

## CHAPTER 6:06

### WILLS ACT

*Acts 13/1987, 2/1990, 21/1998, 22/2001 (s. 4).*

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**AN ACT to consolidate and amend the law regarding the execution, validity, interpretation and protection of wills and the disposal of property by will; and to provide for matters connected with or incidental to the foregoing.**

[Date of commencement: 11th December, 1987.]

#### **1 Short title**

This Act may be cited as the Wills Act [*Chapter 6:06*].

#### **2 Interpretation**

In this Act—

“amendment”, in relation to a will, means a deletion, addition, alteration or interlineation in the will;

“appropriate court” means—

(a) the High Court, in relation to any will;

(b) a magistrates court, where such court has jurisdiction to determine any question relating to the validity, interpretation or effect of the will concerned;

“competent witness” means a person who in terms of section *seven* is competent to witness the signing of a will or the acknowledging of a signature on a will for the purposes of this Act;

“designated official” means any employee of the State, a statutory body or a local or like authority whom the Minister, by notice in a statutory instrument, declares to be a designated official for the purposes of this Act;

“estate”, in relation to any person, means such of his rights, privileges, interests, duties and liabilities, whether vested, contingent or future, as are not extinguished by law on the death of that person, and includes any such rights, privileges, interests, duties and liabilities held or incurred as the case may be, according to customary law;

“make”, in relation to a will, means to draw up a will and perform all the formalities necessary to give validity to the will;

“make a mark” includes to make a cross or to write or stamp initials on a will;  
“marriage” includes a marriage solemnized in terms of the Customary Marriages Act [*Chapter 5:07*];  
“Master” means the Master of the High Court referred to in subsection (2) of section 3 of the Administration of Estates Act [*Chapter 6:01*] and, in relation to a will to which customary law applies, includes a magistrate appointed in terms of section 68I of that Act;

Definition inserted by s.2 of Act 21 of 1998.

“oral will” means a declaration which is valid as a will in terms of section *twelve*;  
“sign” has the meaning assigned to it in section *thirteen*;  
“soldiers will” means a will made in terms of section *ten*;  
“testator” means a person who is making or has made a will;  
“will” includes an oral will, a codicil and any testamentary writing but does not include a document evidencing an antenuptial contract or other transaction of a contractual nature;  
“will made during an epidemic” means a will made in terms of section *eleven*.

### 3 Application of Act

- (1) This Act shall apply in relation to wills made on or after the 1st January, 1988.
- (2) In relation to wills made before the 1st January, 1988, this Act shall apply to—
  - (a) the power of the testator to make any provision, disposition or direction in any such will; and
  - (b) the amendment, revocation, revival, rectification, theft, concealment or destruction of any such will, where the amendment, revocation, revival, rectification, theft, concealment or destruction is done on or after the 1st January, 1988; and
  - (c) the acceptance in terms of section *ten*, *eleven* or *twelve* of any such will which, if it had been made on or after the 1st January, 1988, would have been valid as a soldiers will, a will made during an epidemic or an oral will; and
  - (d) the effect upon any such will of the testator’s marriage or of the dissolution or annulment of his marriage, where the marriage or the dissolution or annulment thereof, as the case may be, took place on or after the 1st January, 1988; and
  - (e) the effect upon any such will of the birth, legitimation or adoption of a child, where the birth, legitimation or adoption took place on or after the 1st January, 1988; and
  - (f) the application of foreign law to determine the formal validity of any such will, where the testator is alive on the 1st January, 1988.

### 4 Capacity to make a will

- (1) Subject to this Act, every person who is of or over the age of sixteen years may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act.
- (2) The fact that a person has been interdicted as a prodigal shall not invalidate—
  - (a) any will that he made before he was so interdicted; or
  - (b) any will that he makes whilst he is so interdicted, except to the extent that the will shows signs of prodigality in the disposition of his estate.
- (3) A minor or other person under a legal disability who is competent to make a will shall not require the authority or assistance of any other person in doing so.
- (4) The burden of proving that—
  - (a) at the time of making a will, the testator was mentally incapable of appreciating the nature and effect of his act; or
  - (b) a will made while the testator was an interdicted prodigal shows signs of prodigality in the disposition of his estate;

shall rest on the person alleging it.

