

## WILLS UNDER KENYAN LAW

When a person is deceased, they are deprived of the power and control over their property. However, by way of Will (written or oral), individuals can determine the manner in which their dependents and beneficiaries will share the estate and liabilities.

### What is a Will?

A Will is a legal declaration by a person of their wishes regarding the disposition of their free property after death. Nevertheless a Will is only valid if a person of sufficient age and of sound mind makes it in the proper form. The validity of a Will is predicated upon capacity and form.

### Why write a Will?

A Will provides certainty to the surviving members of the deceased's family, by distributing the property of the deceased according to his/her wishes. It prevents or minimizes family disputes that are likely to arise during division of property.

### Who can make a Will?

Any person, male or female. The person making the Will, (a "testator") must have testamentary capacity. The testator must have attained majority age and be of sound mind. The testator must also express the intention to make a Will. Most importantly, the intention should be free from fraud, coercion, or undue influence.

### What are the essentials of a valid Will?

**Capacity** is the ability of the testator to make a Will free from influence that will affect the testamentary intention or mental weakness that could misinform the intention. Hence, capacity of the testator to make a Will includes age and soundness of the mind. Section 5 of the Law of Succession Act, Cap 130 Laws of Kenya (the "Act") provides that any person of sound mind and not a minor can dispose their free property by Will and may do so by way of secular or religious law of choice.

Mental capacity is the ability of the testator to understand the nature of his/her action relating to making of a Will. Therefore, courts have variously held that mental disorder does not premise unsoundness of mind under the testamentary capacity. Every person is presumed sane and therefore the burden of proof is upon the person claiming that the testator was not of the right mind to make a Will.

**Execution** is defined as the signing, sealing, and delivery of a deed or more specifically the signing and publication of a Will. Section 11 (a) of the Act provides that for a written Will to be valid, the testator must have signed or affixed his mark to the Will, or it has been signed by some other person in the presence and by the direction of the testator. Courts interpret a signature or a mark to mean any mark of the testator intended as a signature including: initials, thumb prints, rubber stamps and assumed names among others. The signature or mark should be placed on the Will in such a way to show that the testator intended it to give effect to the Will.

**Attestation:** No written Will shall be valid unless the signature is made or acknowledged by the testator in the presence of two or more independent and competent witnesses present at the same time and each of the witness must attest and sign the Will in the presence of the testator. The witnesses must be competent and of sound mind and full age. To be present at signing means the witnesses must be capable of seeing the testator sign and must understand what they are doing. Beneficiaries under the Will can also be witnesses provided that the Will is attested to by two additional independent and competent witnesses failure to which the bequest to the attesting beneficiary will fail. Section 14 of the Act provides that executors of a Will, being the persons appointed by a testator to carry out the terms of the Will, are also competent and independent witnesses.

**Knowledge and approval:** Section 7 of the Act provides that a Will or any part of a Will affected by fraud, coercion, importunity or mistake that takes away the free agency of the testator is void. These factors are therefore vitiating factors that may affect the knowledge and approval of a testator.

#### **What makes a Will void?**

**Mistake:** A Will is void if it is induced by mistake. Mistake affects intention in that the testator's belief as to whatever he/she is executing is not true. In any case, would the testator had known the contents of the will he/she would not proceed to execute it.

**Undue Influence, Coercion, and Fraud:** A Will that has been influenced by fraud, coercion or importunity, which takes away the intention of the testator, is invalid. Sir J.P. Wilde defined undue influence in *Hall v Hall*<sup>1</sup> as being "Pressure whatever character ... if so exercised as to overpower the volition without convincing the Judgment". It can also be termed as *that degree of importunity which deprives the testator of his/her free agency, which is such that he/she is too weak to resist, and will render the instrument not his/her free and unconstrained act*. It is necessary the person having power over the testator actually exercise it and that through the same, the testator is moved to make the Will against his/her free volition.

**Revocation:** A Will is only valid if it has not been revoked by another Will or a Codicil; by actual destruction; by loss or, marriage where the Will was not made in contemplation of the said marriage.

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<sup>1</sup> Hall v Hall [1868] LR 1 P&D 481

### Is a Will a necessity?

Absolutely. The true test of a person is the legacy that he or she leaves behind. A Will, which takes less than several hours to prepare, could save your loved ones tens of years of dispute.

Anytime that circumstances under which the Will was written change, you could always write a codicil varying the original Will.

### Storage of Wills

Keeping a Will safe is as important as making sure it is written effectively. If a Will is lost or damaged, the executors may not be able to distribute assets according to the wishes of the deceased and may have to revert to the rules of intestacy.

If an attorney has written your Will they will normally be able to store one original copy of the Will. A Will can also be stored with banks or other custody companies provided that the Will is accessible to the executors before commencement of the probate process. In some cases safety deposit boxes may require the probate process to be completed before they can be accessed and in such a case they may not be suitable storage places.

It is critical that your executors know where the Will is stored and the process for retrieving the Will in case of your demise.

### Emerging Issues affecting Wills-Electronic Signatures and Pandemics

Kenya has recently passed into law the Business Law (Amendment), Bill 2009 which allows for electronic signatures to be admissible on some legal documents.

However Wills, probably because of issues of fraud, coercion and related abuse, still require physical signatures for them to be valid and it remains to be seen whether this law will further evolve to allow for matters such as electronic signatures in Wills, online Will preparation including using video evidence particularly in light of the current Coronavirus (Covid-19) and similar pandemics or circumstances that may require social/physical distancing and limited movement making it difficult to satisfy the current requirements on execution and attestation of Wills.

### Disclaimer

This article should be regarded as being for general information only and does not constitute legal or professional advice. For specific legal advice on the issues discussed in this article, please contact us on [commercial@mga-legal.com](mailto:commercial@mga-legal.com) or on the contact details listed below.

**Date: 1<sup>st</sup> April, 2020**



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