

The Importance of Leaving a Valid Will

A valid Will is the most important legacy you can leave your loved ones. It not only shortens the period in which your estate is wound up but if properly planned and structured, it may lead to huge estate duty savings.

Is your Will Valid?

The Wills Act, Act 7 of 1953, sets out strict guidelines pertaining to the validity of Wills by determining who may execute a Will, who may sign as a witness, how a Will should be amended and the formal requirements that need to be adhered to.

❖ General Definition of a Will

A Will can be defined as a **written document** in which a person **voluntarily** sets out their instructions as to how their assets are to devolve upon their death. From this definition it is clear that a Will must be in writing and must be freely made with the clear intention of constituting such a document.

This means that at present a written Will is the only recognised form of a valid Will, subject to compliance with the prescribed formalities.

❖ The capacity to make a Will - *Section 4 of The Wills Act*

In terms of this section every person **aged sixteen** years or more has the right to make a Will **unless** at the time of making the Will they are mentally incapable of appreciating the nature and effect of their actions. This requirement could disqualify a Testator who is under the influence of alcohol or narcotics or so ill that it has impaired their ability to correctly express their true intent.

❖ The capacity to act as a Witness

A **competent witness** is defined in section 1 of the Wills Act as “a person **aged fourteen years** or more, who at the time that he or she witnesses a Will is not incompetent to give evidence in a court of law”.

❖ Formalities required in the Execution of a Will

Before a document is recognised as a legal Will or Codicil it has to meet all the formal requirements set out in section 2(1)(a) of the Wills Act.

The Wills Act requires that the document must be signed by the Testator and two independent witnesses. “Sign” is defined as including “the making of initials and, only in the case of a Testator, the making of a mark, and ‘signature’ has a corresponding meaning.” The effect of this provision is that where the Testator and the witnesses are called upon to sign, their initials will suffice.

The formalities required in the execution of a Will as set out in the Wills Act are:-

- (a) **The Will is to be signed at the end thereof by the Testator** or by some other person in their presence and by their direction (s 2(1)(a)(i)).
- (b) **Such signature must be made by the Testator** or by such other person or be 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** (s 2(1)(a)(ii)).
- (c) **Such witnesses must 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 (s 2(1)(a)(iii)).
The date should be inserted in the attestation clause **before** the Will or Codicil is signed.
- (d) If the Will consists of more than one page, **each page other than the page on which it ends must also be signed by the Testator** or by such other person anywhere on the page (s 2(1)(a)(iv)).
- (e) **If the Will is signed by the Testator by making a mark or by some other person** in the presence and by the direction of the Testator certificate by a commissioner of oaths must be attached to the Will.

❖ Invalidity of Wills

A Will can be invalid and regarded as never having come into existence if the formal requirements set out by the act as discussed above have not been met.

A Will may be invalid either partially or in its entirety, that is at the time of execution where:

- (a) The prescribed formalities in regard to execution have not been complied with. Bear in mind, however, that in terms of section 2(3) of the Wills Act the court may now condone the formal shortcomings;
- (b) the Testator or the witnesses do not have the prescribed legal capacity;
- (c) the Testator does not have the necessary *animus testandi*, that is they do not realise that they are signing a document in which they express their intent as to how their assets are to devolve following their death;
- (d) the Testator executes the Will as a result of fraud, duress or undue influence. Where a Will has been signed in any of these circumstances, the Testator is not acting voluntarily and one of the bases required for a valid Will is missing.

❖ **Statutory Disqualification**

Section 4A of the Wills Act provides that any person who attests a Will as a witness or who signs a Will in the presence and by direction of the Testator, or 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 under that Will** provided that:

- (i) a court may declare the aforementioned disqualified person to be competent to receive a benefit from the Will if the court is satisfied that the person or his spouse did not defraud or unduly influence the Testator in the execution of their Will (s 4A(2)(a));
- (ii) a person or their spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the Testator if that Testator had died intestate shall not be disqualified to receive a benefit from that Will provided that the value of the benefit which the beneficiary or their spouse receives in terms of the Will does not exceed the value to which they or their spouse would have been entitled in terms of the law of intestate succession (s 4A(2)(b));
- (ii) a person or their spouse who attested and signed a Will as a witness shall not be disqualified from receiving a benefit from that Will if the Will concerned has been attested and signed by at least two other competent witnesses who will not receive any benefit from the Will concerned (s 4A(2)(c)).

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