THE REPUBLIC OF UGANDA

School of Law  Makerere University

"HOW TO WRITE A WILL".

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Introduction.

Ladies and Gentlemen, I am exceedingly honoured to have been given this opportunity once again to present to you this paper. The topic is quite critical as it concerns administration of estates of deceased persons, who are obviously no longer in position to manage and distribute their property.

Over time, Wills have been a subject of dispute amongst beneficiaries and some have ended up in courts of law for judicial pronouncement on their validity. The disputes stem from among others, the manner in which the Wills are written or otherwise executed, the distribution of properties, the manner of attestation or witnessing and quite a number of other omissions that may arise from ignorance of the pertinent features of a Will by the testator or the maker of the Will.

In that context knowledge of how to write a Will is pertinent for all of us, especially, in view of the fact that our wishes as enshrined in the Wills can only be effectuated upon our death. We shall not be present to enforce the Will or rectify any omissions therein. It is thus inconceivable that, even with belief in the spiritual world, it is practically possible to remedy any defects in the Will in order to enforce the intentions of the testator.

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It follows therefore that in order to have our wishes duly enforced; we must learn to express our wishes through writing and executing Wills in a manner that safeguards against any possibility of the Will being a subject of challenge upon death[2].

Cardinal Issues Pertaining to Writing of Wills

Before delving into the procedure and manner of writing Wills, it is of utmost importance to highlight quite a number of what I consider to be the pertinent issues that relate to Wills;

a) The Law;

- Where a person dies, the estate of such a person is regulated by law. The Key legislations include the Constitution of Uganda 1995, the Succession Act Cap 162, the Administrator General's Act, Islamic Law and Customary law among others.

- Besides the constitution, which is the supreme law of the land, the principal legislation that governs Wills in Uganda is the Succession Act Cap 162. S.1 thereof emphasizes that the provision of the Act shall constitute the law of Uganda applicable to all cases of intestate or testamentary succession.

- The laws are normally a guide on the legal prerequisites relating validity and enforceability of Wills.

- However, because there are properties involved, especially moveable and immovable property, a number of other legislations especially those governing such properties may be invoked as shall from time to time be illustrated herein after.

- It is however not uncommon in practice for us to refer to cases already decided by courts of record for guidance in matters relating to estates including Wills especially to avoid making similar mistakes that may have rendered the Wills in such cases invalid.

- Nevertheless, the applicable law depends on whether the deceased made a will (died testate) or never made a will or if they made one, it is invalid (died intestate). The regulation of their wishes and the manner of

[2] *If a Will is well crafted but fails to comply with the statutory requirements, it is not a Will at all but a mere piece of paper, the contents whereof are incapable in law of being given legal effect. The testator is as good as having died without making a will.*

management, administration and distribution of their estate is quite different as shall be demonstrated herein after.

b) Meaning of a Will;

- The essence of testate succession is a will. It is an expression by a person of their wishes which is intended to take effect only upon their death.

- The Succession Act doesn't specifically define a will but is defined by the **Black's law dictionary**[3] as a document by which a person directs his or her estate to be distributed.

- Note however, that the foregoing definition is quite restrictive as it presupposes that a will relates to only distribution of properties. It would actually create a wrong impression that only persons with properties qualify to make wills, yet there are quite a number of aspects that may be included in a Will as shall later be demonstrated in this presentation.

c) Who can make a Will

- The position of the law is that every person of sound mind and who is not a minor may dispose off his or her property by Will[4].

- The foregoing renders any customary or cultural norms that equate women to property of a man liable to be part of the distribution, and those that deprive women of the right to make Wills null and void[5].

- Under the reign of customs, cultural norms in some societies in Uganda, part of the distributable property under a will would include the wife of the testator, who would be inherited in accordance with the expressed wishes of the testator[6].

- Such practices are now deemed to be null and void, as they constitute violation of women's rights. A clause in the Will to that effect would definitely be challenged, on account of being inconsistent with provisions of the constitution.[7]

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[4] See Section 36 of the Succession Act explained by Byamugisha J in James Katende vs. Don Byamukama Administrator cause No.201 of 1992 where she held that the making of the will is governed by provision of section 46 of the Succession Act (now section 36)

[5] See Mariam Adekur Versus Opaja &Anor Constitutional Petition No. 2of 1997

[6] Best Kemigisha versus Mable Komuntale Civil Suit No. M.FP No.08/1998

[7] See Article 2(2), 33(6) of the Constitution of 1995.

