Lawofsuccession/COVID-19

A COVID-19 health check for the Wills Act

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Every aspect of life has been affected by COVID-19. Estate planning is no exception, especially the execution of wills. The stark reminder of mortality, coupled with the extra free time at most individuals' disposal during lockdowns has resulted in more enquiries directed to fiduciary practitioners. Would-be testators and practitioners were, however, confronted with major practical obstacles in giving effect to these instructions.

While the exact rules for the execution of wills vary from jurisdiction to jurisdiction, the pandemic confronted all with the very same problem: complying with rules of formality while adhering to lockdown restrictions. Some jurisdictions were quick and decisive in dealing with the issue, promulgating interim legislation and granting concessions to relax the requirements in respect of signing. No such steps were taken by the South African legislature.

Despite the restrictions of movement placed on individuals, and the precautions implemented by individuals, most testators and practitioners have, with the benefit of technology, been able to give and take instructions, and even prepare and produce wills. However, the execution of the wills; colloquially referred to as the "signing" of the will, has presented a greater obstacle.

The requirements for a will to be valid

Although the Wills Act (7 of 1953) does not define a will, it is clear from the legislation that wills require signatures. As such, wills are confined to the written form. It follows that a would-be testator cannot – in these or any circumstances – choose to rather produce an audio or video recording evidencing his testamentary wishes.

The minimum requirements to ensure the validity of the document are set out in s2(1) of the Wills Act as amended. These requirements ensure the authenticity of the document and safeguard against undue influence or fraud. In our law, in brief, the will must be signed by the testator in the presence of two individuals who, in turn, must sign the document in each other's, and the testator's presence. The signing is proof of their witnessing the event. And here lies the heart of the problem: would-be testators may find it difficult, if not impossible, to safely be in the presence of individuals outside the circle of their immediate family during the lockdown. To complicate matters, family members may not be suitable witnesses, because s4A of the Wills Act determines that a beneficiary is disqualified from benefiting from a will if they signed it as a witness.

Importantly, as mentioned above, the Wills Act requires the three parties (that is, the testator and the two witnesses) to be in each other's presence. While the word presence is not defined in the Wills Act, it is considered to mean that the relevant persons must see or be able to see the other sign.

Having some bearing on this discussion is the fact that a testator cannot get around a will's necessary formalities by relying on email or the like, as wills are specifically excluded from the ambit of the Electronic Communications and Transactions Act (25 of 2002). For simplicity's sake this article will not deal with the possibility of the testator acknowledging his signature nor the possibility of him signing by making a mark or someone signing on his behalf, provided for in the Wills Act.

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Proposed solutions

Since the onset of lockdowns, numerous articles have appeared, both locally and internationally, proposing various solutions to the problem of finding two witnesses (who are not named as beneficiaries) to be in the would-be testator's presence, while at the same time not taking health risks or breaching promulgated restrictions. These solutions (many quite creative and detailed) can be divided into three approaches.

Real world (physical) solutions

These options consist of variations of a plan where the participants are spaced far enough apart to comply with health concerns and regulations, but close enough to be able to see each other sign the document. A refinement of the plan introduces an artificial barrier between the parties, thereby further limiting physical presence (vulnerability) while not compromising visual sight. A further precaution is to stagger the signing events into three different stages to prevent contamination. While precautions can be taken by using separate pens, the same document must be signed by all the parties, as our law does not make provision for counter-signed documents. This solution requires all the parties to be present on each of the three signings, making this method rather arduous.

Virtual solutions

Another group proposed online or virtual solutions. Such solutions suggest that the testator and, thereafter, each of the witnesses sign the document in their own home and that this is done with the aid of technology, such as Skype, Facetime or Zoom. Because the same document must be signed, this process must also be staggered, with the added logistical requirement of getting the same document to the three venues after the elapse of a certain time. While it could be argued that the parties could

see each other and even see the other person affixing a signature, the solution, if challenged, would be dependent on whether a court would be satisfied that the parties were in each other's presence as instructed by the legislature. It could be argued that the reasons for the parties being in each other's presence is not physical proximity itself, but rather to be able to see the signing. A court would have to be convinced that the parties could see each other and if that could be factually proved, that they were therefore in each other's presence. The fact that the actual physical document would not simultaneously be in all the parties' presence may dilute the evidentiary purpose of execution. In this instance then, the virtual world may not prove to be the solution as it has in other spheres.

Post-event condonation (solutions)

In certain circumstances, the testator may have had no option but to knowingly leave a document that does not – even on the face of it – satisfy the mandatory requirements for validity. This would typically arise where there were no witnesses or only one witness available, or where only members of the same household (who are also named as beneficiaries) are available to sign as witnesses. The solution offered is that the testator, in anticipation of a challenge, prepares documentation (in the form of an affidavit) to set out the circumstances of the execution, explaining why the formalities were not complied with, while unequivocally reiterating his intention that, despite these inadequacies, he intends the document to be his will. Our law does not allow for informal validation, nor can the Master of the High Court pardon an irregular will and, therefore, such a question would have to be brought before a high court to adjudicate. This solution is thus premised on the relief provision set out in s2(3) of the Wills Act – a condonation provision introduced into our law by the Testamentary Amendment Act of 1992. Prior to the introduction of this section, a will that did not comply with the mandatory requirements of execution simply could not be, and bluntly never would be, saved.