### 5 Power to make dispositions by will

- (1) Subject to this Act and any other enactment, any person who has capacity in terms of section *four* to make a will may in his will—
  - (a) make provision for the transfer, disposal or disposition of the whole or any part of his estate; and
  - (b) make provision for the custody or guardianship after his death of any of his minor children; and
  - (c) make any other lawful provision, disposition or direction, whether in respect of his own or any other property or in respect of any other matter.
- (2) Subject to this Act and any other enactment, a will shall not be invalid solely because the testator has disinherited or omitted to mention any parent, child, descendant or other relative or because he has not assigned any reason for such disinheritance or omission.
- (3) No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the rights of—

- (a) any person to whom the deceased was married to a share in the deceased's estate or in the spouses' joint estate in terms of any law governing the property rights of married persons; or
  - (b) any person to receive any property, maintenance or benefit from the testator's estate in terms of any law or any award or order of court; or
  - (c) any creditor in respect of any debt or liability payable from or attaching to the testator's estate;
- except in so far as such variation or prejudice is brought about with the consent of the person or creditor concerned or through the exercise by him of a right of election.

## 6 Capacity to benefit under a will

(1) Subject to this section, any person, whether born or unborn, natural or juristic and whatever his legal capacity, may receive a benefit conferred by or in terms of a will.

(2) Subject to this section and to any other enactment, the following persons shall not be capable of receiving any benefit conferred by or in terms of a will—

- (a) any person who signs the will as a witness to the making thereof or as a witness to the making of any amendment in the will;
- (b) any person who, in accordance with paragraph (b) of subsection (1) of section *eight* or paragraph (a) of subsection (2) of section *nine*, signs the will or any amendment in the will in the testator's presence and at his direction;
- (c) any person who, on behalf of the testator or at his direction, personally writes out the will or any part of it that confers a benefit upon him;
- (d) any magistrate, presiding officer of a community court, justice of the peace, commissioner of oaths or designated official who has certified the will in terms of subsection (2) of section *eight* or who has certified any amendment in the will in terms of subsection (3) of section *nine*;
- (e) where the testator was a minor or under a legal disability at the time the will was made, any person who at that time was—
  - (i) a guardian of the testator, other than a parent; or
  - (ii) a curator, trustee or administrator of the testator;
 as the case may be;
- (f) any person who, when the will was made or amended, as the case may be, was a spouse or child of a person incapable of receiving a benefit under the will by virtue of paragraph (a), (b), (c), (d) or (e);
- (g) any person who claims the benefit through a person incapable of receiving the benefit under the will by virtue of paragraph (a), (b), (c), (d), (e) or (f);
- (h) any person who, through fraud, duress or undue influence, has—
  - (i) caused the testator to make the will or to insert therein the provision conferring the benefit upon him; or
  - (ii) prevented or attempted to prevent the testator from altering the will or making a new will;
- (i) any person who unlawfully destroys or conceals a will made by the testator or a copy of such a will;
- (j) any person who has unlawfully and intentionally killed—
  - (i) the testator; or
  - (ii) any person from whom the testator has inherited the benefit concerned, where such other person and the testator were married to each other or were parent and child; or
  - (iii) any other person through whom his claim to the benefit derives;
- (k) any person who, in some way other than by causing the death of a person, has by his unlawful and intentional act or omission directly caused the benefit to be conferred upon him.

(3) A person referred to in paragraph (a), (b), (c), (e), (f) or (g) of subsection (2) may receive a benefit conferred by or in terms of a will to the extent that the benefit does not exceed in value any benefit he would have received had the testator died intestate.

