

YOUR WILL: COMPLYING WITH THE LAW IS NOT CHILD'S PLAY

The recent case of [VM Smith v SP Sampson and another](#), where the testator's supposed last will and testament was not signed at all, again highlights the importance of one's will being prepared by a professional person having expertise in the field of succession law. In this article, we shed light on the more commonly encountered errors and irregularities presented to our courts and the possible serious and often expensive repercussions.

Any document purporting to be a will which does not comply with these formalities will not be legally enforceable unless the High Court has granted an order authorising the Master of the High Court to accept same. This means that, in the absence of an appropriate court order, the estate of such deceased person will not devolve according to his last wishes but may be awarded either in terms of a prior will which has been properly executed or in terms of the law of Intestate succession.

High Court applications are costly, even if unopposed. Any party who may be detrimentally affected if the will is to be declared valid has to be advised of the application and given the opportunity to oppose it. If opposed, the costs will skyrocket.

Some irregularities in the signing of wills are very clearly simple mistakes, for example where there is only one witness and not two as the Act requires. Others cast some doubt on whether or not the will was actually a true expression of the testator's last wishes, as in the above case where the will was not signed at all. Other examples of problems in the latter category are where a beneficiary named in a will or such beneficiary's spouse has personally handwritten portions of the will or has witnessed the will. In the simple cases, it is fairly certain that the Court will order that the will must be accepted by the Master, whereas in the second group there is no way of knowing what the outcome of the application might be - quite possibly negative, with all costs wasted.

Another problem which is worth mentioning here - as it also can only be rectified by a successful High Court application - is the circumstance where the original signed will of a deceased person cannot be found. The original is the document which was actually signed by the person concerned and not a copy thereof, even if the copy is certified. Only the original is acceptable to the Master of the High Court. If missing, an interested party must make an application to the High Court for an order authorising the Master to accept a copy of the will in place of the original. The success of the application will depend on the applicant's ability to prove that at the time of death of the deceased the copy was a duplicate of the original will which the deceased actually intended to be his last will and testament. This is not an easy thing to do as the possibility of fraud, when originals are

missing, is high and the onus of proof correspondingly so.

The conclusion one must come to is that one's will is an extremely important document which one should not try to prepare oneself. It should be drawn professionally, signed under the supervision of someone who can ensure full compliance with the legal formalities and take responsibility for the safe custody of the will. Preferably, the will should be kept outside one's home where it is not vulnerable to negligent loss, malicious destruction or the elements of nature. By doing so one is guaranteed the peace of mind of knowing that this incredibly important aspect of one's financial and personal affairs is secure and in order.

Consult with June Theron (JuneT@stbb.co.za) for professional assistance in the drafting and safekeeping of your will.

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