

WHAT IS A WILL?

A will is a record of a deceased persons' wishes and intentions pertaining to the devolution of his property upon his death.

A will is a testamentary document stating the manner in which the makers' property is to devolve upon his death. Hence a will is chiefly concerned with the disposition of property although it can also be used for some incidental matters e.g. the manner in which the testator's body is to be disposed, to appoint guardians for one's children. However, a will is not the place for philosophical reflection nor for expressing emotions like hate, gratitude, despair or feeling about the world in general.

The wishes in a will must be expressed simply and clearly without trace of ambiguity as serious ambiguity can lead to the will being challenged on the grounds of uncertainty.

WHO CAN MAKE A WILL?

A will is invalid unless it is made by a person who at the material time had the capacity to do so. As a general rule, infants and persons of unsound mind are incapable of writing a valid will. However a will made during one's infancy may be validated by re-execution by a cordial when the testator reaches the age of majority, confirming the contents of the document.

Capacity takes two forms.

- i) Physical capacity: (which denotes age and has been discussed above and)
- ii) Mental Capacity: in order to decide if any particular matter deprives the testator of mental capacity there are three essential tests.

- **Sound Mind**

If a person is to be found to be of sound mind, it must be demonstrated that he is devoid of mental disease, insane suspicions and that his mind is not prey to disillusions calculated to interfere with the normal functions of the mind such as making decisions on his own.

- **Sound Memory**

The testator ought to be able to recollect all the property he owns and wishes to devolve the whomsoever he wishes. He also ought to be in a position of recalling all his dependants or objects of affection, the property he was about to bequeath as well as the manner of distributing. In addition to mental capacity testamentary intention must be present. However, it is not necessary that the testator be able to recollect these matters in detail. A broad idea of this is sufficient to deem a person as having a sound memory.

- **Sound Understanding**

The testator must understand the nature of transaction in which he was engaged at the time he executed his will. He must be able to understand the claims of his various relatives and friends on his estate and the effect of the dispositions he is making.

NOTE:

A will that has been made by insane person may be accepted as a valid will if it can be shown that such a person made the will during a lucid moment i.e. that he was aware of what he was doing and the implications of his action at that time.

WHAT IS THE IMPORTANC OF MAKING A WILL

The primary importance of making a will is that it avoids quarrels and squabbling over one's property after the testator's has passed away. A will ensure that the testator's estate is enjoyed by his rightful dependants as well as anyone else he may please.

A will makes provisions for guardianship and trusteeship which also ensures that a testator's minor children will be taken care of by responsible people and those in whom the testator is not squandered by irresponsible/greedy kin who are entitled to the estate but cannot properly look after their interests. By making a will , a testator who appoints trustees ensures that his estate is properly managed for the benefit of all who have an interest in it.

In short, a will ensures that the testator's estate is properly taken care of inspite of his absence due to is death and that he makes provision for his dependants who will not be rendered destitute as a result of his death.

KINDS OF WILLS

A will may be either oral or in writing:-

Oral Wills

An oral will should be made before two or more competent witnesses. Competent witnesses are witnesses who understand the nature and implications of what a will is and what the implications of making a will are.

It is provided for in the law (section 9 (i) (b) LSA) that an oral wills valid provided that it was made within a period of three (3) months before the testator's death. The reason behind this provision is that being oral, there is the danger of some details being oral mis-reported after a long time.

Another reason is that such wills are usually made in a state of panic eg when one is very ill or in a state of fear or when in imminant danger. The period of three months is meant to allow the testator to have time to reconsider the terms of oral will and reconfirm them in writing if possible when he gets out of the difficult situation he was in at the time he made the will.

Weakness of an Oral Will

The law provides that no oral will shall be valid and so far as it is contrary to any written will, thus a written will always prevail over an oral one.

Written Wills

- No written Will shall be valid unless the testator has 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.
- The will has been attested by two or more competent witnesses each of whom must have seen the testator sign on affix his mark to the Will.

It is generally advisable to have the will attested by witnesses who are not beneficiaries under the will. However a Will shall not be considered as insufficiently attested by a reason of any benefit thereby given to the person attesting the document as long as at least two additional competent and independent also attest the Will.

Having made a Will, a testator has the freedom to revoke or alter it before his death. There are four main ways of revoking a will:

- i) subsequent marriage of the testator
- ii) By another Will or codicil
- iii) By destruction of the Will
- iv) By providing evidence of loss of the will.

A testator is free to make a Will and make provisions as a result of it in any way he so chooses. However a Will or any part of a Will, the making of which has been caused by *fraud, coercion* or by *importunity* that takes away the free agency of the testator, or has been induced by *mistake* is void.

Coercion

For there to be undue influence in the eyes of the Law there must be coercion. It is only when the Will of the testator was induced or forced into doing that which he or she does not desire to do that it will be termed as undue influence. However, there will not be undue influence if persuasion or mere influence has been exercised on the testator. One can convince the testator but he cannot force that testator to do anything against his Will.