The section provides that a court can order a will to be accepted for estate administration, if it is satisfied that the document, which was drafted or executed by a person who has since died, was intended to be his will despite the fact that the document did not comply with all the formalities set out in s2(1). The solution suggests that, forewarned and armed with good contemporaneous evidence, any interested party should be able to shorten the process, reduce the costs and greatly increase the chances of success of the desired outcome. Similarly, a s4A (2) application can be brought to declare a beneficiary, who signed as a witness, competent to inherit.

Currently, the savings provision is limited to a document. Therefore, a medium that cannot be converted into a paper document cannot be condoned. A will prepared by someone other than the testator will only be able to be condoned if there is at least partial execution by the deceased. The reasons for the non-compliance of documents that have come before the courts in the last 28 years were as a result of the would-be testator lacking knowledge of the requirements, alternatively, as a result of a blunder that took place during the execution. Some wills have come before the courts where the death of the deceased occurred prior to the intended execution of the produced document. I am not aware of any case brought to save a will where it was averred that the testator had knowledge of the requirements but, as a result of circumstances beyond his control, was unable or unwilling to comply. The vexing question is this: would a formally invalid document produced as a result of isolation and social distancing fall within the ambit of s2(3)? I am of the view that it would, subject to the thresholds as established in case law and already set out in this article.

Legislative reform

The very real hurdles that have confronted planners and fiduciary professionals alike should hopefully act as a catalyst for the legislature to reconsider the formalities set out in s2(1), as well as the scope and application of the relief provisions set out in s2(3) of the Wills Act. The introduction of s2(3) has had a salutary effect, saving many a flawed document and thereby giving effect to a deceased's wishes while safeguarding against fraud. However, with the effluxion of time, a body of case law and academic commentary has revealed that theoretical and practical concerns may justify legislative intervention to simplify and enhance the effectiveness of the provision. This, coupled with the advances in technology and its impact on communication and data retention, should bolster the call for renewed consideration of South Africa's Wills Act. It is proposed that the legislature should reflect on the unresolved and contentious aspects of the Act, and also bring it in line with modern technology. Specifically, the insistence on personal drafting should be reconsidered and possibly remedied by the introduction of a definition of drafting. The focus on the status of the document as opposed to the general testamentary intention of the deceased should possibly be revisited. During such an investigation, a re-examination of the status of lost wills, draft wills and erroneously or mistakenly-signed wills should be addressed. While not exhaustive, the legislature should consider whether the adoption of electronic signatures should fall within the definition of signatures and if recognition of non-paper records should fall with the ambit of documents for purposes of the Wills Act.

It has always been a difficult balancing act for the legislature to devise rules that both ensure the authenticity of a will without being so burdensome as to trigger invalidity and the ultimate frustration of a deceased's wishes. The attempt to incorporate technology will no doubt pose further and more complex challenges to achieve that balance.

Not unprecedented

It is ironic that, as we search for a solution in state-of-the-art technology and possible future legal reform, such a solution already existed at a point in time in our common law. Roman Dutch law provided a custom-made solution in the form of a so-called privileged will. A common feature of a privileged will was that all or some formalities were dispensed with by virtue of the situation the testator found himself in, or by virtue of his status. History reveals that the occurrence and risk of pandemics was not unknown and may have even been common enough (and thus not unprecedented) for the law to make specific allowance, among other forms of privileged wills, for a will executed at a time of pestilence (*testament tempore pestis conditum*). The major distinguishing feature of such a privileged will was that it was, without any further process, accepted despite being unwitnessed. These common law wills were, however, repealed with the introduction of the unifying Wills Act.

It is illuminating to note that when the Law Commission was reviewing the rules of formalities in the 1980s, it considered the re-introduction of a privileged will executed during an epidemic or pestilence but concluded there was insufficient justification for it and that the proposed s2(3) would be adequate.

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Precaution

There are still some testators in self-enforced isolation and hesitant to have outside contact and exposure, who continue to grapple with the testamentary issues presented by COVID-19. However, the recent relaxation of lockdown restrictions alleviates many of these problems for the vast majority of citizens. Although this reprieve is very welcome, it will not save would-be testators and fiduciary practitioners from experiencing these same conundrums in the future. Having slowly regained some normalcy in our lives, none of us want to consider the possibility of a resurgence of the virus, future viruses or other catastrophes, but such events would re-expose the issues and limitations that COVID-19 revealed in our legislation. Our legislature should take the opportunity to reconsider the Wills Act in the quiet after the storm and not in the urgency of the next one.

To the extent that wills executed during lockdown could result in their invalidity or the need to incur costs, consideration should be given to re-execute the documents as soon as circumstances permit. More than ever, the oft-repeated advice proves true: estate planning and its execution should not be done in the face of an emergency or in anticipation of an emergency, but at regular intervals in the normal course. ◆

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