule of Interpretation of Wills is to ascertain the wishes of the testator from the language used
- The criterion used in determining the testator's intention is the actual wording
- The court's purpose is to ascertain the meaning of the words in which the testator's intention is couched and not what the testator actually intended



- The Will is a Letter of Gratitude
- A properly drawn Will should leave a legacy of love



Testimonials

THANK YOU

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