Fraud

Any form of deception practiced on the testator which affects his Will will amount to fraud. Fraud may arise from reading over a Will to the testator by failing to convey to the mind of the testator the effect of his testamentary act or pretending that things which are being “read” are in the Will when they are not.

Mistake

However it is proved that a word or clause was introduced into a Will by mistake without the knowledge or information of the testator it shall be struck out and the will shall be void to *the extent of the mistake* .

SUMMARY

ESSENTIAL REQUIREMENTS OR ORAL WILLS AND WRITTEN WILLS



BOTH TYPES



CAPACITY

Sound Mind

Sound Memory

Sound Understanding

Age

VALIDITY

Fraud

Mistake

Coercion

WITNESSES

Two or more

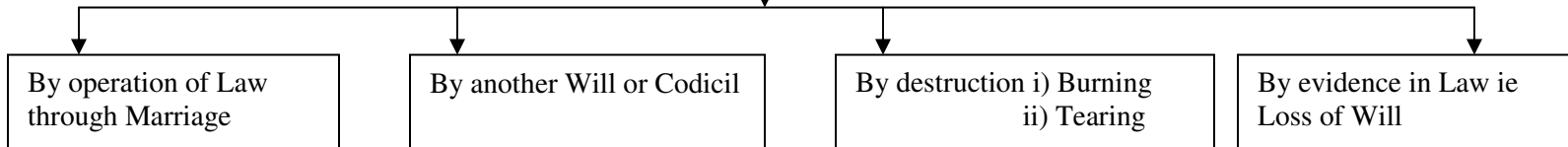
Competent

ESSENTIAL REQUIREMENTS OR ORAL WILLS



REVOCAION OF WILLS

HOW CAN IT BE REVOKED



ADMINISTRATION OF A DECEASED'S ESTATE

Introduction

In order for a person to be allowed to manage or deal with the property of the deceased, he or she is required to apply in court for Letters of Administration where there is a Will, it should be attached.

Where a Will has been written and a person is named to manage the affairs of the testator, such a person is referred to as an executor (male/executrix (female)).

Depending on how the deceased died and left his affairs, different applications of grant have to be applied for where a deceased died testate the executors will apply for a Grant of Letters of Administration with the Will annexed to it. Where a deceased dies intestate one applies for a Grant of Letters of Administration Intestate.

Grant of Letters of Administration

This is given where a person who dies leaves behind his will but has not named the person who should handle his affairs. Any beneficiary can apply for this and must attach the Will to it.

Grant of Probate of Proof of Oral Will

Where a person gives an Oral Will and dies within three months any beneficiary can apply

Grant of Letters of Administration Intestate

Any person may apply for a grant of these letters. This though, must first be applied for by a person who is a survivor and in the order of consanguinity (ie wife, husband, children, parents etc).

In applying, the total number of persons to apply is four. None the less where an affidavit has to be sworn it is sworn by any of the four.

PROCEDURE OF APPLYING FOR LETTERS OF ADMINISTRATION

Grant of letters of administration with Will annexed

- 1) The applicants execute For P and A 79 (Petition) and P and A 3 (affidavit), an original Will, two photocopies of the Will and a Death Certificate.
- 2) If all documents are in order the file is placed before the judge by the deputy registrar.
- 3) It is given orders to have the matters advertised in the Kenya Gazette. If no objections are raised before 30 days, letter of grant of probate is issued.
- 4) After a period of 6 months the parties come in to confirm the said grant.
- 5) Any account should be filed within 6 months after the confirmation of grant.

Grant of Letters of Administration Intestate

- 1) In a general situation one should file a petition affidavit, affidavit of means, affidavit of justification of proposed suits, guarantee of personal sureties and the death certificate (mandatory).
- 2) Where the applicant is a widow or widower with adult child as survivors, one must file a petition an affidavit and an affidavit of means. The adult children are required to give consent to the widow/widower to apply for the grant.

- 3) Where the applicant is a widow/widower with minor children as survivors, one must file a petition, affidavit, affidavit of means, affidavit of justification of proposed suits, guarantee of personal sureties and the death certificate. There must be two persons to apply for the grant. This is because there is created a trust as a result of the death of the spouse.

LIMITED GRANT

In order to ensure that an estate does not go to waste or that there is a pending case required to be administered, an applicant can apply for a limited Grant.

Note: a party must apply for a full grant in order to divide and dispose of the deceased's assets.

GRANT FOR SPECIAL PURPOSES

Where the will specifies that the probate shall be for the purposes specified, a grant is issued limited only to whatever is specified.

This can also be given where a person wishes to sue on behalf of the estate. The grant will enable such a person have the capacity to represent the estate or the deceased in a suit.

Where parties are disputing over the estate, the estate in the meantime should not be left unadministered. The courts to ensure that it is not wasted will issue a grant known as administration pendente lite. No division or appointment of properties is to be done during this time.

Where the executor/executrix or administrator/administratrix dies, another person can apply to take over the grant. They would