- **Note;** Minors and adults of unsound mind, under the provisions of section 36 (1) of the Act, do not qualify to make Wills recognized and enforceable under the law. The plausible explanation is that a Will is an expression of a person's wishes. A person of sound mind or a minor may not be in position to make such wishes[8].

- 36 (2) of the Succession Act states that a married woman may by Will dispose of any property which she would alienate by her own act during her life. However, an unmarried woman would be covered by section 36 (1) of the Act under the phrase "*every person*".

- Likewise, S.36 (3) of same Act states that a person who is deaf or dumb or blind is not thereby incapacitated from making a Will, if he or she is able to know what he or she does by it. *(see; technological advancement with the use of Brails and laptops designed for such persons like visually impaired persons)*

- A minor for purposes of the law regulating the making of wills is not defined by the Act. Recourse is then had to Article 274 of the Constitution, which requires pre-existing laws before the coming into force of the Constitution is to be read subject to necessary modifications and qualifications to bring them into conformity with the constitution. In light of Article 31, the majority age is 18 years.

d) Why make a Will

- There is always fear amongst some of us that making a Will is a sign of preparation for near death. The focus is thus not on the advantages of making a Will.

- There are legal and factual reasons for the need to make a Will. In terms of legal reasons, a Will regulates the manner of distribution of the testator's property and thus reduces the possible disputes amongst the beneficiaries. Other key advantages shall be considered when discussing the contents of a Will.

- Once one makes a Will, such a person is deemed to have opted out of all others laws and practices that would affect the manner of administration and distribution of his estate, (other than the Succession Act).

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[8] ***C. Byamigisha .J.*** *In the* ***matter Administrator General V Teddy Bukirwa and Ester Bukirwa (1992-1993) HCB 192,*** *the learned judge is reported to have stated at* ***page 195*** *that the making of wills is governed by the provisions of* ***S.46 0f the Succession Act*** *which states that very person of sound mind and who is not a minor may by will dispose off his /her property*.

e) What if no Will is made.

- ❖ It is not a mandatory requirement to make a Will. It is however prudent practice to make a Will, as failure to do so may have adverse legal implications. Where a person dies without making a Will, the administration and distribution of his estate is dictated by the law of intestate succession.

- ❖ Note; In the course of discussion of key terms or clauses in a will, the advantages or disadvantages of making or not making a Will shall be considered.

f) Types of wills

- ❖ There are basically two types of wills namely; privileged and unprivileged Wills.

- ❖ Privileged[9] wills are ones made by any member of the armed forces being employed in an expedition or engaged in actual warfare or any mariner being at sea, but such person must have completed the age of 18 years and these may either be in writing or by words of mouth..

- ❖ A privileged will may be written or oral. An oral privileged will may be made by a testator's declaring his intention before two wittiness present the same time. It is nullified after the expiration of one month, after the testator has ceased to be entitled to make privileged will.

- ❖ Privileged wills may be written wholly/ partially by the testator or reduced into writing according to the testator's instruction by another person.

- ❖ The testator's instruction must be given in presence of two witnesses. If a privileged will is written wholly or in part by another person and it isn't signed by the testator it shall be considered to be his or her will if it is shown that it was written by the testators' directions or that he or she recognizes it at his will.
- ❖ A member of the armed forces being employed in an expedition includes; typists, *nurses, doctors, chaplains* and others[10].

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[9] *They are provided for under S.52 and S.53 of the Succession Act*

Re Wingham (1949) P187 at 196 *where* ***Lord Denning*** *said that when the Act refers to the soldier, as the member of the armed forces, it includes only not the armed, but also all those who serve i.e. the* ***Estate of Stanley (1916) P190****, a nurse employed by the war office in a hospital ship wrote a letter giving addressee full liberty to deal with her affairs.*

- ❖ It must be witnessed, especially when oral (essential for evidential purposes)

Unprivileged/ Ordinary Wills;-

- ❖ These are wills made by most people and these comprise what would be called the civilian population, i.e. locals who do not qualify to make privileged wills. The main pre-condition is that the testator must be a person of sound mind not a minor at the time of making the Will.

G) When does the will take effect?