(4) A person who—

- (a) is referred to in paragraph (a), (b) or (c) of subsection (2); or
- (b) when the will concerned was made or amended, as the case may be, was a spouse or child of a person referred to in paragraph (a), (b) or (c) of subsection (2); or
- (c) claims through a person, spouse or child referred to in paragraph (a) or (b) of this subsection;

may receive a benefit conferred by or in terms of a will if after the will has been made the testator confirms the benefit, whether by written endorsement upon the will or in a codicil or orally or in any other manner that clearly shows the testator's intention to confer the benefit.

(5) The burden of proving that any person is incapable in terms of this section of receiving any benefit conferred by or in terms of a will shall rest on the person alleging it.

(6) Except in relation to a person referred to in paragraph (e) or (g) of subsection (2), appointment under a will as executor, administrator, trustee or guardian shall constitute a benefit for the purposes of that subsection.

(7) Nothing in this section shall be construed as entitling a body corporate to receive a benefit conferred by or in terms of a will if the body corporate is incapable of receiving such a benefit under its constitution or under the law by which the body corporate is constituted or established.

## 7 Competent witnesses

Any person who—

- (a) is of or over the age of sixteen years; and
- (b) is competent to give evidence in a court of law; and
- (c) is physically capable of seeing a testator sign his will or acknowledge his signature on a will;

shall be competent to witness the signing of a will or the acknowledging of a signature on a will for the purposes of this Act.

## 8 Formalities for making wills, other than soldiers wills, wills made during epidemics and oral wills

(1) Subject to subsections (3) and (5), a will shall not be valid unless—

- (a) it is in writing; and
- (b) the testator, or some other person in his presence and at his direction, signs each page of the will as closely as may be to the end of the writing on the page concerned; and
- (c) each signature referred to in paragraph (b) is made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time; and
- (d) each competent witness either—
  - (i) signs each page of the will; or
  - (ii) acknowledges his signature on each page of the will;

in the presence of the testator and of the other witness.

Subsection as amended by s.3 of Act 21 of 1998.

(2) Subject to subsection (3), a will that has been signed—

- (a) by the testator by the making of a mark; or
- (b) by some other person in the testator's presence and at his direction;

shall not be valid unless either—

- (i) a magistrate, presiding officer of a community court, justice of the peace, commissioner of oaths or designated official, at any time before the testator's death—
  - A. certifies on the will that he has satisfied himself as to the identity of the testator and that the will is the testator's will; and
  - B. signs each page of the will;
- or
- (ii) an appropriate court, on being satisfied that the will is the testator's will and that it was duly made by the testator, declares the will to be a valid will.

(3) Subsections (1) and (2) shall not apply to soldiers wills, wills made during epidemics or oral wills.

(4) A will shall be valid for the purposes of this section notwithstanding that the competent witnesses who signed it were unaware of its contents or were unaware that the document they were signing was a will.

(5) Where the Master is satisfied that a document or an amendment of a document which was drafted or executed by a person who has since died was intended to be his will or an amendment of his will, the Master may accept that document, or that document as amended, as a will for the purposes of the Administration of Estates Act [Chapter 6:01] even though it does not comply with all the formalities for—

- (a) the execution of wills referred to in subsection (1) or (2); or
- (b) the amendment of wills referred to in subsection (2), (3) or (4) of section *nine*.

Subsection inserted by s. 3 of Act 21 of 1998.

(6) Any person who is aggrieved by a decision of the Master may appeal to an appropriate court within thirty days of being notified of the decision of the Master.

Subsection inserted by s. 3 of Act 21 of 1998.

## 9 Amendments to wills, other than soldiers wills, wills made during epidemics and oral wills

(1) For the purposes of this section—

- (a) any amendment in a will shall be presumed, unless the contrary is proved, to have been made after the will was signed and witnessed in terms of section *eight*;
- (b) a signature, initial or other mark shall sufficiently identify an amendment in a will if—
  - (i) the signature, initial or mark is placed next to or in reasonably close proximity to the amendment; or
  - (ii) the signature, initial or mark is accompanied by words indicating that it was intended to relate to the amendment; or
  - (iii) any other circumstance indicates that the signature, initial or mark was intended to relate to the amendment.

