

■ ESTATE PLANNING

Can you execute a will during lockdown?

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THE EXECUTION of a will seems to have been overlooked as an essential service during the lockdown.

The Master of the High Court, with whom wills are lodged after the death of the testator, has no authority to change the way in which a will must be executed, as the Master has no discretion under the Wills Act.

The Wills Act requires the following for the proper execution of a valid will:

- ◆ The testator must sign the will in the presence of two witnesses or acknowledge his or her signature in the presence of the two witnesses.

- ◆ The witnesses must sign the will in the presence of the testator and of each other.

- ◆ The witnesses must be 14 years or older, and must be able to testify in court.

- ◆ Anyone who signs a will as a witness or writes any part of the will in his or her own hand or signs on behalf and by direction of the testator, is disqualified from receiving any benefit under the will. Most of the people in your home are probably heirs in your will and should not therefore sign as witnesses.

Despite this provision, someone who would have inherited under the rules of intestate succession will not



be disqualified, but the inheritance will be limited to the intestate portion that the person would have inherited.

A benefit includes nomination as an executor, trustee or guardian.

Electronic signatures are not a valid way to execute a will, as a will is expressly excluded from the provisions of the Electronic Communications and Transactions Act. Although the Act does not contain a definition of the word "document", the context in all the places in the act where the word is used clearly indicates the requirement

for a "hard" document that can be signed.

The following might be practical ways to execute a valid will under the current circumstances:

- ◆ If the testator is a terminally ill patient in a hospital, if the testator could sign in the presence of two nursing staff members who can sign as witnesses.

- ◆ If your relationship with your neighbours is such that you are comfortable that they sign as witnesses, you can place the will document through

or over the fence and confirm to them on the other side of the fence that it is your signature that appears on the document. They can then sign while you observe over or through the fence, complying with the requirement that the signing by the witnesses must be in the presence of the testator.

- ◆ Although the SAPS is classified as an essential service, and having copies of documents certified or affidavits solemnised would probably be essential services, it is not clear if the local police station would be willing to allow members of the SAPS to sign as witnesses to a will, if the testator walks into the police station and asks them to.

Where none of the above is an option, the common sense approach would be for the testator to date and sign the will properly, and also draft and sign a memorandum or letter making it clear why the will was not signed by witnesses, and stating that the will is intended to be the testator's last will and testament. The will can also be scanned after signature, and emailed to a fiduciary practitioner. This course of action will increase the chances of a successful court application to order the Master of the High Court to accept the will as valid.

Louis van Vuren is chief executive of the Fiduciary Institute of Southern Africa.