- ❖ A will is ambulatory in nature which means that it has no effect until the testator dies, it has an executory / ritual function that is it ensures the intent of the testator upon death. Thus a will cannot confer benefits while the testator is still alive, neither does it bind the testator during his life time.

- ❖ Additionally, it does not limit the testator's rights of ownership and accordingly he remains free to sell, give away or otherwise dispose of property during the rest of his life time. If no codicil is made, the Will only affect the testator's property not dealt with in his life time

H) How to write a Will; the Key Considerations

Need to reduce the Will into writing;

Save for the privileged Will, it is a rule of law and prudent practice that a Will be reduced in writing. In essence the provisions of section *50 of the Succession Act* are to the effect that such a Will in the ordinary sense must be in writing and signed by the testator or someone in his presence and at his direction[11].

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[10] In the case of **Re stable (1902) P7** his lordship Horridge held; that the statement made by the deceased man must be meant for a will only in the sense that he intended deliberately to give expression to his wishes of what to be done with his property in the event of his death.

[11] James Katende vs. Don Byamukama Administrator cause no.201 of 1992 but a thumb print too is acceptable

Language of the Will

- Under Article 6 of the Constitution, English is the official language of Uganda, and it is also the language of court. However, the Succession Act does not make it a pre-condition that a Will must be written in English. It follows therefore, that a Will may be written in a language that the testator is comfortable with or fluent in.

- However, if the said Will written in any language other than English becomes a subject of court litigation, an English translation *(preferably by the School of Languages at Makerere must be attached)*

- *In the alternative where the Will is written in English under the direction of an illiterate testator, it must contain a certificate of translation that the contents therein were translated to the testator who appeared to have understood the same before appending their signature, and the particulars of the person who interpreted must be specified*[12].

Typed or handwritten Will and why?

- The requirement of a valid will entail it to be in writing if it is an ordinary will. It may be written in ink or pencil or a combination of both. However, where both are employed and there is a conflict between the portions of the Will in ink and in pencil, the presumption is that the pencil writing was merely deliberate and not intended to operate as part of the will. But is safer to use ink because the pencil is easier to erase.

- A Will can be written on any tangible material, where it can be read[13].

- A will may also be typed, but should be properly proof read to avoid errors in transmissions of information, which are very common[14].

- A person may by fraud substitute his name for that of another in a Will or may by error misrepresent particular facts or improperly describe particular property.

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12. See s. 2 & 3 of the Illiterates Protection Act. See Kasaala Growers Co-operative Society versus Kalemera Jonathan

[13] ***Hodson v Bames (1926)*** *a will written on an empty egg shell was accepted as valid,*

[14] In the **matter of the Goods of Boehm** where the name of Florence was omitted on the beneficiaries due to the typing error

- However, a hand written Will is easier to prove in courts of law by the hand writing experts and mistakes are limited since it is written by the person themselves.

Need for Clarity of the Will and Why?

- Since a Will operates upon the death of the testator yet it evidences his/ her wishes, it is imperative that the words used and the language be precise and unambiguous. The Role of court is to ensure that the testator's wishes as expressed in his Will are effected[15]; otherwise the Will can be successfully challenged and rendered void on account of uncertainty[16]. However, a Will may not be rendered void if a meaning can be ascertained and the Will is capable of being effected. *(See section 72 of the Act)*

Form and Content:

- There is no statutory or general form of writing wills. S.49 of the Succession Act only provides a guide on the contents of a Will and the form in the *fourth schedule of the Act*. States the guidelines as follows;
  - Name of the person making a will and their address.
  - Name of the executors.
  - Appointment of heirs.
  - Name of guardian of young children if that person has any younger children.
  - Names of the person who are given specific gifts say money etc.
  - Names of a person who are given a share in the will makers' property.
  - Signature of the testator.
  - Witnesses and their address plus their signatures.

- However, even in the absence of a statutory format, it is proposed that generally a Will should contain the following key clauses for the reasons explained against each of the clauses;

  - **Final or Last Will and the date:** It should always be indicated that the Will is the last/ final Will of the testator and it should be dated. This implies that the will supersedes any previous Wills that he/she may have written before that date. There should be a clause that the Will revokes all previous wills *(see section 74)*.