(2) Subject to sections *ten*, *eleven* and *twelve* and to subsection (5), no amendment made in a will before the will has been signed and witnessed in terms of section *eight* shall be valid unless the amendment is identified by—

- (a) the signature, initials or other mark of the testator or, where the will is signed by another person in the testator's presence and at his direction, by the signature or initials of that other person; and
- (b) the signature or initials of the competent witnesses who sign the will.

(3) Subject to sections *ten*, *eleven*, *twelve* and *fifteen* and to subsection (5), no amendment made in a will after the will has been signed and witnessed in terms of section *eight* shall be valid unless—

- (a) the amendment is identified, on each page on which it appears, by the signature of the testator or by the signature of some other person made in the testator's presence and at his direction; and
- (b) each signature referred to in paragraph (a) is made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time; and
- (c) each competent witness identifies the amendment by either—
  - (i) signing each page on which it appears; or
  - (ii) acknowledging his signature on each page on which it appears;

in the presence of the testator and of the other witness.

(4) Where an amendment referred to in subsection (3) has been identified—

- (a) by the testator by the making of a mark; or
- (b) by the signature of some other person in the testator's presence and at his direction;

the amendment shall not be valid unless either—

- (i) a magistrate, presiding officer of a community court, justice of the peace, commissioner of oaths or designated official, at any time before the testator's death—
  - A. certifies anywhere on the will that he has satisfied himself as to the identity of the testator and that the amendment was made by or at the request of the testator; and
  - B. signs each page on which the amendment appears; or
- (ii) an appropriate court, on being satisfied that the amendment was duly made by or at the request of the testator, declares the amendment to be valid.

(5) To the extent that any amendment in a will completely obliterates, renders illegible, excises or destroys any words or part of the will, it shall be presumed, unless the contrary is proved, that the testator intended to revoke those words or that part, as the case may be, and section *fifteen* shall apply in relation thereto.

## 10 Soldiers wills

(1) In this section—

“active service” means full-time employment with or as a member of any branch of the Defence Forces of Zimbabwe or the armed forces of any other country allied to or associated with Zimbabwe, at a time when—

- (a) Zimbabwe is at war; or
- (b) the forces concerned are engaged in the suppression of armed rebellion or insurrection either in Zimbabwe or in any other country in support of the government of that other country;

“appropriate official” means the Master of the High Court or any other member of the Public Service responsible for ensuring that the estate of a person who has made a soldiers will is properly administered and distributed.

(2) Any person while on active service may make a will without complying with any formalities whatsoever, except that the will shall be in writing, and may in like manner while on active service make any amendment in such a will.

(3) A soldiers will shall be valid if the testator dies while on active service or within one year after he has ceased to be on active service.

(4) A soldiers will that has been signed by the testator may be accepted by an appropriate official without a court order for the purposes of the administration of the testator's estate, if the appropriate official is satisfied that the will is a valid soldiers will.

(5) If a soldiers will has not been signed by the testator, an appropriate court may on application, if satisfied that the will is a valid soldiers will, direct an appropriate official to accept the will for the purposes of the administration of the testator's estate.

(6) Any person aggrieved by—

- (a) an acceptance of a soldiers will by an appropriate official; or
- (b) a refusal by an appropriate official to accept a soldiers will;

may make application to an appropriate court for an order setting aside such acceptance or refusal, as the case may be, and the appropriate court may confirm or set aside the acceptance or refusal, as the case may be, and may make such other order in the matter as it thinks appropriate.

(7) Notice of any application to—

- (a) an appropriate official to accept a soldiers will in terms of subsection (4); or

(b) an appropriate court for an order in terms of subsection (5) or (6); shall, unless the appropriate court otherwise directs, be given to any spouse and intestate heir of the testator and also to any person who may be entitled to a benefit under any previous will made by the testator, if such previous will is known to exist.

## 11 Wills made during epidemics

(1) In this section—

“appropriate official” means the Master of the High Court or any other member of the Public Service responsible for ensuring that the estate of a person who has made a will during an epidemic is properly administered and distributed;

“epidemic” means a greatly increased incidence of an infectious or contagious disease which results in the deaths of large numbers of persons in Zimbabwe or in any area within Zimbabwe.

