What is a will?

Will Making

In general terms, a will is a legal pronouncement by a person on how they wish to have their property (also known as the Estate) disposed of upon their death. A will covers the original will and further attachments (also known as codicils) made in future and explaining alterations and modifications of the original will.

What are the various types of wills?

Wills are mainly categorized into two as written and oral wills. Written wills are the most common but we also have oral wills which must be witnessed by not less than two persons, and the maker of such wills must, conditionally, pass on within a period of three months from the making of the oral will.

Written wills on the hand must meet particular conditions provided in the law to be valid. Written wills are further divided into the following types:

1. **Simple wills**

These are the most common straightforward wills. They provide the will-maker the opportunity to devolve their assets to their beneficiaries with ease and even appoint the executor and even name a guardian where minors are involved. They are easy to make just from their name "simple".

2. **Joint or mirror wills**

This one is most common with spouses. It is mostly executed by spouses in favor of the other spouse to inherit all the estate in the demise of the other. They work better where there is matrimonial property or property jointly owned by the spouse only without the involvement of a third party in the joint ownership. Terms of a joint will are usually hard to change and this may work against the surviving spouse.

3. **A living will**

This one does not usually devolve property. It mainly works to enable the maker to decide how they want to benefit, especially, from life and medical insurances should they be incapacitated.

4. **Testamentary Trust Will**

Testamentary Trust Will is best used where, in the will, the maker of the will wants to create a trust to provide for and take care of beneficiaries who are minors. This type of a will enables the will maker to put some portion of the estate into a trust and put conditions on who the estate under the trust should devolve upon their demise.

Does a will have to follow a particular format?

The answer to this question may vary from one legal system jurisdiction to the other. In Kenya, there is no particular format to follow while making a will. All that is required, as we shall see late, is that the will, in whichever format, meets the legal requirements provided under probate law.

Why does one need to have a will?

Due to our cultural setting and beliefs, the discussion around death is not a comfortable one in most families. This makes the idea of will making such a sensitive one. However, with change in the society and the growing need to avoid succession battles for the estate of the deceased, our society is gradually warming up to the idea of will making. Making a will comes with enormous advantages, not just to the will maker but most importantly, to the beneficiaries. The following are reasons why it is important to make a will:

Making a will enables the maker to retain control over their estate even after their demise. This ensures the despite their demise, will makers still have their hand in ensuring that the estate devolves in a way that they are comfortable and in accordance with their wishes. This is better than letting their estates to be subjected to rules of intestacy.

Will making also enables Administrators of the Estate of the deceased to carry out their mandated with ease and convenience. This is because a will already comes with directions on how the estate is to devolve and therefore no hard imagination is required.

A will identifies the properties of the deceased making it easy for the administrators of the estate to just do the distribution. In the absence of the will, administrators of the estate of the deceased may find it hard to identify the whole estate especially where it is unknown to them.

A well-developed will has the potential of deflating family disputes upon the death of the will maker. Issues between relatives that would have otherwise produced conflicts and litigation can be avoided if the will is well crafted. This position is not easy to achieve where rules of intestacy are being applied.

A will gives to the maker the advantage of appointing guardians and executors of his estate. This option is applied differently under rules of intestacy which may end up disposing the estate of the deceased in a manner they would have never imagined. Appointment of guardians has the input of safeguarding the minors and ensuring that the estate is not left into the hands of ill-intent people.

One of the fundamental benefits of making a will is to avoid the subjecting the estate of the deceased t9o rules of intestacy. In the absence of a will, Rules of Intestacy will automatically come into play. Rules of Intestacy give authority to other bodies to play a role in distributing the seats in manner that conforms to the rules as opposed to the wishes of the estate owner. This can turn out to be unfair especially where the deceased had specially relationships with beneficiaries and wished to bequeath them in only a way they understand better.

What do I need to make a valid will?

For a will to be valid, the will maker must meet some legal requirements without which, the whole will or part of it may be rendered invalid. The following are the requirements while making a valid will:

a) The maker of the will (also known as the testator) must be 18 years old

b) The testator must be of sound mind

c) Where will is written, the maker must sign it or affix their mark on the written will.

d) A testator can only will free property. Property is free if it has no other obligations attached to it.

e) The testator will also require to have not less than two competent witnesses. Competent means that they must also be of sound mind and age of majority

f) The signature or mark must be put in such a place where it can be concluded easily that it is giving effect to the will.

g) Where beneficiary is also a witness, then an extra two witnesses will be required to give effect to the writings as will

Who can make a will?

The general rule is that any person who meet the legal requirements can make a valid will. In regard of the above, different persons in different social positions can make a valid will but the will may be worded differently to retain their social status even as they devolve their assets. Under this answer, we shall discuss how the following personscan make their wills:

- A married couple
- Young adults
- The elderly
- The single adults
- Divorced and separated couples
- Children

Here, children could be minors or adults to whom you are a parent.The general rule is that minors do not have capacity to make wills. However, where a minor makes a will, they can re-execute it the moment they attain the age of majority to give it a validation andmake it legal. Where

your children are adults, nothing stops themfrom making a will even though you have not made your own.

Can parts of my will be invalid?

Sometimes a will may fail to meet the legal requirements and may, therefore, be declared as invalid in whole or in part. A will is partially invalid if only some part(s) of it do not meet the validity threshold.

Where only parts of the will are declared as invalid, the affected clauses in a will and the assets under those clauses shall be subjected to the rules of intestacy, but the rest of the valid will may be implemented in accordance with the wishes of the testator.

Where the whole will is declared as invalid, the estate of the deceased shall then be subjected to rules of intestacy.

It is worth noting that a will can only be declared as invalid by a court of competent jurisdiction and not by any other person.

