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Wills



What is a Will?

A Will is a legal document that specifies how and to whom a person's belongings and assets will be distributed when he/she dies. It includes a codicil and any other testamentary writing.

Who can make a Will?

Every person of the age of sixteen years or more may make a will unless at the time of making the will he/she is mentally incapable of appreciating the nature and effect of his/her act.

What are the requirements for a valid Will?

- It must be in writing
- The Will must be signed at the end of it by the testator or by some other person in his/her presence and by his/her direction.
- The testator's signature must be witnessed by two or more competent witnesses present at the same time.
- The testator and the two witnesses must sign the Will in the presence of each other. It should be noted that a person who signs as a witness is disqualified from receiving any benefit from the Will.
- 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 the person who signs on his/her behalf and by the same witnesses anywhere on the page.
- If the testator is not able to sign the Will (for example where he/she cannot read or write), someone can sign the Will on his/her behalf or the testator can sign the Will by the making of a mark (like a thumbprint or a cross). In this instance, a Commissioner of Oaths must also be present when the testator makes the mark or someone else signs on behalf of the testator.
- The Commissioner of Oaths must certify at the end of the Will that he/she has satisfied himself as to the identity of the testator and that the Will so signed is that of the testator.
- If the Will consists of more than one page, each page, other than the page on which it ends, must also be signed anywhere on the page by the Certifying Officer.

No deletion, addition, alteration or interlineation made in a Will executed on or after the said date and made after the execution of the Will shall be valid unless-

- the deletion, addition, alteration or interlineation is identified by the signature of the testator or by the signature of some other person made in his/her presence and by his/her direction; and
- such signature is made by the testator or by such other person or is 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; and
- the deletion, addition, alteration or interlineation is further identified by the signatures of such witnesses made in the presence of the testator and of each other; and
- if the deletion, addition, alteration or interlineation has been identified by the signature of such other person, in the presence also of such other person; and
- if the deletion, addition, alteration or interlineation is identified by the mark of the testator or the signature of some other person made in his presence and by his direction, a Magistrate, Justice of the Peace, Commissioner of Oaths or Notary Public certifies on the Will that he/she has satisfied himself as to the identity of the testator and that the deletion, addition, alteration or interlineation has been made by or at the request of the testator.

For more information and help on this QuickLaw topic you can talk to a Legal Counsellor at your nearest LegalWise Branch or email windhoek@legalwise.na / oshakati@legalwise.na / walvisbay@legalwise.na

What are the basic elements that must be included in the content of the Will?

- The Will should be practical and care must be taken that legal and practical restrictions are adequately provided for.
- The Will must contain:
 - a distribution of property;
 - the extent of the interest in the property (full or limited ownership);
 - and the identities of the heirs (the persons who must receive the property).
- The Will can also make provision for the nomination of an executor and a legal guardian of the minor children of the testator; a testamentary trust; and a clause stating that all previous Wills are cancelled.

What will happen if a person dies without a Will?

- A person who dies without leaving a valid Will is said to have died intestate. It is difficult to give a simple answer to the question of who inherits the deceased's estate, because the answer still depends on the racial group of the deceased. For example, if a person dies without leaving a valid Will, one of the following will happen:
- If the deceased person is "white" or "coloured" his/her estate will be distributed according to the rules laid down by the laws of intestate succession.
- If the individual is a "black" person, his/her nearest relative can go to the local court with a copy of the death certificate and get an appointment as executor. The executor is obliged to distribute the estate in terms of the customary law of the deceased.
- An intestate estate of a member of the Rehoboth "Baster" community will be distributed in accordance with the Second Schedule of the Administration of Estates (Rehoboth Gebiet), Proclamation 36 of 1941.

In some cases, a "black" person's intestate estate will be distributed according to the law applicable to "whites" and "coloureds".

- If there are no family and children of the deceased, the property will be forfeited to the State.

Will a divorce have any effect on a Will?

- A divorce Will not invalidate the will or the part of a Will where a bequest was made to an ex-spouse.
- If any person dies within three months after his/her marriage was dissolved by a divorce or annulment by a competent court and that person executed a Will before the date of such dissolution, that Will shall be implemented in the same manner as it would have been implemented if his/her previous spouse had died before the date of the dissolution concerned.
- If the testator dies three months after the divorce without changing his/her Will, it will be assumed that the testator wanted to include his/her ex-spouse in the Will.

Simply, if a testator dies within three months of his/her divorce, and that person executed a Will before the divorce, the Will shall be implemented as if the previous spouse had died before the date of divorce, unless it is clear from the Will that the testator intended to benefit his ex-spouse despite the marriage ending.

Where must a Will be kept?

- Wills should be kept in a place that is safe and where it can be easily found after the death of a testator, normally at a bank or a law firm.
- The testator must inform a reliable person of the whereabouts of his/her Will.

Glossary of terms:

BEQUEST: the distribution of property in terms of a Will.

CERTIFY: to confirm, usually in writing, that something is true or correct.

CERTIFYING OFFICER: may be a Magistrate, Justice of the Peace, Commissioner of Oaths or a Notary Public.

CODICIL: it is an amendment to an existing Will.

COMPETENT WITNESS: any person of the age of fourteen years or older who is competent to give evidence in Court of Law.

EXECUTE: means to perform or carry out the administration of the estate or the property of the deceased person in terms of the Will.

EXECUTOR: is a person appointed by a testator in the Will to see to the administration of his/her estate in terms of the Will.

INTESTATE: when a person dies without leaving a Will.

INTESTATE SUCCESSION: refers to the method of property distribution when a person dies without a valid Will.

PROPERTY: a place where a person can live in, for example, a house, room, flat, garage or similar structure built on land used for housing purposes.

SIGN: signing **Includes** in the case of a testator, the making of a mark but does not include the making of a mark in the case of a witness, and "signature" has a corresponding meaning.

TESTAMENTARY TRUST: a trust is a fiduciary relationship or a relationship of trust in which one person gives another person authority to handle their assets or property for the benefit of a third party, called the beneficiary. A testamentary trust is a trust which arises upon the death of the testator and which is specified in his/her Will.

TESTAMENTARY WRITING: is a document which is given by an officer lawfully authorised and which grants power to a person named as executor to execute a last.

TESTATOR: a person who makes a Will.

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