(2) Any person who is within an area affected by an epidemic may during the epidemic make a will without complying with any formalities whatsoever, except that the will shall be in writing, and may in like manner during the epidemic make any amendment in such a will.

(3) A will made during an epidemic shall be valid if the testator dies within one year after making the will.

(4) A will made during an epidemic may be accepted by an appropriate official without a court order for the purposes of the administration of the testator’s estate, if the will has been signed by the testator and the appropriate official is satisfied that the will is a valid will made during an epidemic.

(5) If a will made during an epidemic has not been signed by the testator, an appropriate court may on application, if satisfied that the will is a valid will made during an epidemic, direct an appropriate official to accept the will for the purposes of the administration of the testator’s estate.

(6) Any person aggrieved by—

(a) an acceptance by an appropriate official of a will made during an epidemic; or

(b) a refusal by an appropriate official to accept a will made during an epidemic;

may make application to an appropriate court for an order setting aside such acceptance or refusal, as the case may be, and the appropriate court may confirm or set aside the acceptance or refusal, as the case may be, and may make such other order in the matter as it thinks appropriate.

(7) Notice of any application to—

(a) an appropriate official to accept a will made during an epidemic in terms of subsection (4); or

(b) an appropriate court for an order in terms of subsection (5) or (6);

shall, unless the appropriate court otherwise directs, be given to any spouse and intestate heir of the testator and also to any person who may be entitled to a benefit under any previous will made by the testator, if such previous will is known to exist.

## 12 Oral wills

(1) In this section—

“appropriate official” means the Master of the High Court or any other member of the Public Service responsible for ensuring that the estate of a person who has made an oral will is properly administered and distributed.

(2) Subject to this section, an oral declaration by a person providing for any matter for which provision may be made in a will shall be valid as that person’s will if—

(a) such a declaration is regarded as a valid will according to any law or custom to which the testator was subject when he made the declaration; and

(b) the value of the testator’s estate on the date of his death does not exceed ten thousand dollars.

(3) If an appropriate official is satisfied, from information given to him by persons who witnessed an oral will and after making such other inquiries as he thinks necessary, that—

(a) the declaration made by the testator concerned is a valid oral will in terms of subsection (2); and

(b) his informants have accurately stated the contents of the oral will;

the appropriate official may cause the terms of the oral will to be reduced to writing and may accept the will without a court order for the purposes of the administration of the testator’s estate.

(4) Any person aggrieved by—

(a) an acceptance of an oral will by an appropriate official; or

(b) a refusal by an appropriate official to accept an oral will;

may make application to an appropriate court for an order setting aside such acceptance or refusal, as the case may be, and the appropriate court may confirm or set aside the acceptance or refusal, as the case may be, and may make such other order in the matter as it thinks appropriate.

(5) Notice of any application to—

(a) an appropriate official to accept an oral will in terms of subsection (3); or

(b) an appropriate court for an order in terms of subsection (4);

shall, unless the appropriate court otherwise directs, be given to any spouse and intestate heir of the testator and also to any person who may be entitled to a benefit under any previous written will made by the testator, if such previous will is known to exist.

(6) Notwithstanding any other law, the fact that a person has witnessed an oral will in terms of subsection (2) shall not disentitle him from receiving any benefit under the will.

### **13 Signatures on wills**

(1) For the purposes of this Act, a person shall be held to have signed a will in due form if he has written thereon in his own hand his surname or last name or a name by which he is ordinarily known:

Provided that it shall be sufficient for a testator to sign his will by making a mark thereon.

(2) The fact that a signature on a will is illegible or partly formed or is misspelt shall not invalidate the signature for the purposes of this Act.

### **14 Incorporation of documents in wills by reference**

For the purpose of clarifying, explaining or giving details of any disposition or provision in his will, a testator may refer to any document that is in existence at the time he makes the will, and the relevant provisions of such document shall be construed as having been incorporated in the will notwithstanding that the document may not itself have been signed and witnessed as a will in accordance with section *eight*.