[15] *Section 74 of the Act, the testator's intention must be effected to the full effect as far as possible*
[16] *See Section 61 and 76 of the Act*

- **The Particulars of the testator**: The full names, age or date of birth, faith, sometimes the names of his parents, his clan and residential address of the testator at the time of making the Will. The purpose of this is to ensure the correct identification of the testator, relate it to the signature that may be attributed to him. *(See section 36)*

- **Statement as to State of Mind.** The testator should ordinarily indicate that he/she is of sound mind and conscious as at the time of making the will and has made the will voluntarily without comparison. This stems from the requirement that a will must be made by a person of sound mind See *section 36 (5) of the Act*. *(However that statement may be rebutted by other available evidence that he was not of sound mind, hence it is not conclusive)*.

❖ S.36(5) of the Succession Act states that no person can make a Will while he /she is in such a state of mind whether arising out of drunkenness or from illness or from any other cause that the person does not know what he/she is doing. *(Note that a person who is ordinarily insane may make a Will during the interval in which such a person is of sound mind (see section 36(4) of the Act)*

- The principle is that a Will must be an offspring of the testator's intention to make a Will and not a record of someone else[17].

- **Burial Ceremony:** Statement as to what should be done on death; Includes the place of burial, conduct of the burial ceremony, manner of ceremony, whether subject to prayers or not, or subject to customs, norms and rites or not *(section 74)*

- **Customary Heir:** The nomination and appointment of the customary heir, whose particulars must be stated and the relationship with the testator. It should be indicated whether he should be installed immediately after burial or last funeral rites should be conducted and when *(section 74)*.

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[17] *In **Harwood v Baker (1840) 3 Mooo Pc 282**, a will executed by a testator on his death bed giving all his property to his wife was held invalid because owing to his illness the testator was unable to comprehend and weigh the claims upon him of his relatives. See s.74 of the Act.*

- ***NB:*** It is pertinent to include a clause that if the foregoing is rendered impossible or impracticable by whatsoever circumstances, an alternative decision may be taken by a person or persons nominated and mandated by the testator.

- **Marital Status and Children:** A clause on the marital status of the testator, the full names and particulars of the spouse and where necessary the particulars of the marriage. The full names of the children, their ages or dates of birth and if born to different mothers, the names and particulars of their respective mothers must be indicated.[18] Even adopted children must be included. *(Section 61 and 74)*

- **Appointment of Executors:** There should be a clause on appointment of executors of the Will. Black's Law Dictionary defines an executor under the Will as a person named by the testator to carryout provisions in the testator's will

- These should be adults or sound mind. It is not a requirement that they must be children or spouses of the testator, though in many cases, it the common practice. The advantage of appointing executors is to avoid disputes among beneficiaries on who should be the administrator of the estate.

- Additionally, executors are not required to apply for a certificate of no objection from the Administrator General. They directly petition court for the grant of probate *(not letters of administration) Compare section 4 (3) (c) of the Administrator General's Act.*

- *S.183 of the Succession Act*, provides for appointment of an executor(s) where it states that it may either be by express or by necessary implication.

- *S.180 of the same Act* states that the executor of the deceased person is his or her legal Representative for all purposes and all the property of the deceased person vests in him or her as such.

- It follows that since the law intends to fulfill the intention of the testator, it is the duty of the executor to fulfill the wishes of the testator.

[18] Very helpful where there are disputes as to paternity.

- Therefore if a Will does not appoint an executor, then it has nobody to effect the Will, and the process of obtaining letters of administration with a Will must be adopted *(See section 4 (3) (b) Administrator Generals' Act. So* the reason for the appointment of an executor is to effect the intention of the testator in the Will.

- However, it is possible for the nominated executor to decline the obligation or to predecease the testator. An alternative should be considered in the Will otherwise then section *4 (3) (c) Administrator Generals' Act will be invoked*[19].

Description and distribution of Property in a Will and Why?

- There should be a clause of the proper description of the testator's property, whether registered land or unregistered interests, whether the property is encumbered or not, whether it is moveable or immoveable. It should however be property owned by the testator.

- **Note;** A person cannot by his Will dispose of property not belonging to him *(see joint tenancy where the doctrine of survivorship applies. Upon the death of one of the proprietors, the property by law automatically vests in the survivor)*. Any clause in the deceased's Will bequeathing such property is devoid of any legal effect.

- *S.77 of the Act* states that the description contained in a will of property the subject of the gift shall unless a contrary intention appears by the Will, be deemed to refer to the properly answering that description at the death of the testator[20].