Wills obtained through the following situations can be rendered invalid:

a) A will obtained through fraud
b) A will which has, or some of its clauses have residues of misrepresentation c) A will obtained through coercion and importunity

What are the additional provisions that a will may need?

Every will may be unique in its own ways. We have already seen that there is no particular format to follow when making a will. However, there are other provisions that come in a will to take care of the unique formats of different wills and the nature of the estate of the testator.

One example of an extra provision is the Residuary Clause. This clause is added in the will to take care of the ambulatory nature of the will. For example, after making a will, the testator may acquire more assets but the will is yet to be amended at the time of their demise to

accommodate the new assets acquired subsequent to will making. In sucha case, a residuary clause may be introduced to take care of that.

The following is an example of a residuary clause to take care of assets forgotten when making a will or those acquired subsequent to will crafting:

The maker of the will may say: "I bequeath all of the residue of my estate to my wife if she survives me. If my wife does not survive me, I bequeath all of the residue of my estate to my son."

What is a Power of Attorney?

This is a formal document that gives another person who doesn't have to be an attorney as the name suggest to act on behalf of another person. The person who is appointed as an Attorney under the Power of Attorney will be authorized to carry on with some legal obligations on behalf of the appointing person. The appointee can do the following on behalf of the appointing person:

- Address correspondence
- Sign documents
- Appear in court
- Transact
- And other relevant duties

What steps should I follow when writing my will?

- Decide and choose whether you want to hire an advocate
- Identify your will beneficiaries
- When minors are involved, choose a legal guardian for your child
- Gather all your wishes and possibly list them on paper
- Sign or affix a personal mark on your last will
- Identify your two witnesses. Remember that two is just the legal minimum, you could have more.

How can I will my estate to beneficiaries born subsequent to making of the will?

This is very possible because some testators will make aw ill while still having children. In such a case, it is prudent that use of general terms as opposed to the specific names of the already born children be preferred. For instance, instead of saying "I bequeath my shop to my son Peter", the testator should instead prefer "I bequeath my shop to my children in equal share". The latter takes care of children unborn at the point of will making while the former denies the unborn a chance to benefit from the gift of the shop.

What will happen if I get married after making a will?

Generally, a will made during the subsistence of a marriage is not invalid by virtue of the existence of the marriage. However, marriages subsequent to will making will render the will as invalid for the simple reason that the new entrants in that marriage will be required to be accommodated in the will. A person faced by this type issue will be forced to either update their will or write a new will all together to take care of the new position in their marital status.

Can I will away my future assets?

This is also possible. Professional will drafters will be required in such instances to help you frame your will in a manner that it is able to capture. In most cases, the use of a **Residuary Clause** will assist in this issue.

How do I choose an executor for my will?

An executor is an appointee of the testator usually in the will who carries on the job of implementing the instructions you leave behind in your will upon your death. This process involves many legal rules and institutions and it is therefore not easy work as many may assume. It is a process that may take several months and sometimes, several years.

The executor's job might involve:

- Making the decisions on when to sell your property so the people who

inherit the proceeds get the most money from such endeavours.

- Making sure the right amount of taxes get paid

Being the type of work we have seen, it is important that you must choose somebody you trust. The person you settle upon for this noble job is going to be the one to follow the instructions in your will and to find fair solutions to any disagreements. A competent executor is preferred especially where paper work is involved and there is no doubt, there will be a lot of paperwork where assets are voluminous.

The following people will easily qualify for the obligations of the executor:

- Trusted and competent family members
- Advocates
- Trusted and competent relatives
- Trusted and extremely well vetted friends

The legal qualifications of an executor are not complex. They are not in some book of rules or in some Statute. We presume them in the following way:

- A person above 18 years of age
- A person with sound mind
- Most of the other qualifications are discretionary.

It is important to mention that where an executor has not been appointed in the will, the courts, upon application by relevant persons under the law, may appoint a person to carry on with the distribution of the estate of the deceased in accordance with a valid will.

What is the effect of my mental illness while making a will?

In answering this question, Courts will look at the degree of the insanity of the maker of the will to ascertain whether the insanity might have incapacitated the will maker to the extent that they would not know what they were engaging in while crafting that will. The presumption in law is that

at the point of making the will, the will maker is of sound mind. A person that argues to the contrary must therefore bear the burden of proving their otherwise position

What will happen to my estate if I don't make a will?

This is a straightforward one. In the absence of a will, the estate of the deceased person shall be subjected to rules of intestacy.

Who is entitled to benefit from my estate?

The advantage of making a will is that it prescribes how you wish to have your estate devolve upon your demise. A will therefore states those whom you wish to have inherit from you.

Where there is no will, the probate law in Kenya prescribes expressly who qualifies to get gifts from the estate of a deceased person. They following qualify but the list is not conclusive:

- Wife or wives
- Former wife or wives (provided they have not remarried)
- Children (biological and adopted)
- Relatives of the testator

Can I bequeath my estate to charity?

Where there is a will, it will prescribe how you wish to have your property devolve. Passing gifts to a charity may be possible where for instance, the maker of the will has adequately provided for their dependents.

On the other hand, where wills are absent and the estate is therefore subjected to the rules of intestacy, your wish to have part of your estate gifted to a charity may not be realizable, except where the intestate beneficiaries agree mutually and unanimously to actualize your wish.

How do I take care of my children who are below capacity age in my will?

As a general rule, minors lack the capacity to craft a will. In the same manner, it is not desirable to bequeath minors with some sensitive assets in the estate.

The best way to proceed on this issue, is to create a Testamentary Trust Will which will create a trust to oversee the gifts you lay down for the minors. A trust will provide how the estate will be managed for the benefit of the minors and even state at what age they will be able to decide whether to carry on with the trust, or to begin direct management of their gifts upon the attainment of the age of majority.