### **15 Revocation of wills**

(1) Subject to this section, a testator may at any time before his death revoke his will wholly or partly and either absolutely or conditionally.

(2) A joint and mutual will shall not be revocable by a surviving testator—

- (a) to the extent that the will effects a massing of the estates or any property of the joint testators; and
- (b) if the surviving testator has accepted some benefit under the will.

(3) A will or any part thereof shall be revoked if—

- (a) the testator makes a new will, including an oral will, which expressly revokes the first-mentioned will or part thereof or which is inconsistent with the provisions of the first-mentioned will or part thereof; or
- (b) the testator, or any person acting with the specific authority of the testator—
  - (i) obliterates, renders illegible, excises, tears up, burns or otherwise destroys the will or part thereof; or
  - (ii) draws lines through the will or part thereof and adds words such as “cancelled” or “revoked” or similar words indicating an intention to revoke the will or part thereof; or
  - (iii) obliterates, renders illegible, excises or otherwise destroys the testator’s signature either at the end of the will or on the page containing the part concerned, as the case may be; with the intention of revoking the will or part thereof concerned, as the case may be; or
- (c) in the case of an oral will, the testator does any act which amounts to a revocation of the oral will in accordance with the law or custom under which the oral will was made.

(4) Where a testator voluntarily sells, donates or otherwise disposes of any property that is the subject-matter of a legacy in his will, he shall be presumed, unless the contrary is proved, to have intended to revoke the legacy to the extent that it relates to such property.

(5) If it is proved that a testator altered, marked or destroyed a will or part of a will in a manner referred to in subsection (3), it shall be presumed, unless the contrary is proved, that he did so with the intention of revoking the will or the part thereof concerned.

(6) If a will that was in the possession or custody of the testator at the time of his death, or any part of such a will, has been subjected to any alteration, marking or partial destruction such as is referred to in subsection (3), it shall be presumed, unless the contrary is proved, that such alteration, marking or partial destruction was effected by the testator with the intention of revoking the will or the part thereof concerned.

(7) If a will which was last known to have been in the possession of the testator, or any page of such a will, cannot be found after his death, it shall be presumed, unless the contrary is proved, that the testator destroyed the will or page concerned with the intention of revoking it.

### **15A Power of Master to declare a will to be revoked**

(1) If the Master is satisfied that a testator has—

- (a) made a written indication on his will or, before his death, caused such an indication to be made; or
- (b) performed any other act with regard to his will which is apparent on the face of the will or, before his death, caused such an act to be performed; or
- (c) drafted another document or, before his death, caused another document to be drafted;

by which he intended to revoke his will or a part of his will, the Master may declare the will or the part concerned, as the case may be, to be revoked:

Provided that, before acting in accordance with this section, the Master shall conduct an inquiry to ascertain whether the document so drafted or the act so performed does reflect the testator’s known or likely intention.

(2) Any person who is aggrieved by a decision of the Master may appeal to an appropriate court within thirty days of being notified of the decision of the Master.

Section inserted by s. 4 of Act 21 of 1998.

### **16 Effect of testator's subsequent marriage on will**

- (1) Subject to this section, a will shall become void upon the subsequent marriage of the testator.
- (2) A joint and mutual will shall not become void upon the subsequent marriage of a surviving testator—
  - (a) to the extent that the will effects a massing of the estates or any property of the joint testators; and
  - (b) if the surviving testator has accepted some benefit under the will before his subsequent marriage.
- (3) A will made by a man who is married under a system permitting polygamy shall not become void if, while still so married to one or more wives, he marries another wife.
- (4) Where it appears from a will that when it was made the testator was expecting to be married and that he intended that—
  - (a) the will should not become void upon the expected marriage, the will shall not become void upon that marriage;
  - (b) a particular disposition or provision in the will should not become void upon the marriage—
    - (i) that disposition or provision shall take effect notwithstanding the marriage; and
    - (ii) any other disposition or provision in the will shall take effect also, unless it appears that the testator intended the disposition or provision to become void upon the marriage.
- (5) A will shall not become void upon the subsequent marriage of the testator to the extent that the will disposes of property which would not have gone to the spouse or issue of the subsequent marriage if the testator had died intestate.