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[19] *This was also emphasized* ***in the case of James Katende and 2 others v Dan Byamukama administration case no. 201 of 1992 vol. 2 pg. 127 as by*** *J. Kireju where he stated that* ***S.36 then S.46 of the repealed Succession Act*** *that a person of sound mind not a minor may by will dispose of his property defined to mean property belonging to him or her at the home of his/her death and any disposition of property in which the testator had no interest must fact. Therefore any attempt to dispose of property not belonging to him, will pass no bequest to the person bequeathed as nobody can give away what does not belong to him.*

- This means that a testator must have testamentary capacity to understand what he is doing otherwise, failure to correspond properly specifically claimed in a will and that which a person has in reality, a will may be set aside on grounds that the testator lacked testamentary capacity[21].

- The property must be distributed in very clear terms to stated persons whether individually or jointly and those not given, reasons should stated.

❖ **Effect of leaving out certain property in a Will**

- In cases where such property is left out a person will die intestate in respect of the property which was not disposed of by a valid testamentary *disposition [S.24 0f the succession Act]*.Therefore it means such property will be dealt with as stated in *S 25 of the Act (intestate succession)*.

❖ **Debts and Liabilities;** the testator must indicate his debts and liabilities which may affect the estate; so that if possible the estate is guarded against false claims *(see section 154 of the Succession Act). The beneficiary must take subject to the liability)*

❖ **Miscellaneous and Important information;**

Clause on the whereabouts of pertinent documents, the parties to whom copies of the Will have been given and other important information.

Execution of a Will

❖ A will in ordinary sense must be in writing and signed by the testator or someone in his presence and at his direction[22].

❖ [21] *In the case of **woods v smith (1993) in 90**, where the testator claimed to have investments worth E 105,000 get the actual value was in excess of E 105,000 this showed that he was seriously confused as to the extent of his assets and court held that this was indicating that the deceased lacked testamentary capacity*.

[22] *The signature is intended to give effect to the will emphasized in the matter of AG V Teddy Bukirwa and others 1992-1993 HCB 192 J Byamugisha stated S.50 (2) which is S.50 (b) in the current Succession Act that a will made in ordinary sense must be in writing and signed by the testator or someone in his presence and at his discretion, therefore signing gives effect to the will.*

- The signature must be made by the testator in the presence of two witnesses or more who must be together at same time and should attest to the will in the presence of the testator. The witnesses must see the testator affix his/her signature as required by *S.50 (2) of the Succession Act.*

- The law emphasizes that a will must be signed and attested as stated above and a method of signature can take various forms say an imprint of the thumb or some other mark on the will intending it to represent his signature and it has to be placed at the foot or end of the will. *(and on every page of the Will)*

- It was construed in the matter of ***Smee v Bryer 1848*** where a will was held to be void on the ground that the signature of the testation did not appear on the 8th page out of the 10 pages of the Will. Although at times courts are remarkably liberal in determining whether a will has been properly signed[23].

Attestation of the Will and Why?

- The will must be signed and attested by two or more witnesses[24] although the testator is not bound to inform them that what he/she is signing is his will.

- This is so because what they are required to witness is not the Will but rather the testators' signature when it is being written or after it has been written.

- Therefore the Will won't be deemed to have been properly executed where it emerges that a witness though in a room was unaware that the testator was signing the Will.

- Therefore attestation helps to validly execute the will as one of requirements under **S.50 of the Succession Act** and such witnesses help to prove its existence or validity.

- *[23] In the Goods of Cook 1060; where a will begin with the name of the testatrix and ended with the words your loving mother court held that the Will was valid as the testatrix intended the words to represent her name.*

In the Matter of ***Administrator General Norah Nakiyaga and others. Administration cause No. 554/90 Ongom J*** *held where the will was invalid for the reason that it was not attested as required by S.50 of the succession Act.*

Conclusive Remarks;

From the foregoing it has been demonstrated that making a will is the most appropriate way for a person to have his wishes implemented after death. It is therefore, prudent practice for a person to make a will that complies with the legal principles discussed herein. In that context, disputes that arise after death may be limited.

Before I take leave of the presentation, I wish to extend my gratitude to the organizers of this workshop for giving me the opportunity to share my legal and practical knowledge and experience with you. I am hopeful that the presentation has addressed some of the key concerns that you had and has further enlightened you on the importance and relevancy of writing a Will.

Thank You

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