### **17 Effect of dissolution or annulment of testator's marriage on wills**

- (1) Where, after a testator has made a will, a decree or order of a court dissolves or annuls his marriage—
  - (a) the will shall have effect as if any appointment of his former spouse as an executor or administrator were omitted; and
  - (b) any disposition or benefit to or in favour of his former spouse shall lapse;except in so far as it appears that the testator intended otherwise.
- (2) Where—
  - (a) by the terms of a will any disposition or benefit is subject to a usufruct or fiduciary right granted to a former spouse of the testator; and
  - (b) the usufruct or fiduciary right lapses in terms of paragraph (b) of subsection (1);the disposition or benefit shall be treated—
  - (i) as if it had not been subject to the usufruct or fiduciary right; and
  - (ii) if it was contingent upon the termination of the usufruct or fiduciary right, as if it had not been so contingent;except in so far as it appears that the testator intended otherwise.

### **18 Effect of subsequent birth, legitimation or adoption of children on will**

- (1) If, after a testator has made a will—
  - (a) a child is born, of whom the testator is the mother or, the child being legitimate, the father; or
  - (b) an illegitimate child of the testator is legitimated or, in accordance with customary law, is legitimated or otherwise acknowledged or recognized as a child of its father; or
  - (c) the testator adopts a child in accordance with the law relating to adoption;then, unless the will makes some other provision for the child or unless it clearly appears that the testator intended otherwise, the child shall be entitled to the following benefits from the testator's estate—
  - (i) if the will makes no provision for any child of the testator, the child shall be entitled to any benefit that he would have received if the testator had died intestate; or
  - (ii) if the will makes provision for any other child or children of the testator, the child shall be entitled to the same benefits as, or to benefits of equivalent value to, those that are receivable under the will by—
    - A. the other child or children, where there is only one such other child or where the will treats all such other children equally; or
    - B. the other child or other children, as the case may be, who receive the benefits of smallest value, where the will treats the other such children differently.
- (2) The benefits payable in terms of this section to a child referred to in paragraph (a), (b) or (c) of subsection (1) shall be deemed to be—
  - (a) a legacy payable under the will concerned, if the will makes no provision for any child of the testator or if the will provides for a legacy to be paid to each other such child or to the child who receives the benefits of smallest value, as the case may be:

Provided that, where the will directs that such legacies or legacy shall be paid from a particular fund or source, the benefits payable to the child referred to in paragraph (a), (b) or (c) of subsection (1) shall be payable from the same fund or source;

(b) an inheritance payable from the residue of the testator's estate if the benefits payable under the will to each other child of the testator or to the child who receives the benefits of smallest value, as the case may be, are payable from the residue of the estate after all legacies have been paid; and shall be subject to failure, abatement or reduction accordingly.

(3) Nothing in subsection (1) shall be construed as prejudicing the rights of any child to receive any property, maintenance or other benefit from a deceased person's estate in terms of any enactment.

### **19 Revival of revoked or void wills**

(1) A will or any part thereof that has been revoked or become void in terms of section *fifteen, sixteen* or *seventeen* may be revived by—

- (a) the subsequent remaking of the will or part concerned; or
- (b) a subsequent will which expressly or by clear implication revives the revoked or void will or part concerned.

(2) The revocation or rendering void of a will or any part of a will shall not have the effect of reviving any other will or any part of another will that may have been revoked by the first-mentioned will or part thereof.

### **20 Rectification of wills**

(1) If an appropriate court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence of—

- (a) a clerical error; or
- (b) a failure to understand the testator's instructions; or
- (c) a failure on the part of the testator to appreciate the effect of the words used in the will;

the appropriate court may order that the will shall be rectified by the insertion, deletion or substitution of any words so as to carry out the testator's intentions.

(2) Subsection (1) shall not be construed as limiting in any way the power of an appropriate court under any other law to order the rectification of a will.

### **21 Admissibility of evidence in connection with rectification and interpretation of wills**

(1) An appropriate court may receive and rely on extrinsic evidence, including evidence of the testator's intention—

- (a) when determining whether or not to order the rectification of a will; or
- (b) to assist in the interpretation of a will in so far as—
  - (i) any part of the will is meaningless; or
  - (ii) the language used in any part of the will is ambiguous on the face of it; or
  - (iii) evidence shows that the language used in any part of the will is ambiguous in the light of surrounding circumstances.

(2) Subsection (1) shall not be construed as limiting in any way the power of an appropriate court under any other law to receive and rely on extrinsic evidence in any case relating to a will.

### **22 Conflict of laws: Application of foreign laws in relation to wills**

(1) In this section—

“country” means a state or territory, or part of a state or territory, which is subject to a single system of territorially-applicable law;

“internal law”, in relation to any country, means the law that would apply within that country in a case where no question of the law in force in any other country arose:

Provided that, if in any country there is in force a system of personal law applicable to wills made by persons such as the testator in the case concerned on the ground of his race, tribe, religion, caste or other personal characteristic, that system of personal law shall be deemed to be the internal law of the country concerned in relation to that particular testator and his will.

(2) The question whether or not a testator had capacity to make a will disposing of—

- (a) movable property, shall be determined according to the internal law of the country in which he was domiciled when he made the will;
- (b) immovable property, shall be determined according to the internal law of the country in which the immovable property is situated;

and the question shall be determined according to such internal law as it existed at the time the will was made.

(3) The question whether or not a person has capacity to receive a benefit under a will disposing of—

- (a) movable property, shall be determined according to the internal law of—

- (i) the country in which the beneficiary is domiciled on the date of the testator's death, where the question of his capacity to receive the benefit arises because he is a minor, a married person, a body corporate or because of some similar personal or inherent characteristic; or
  - (ii) the country in which the testator was domiciled at the date of his death, in any case not mentioned in subparagraph (i);
- (b) immovable property, shall be determined—
- (i) according to the internal law of the country in which the immovable property is situated; and
  - (ii) in the case of a beneficiary that is a body corporate, additionally according to the internal law of the country in which the body corporate was constituted or established;
- and the question shall be determined according to such internal law as it existed when the testator died.

(4) A will shall be valid in respect of its form—

- (a) if its form complies with the internal law of—
  - (i) the country in which the will was made; or
  - (ii) any country in which the testator was domiciled or ordinarily resident, either when he made the will or when he died; or
  - (iii) any state or territory of which the testator was a citizen or national, either when he made the will or when he died; or
- (b) to the extent that the will disposes of any movable property, if the form of the will complies with the law of the country in which the property concerned is situated either when the will was made or when the testator died; or
- (c) to the extent that the will disposes of any immovable property, if the form of the will complies with the law of the country in which the immovable property is situated; or
- (d) to the extent that in the will the testator exercises a power of appointment or other function conferred upon him by any instrument, if the form of the will complies with the law governing the essential validity of the instrument; or
- (e) to the extent that the will expressly or impliedly revokes another will or part of another will which is formally valid by virtue of paragraph (a), (b), (c) or (d), if the form of the first-mentioned will complies with any law under which the revoked will or part thereof is formally valid; or
- (f) where the will was made on board a vessel or aircraft of any description, if the form of the will complies with the internal law of the country with which, having regard to any relevant circumstances, the vessel or aircraft may be taken to have been most closely connected when the will was made.

(5) For the purposes of subsection (4)—

- (a) where under the law of any country—
  - (i) a testator of a particular age, citizenship or nationality or possessing any other personal qualification or disqualification is required to observe any special formality in the making of a will; or
  - (ii) a witness to a will is required to possess any particular qualification;such requirement shall be regarded as a requirement relating to the form of the will;
- (b) in determining whether or not the form of a will complies with a particular law, regard shall be had to the requirements of that law when the will was made, but this shall not prevent account being taken of a subsequent alteration in that law after that time if the alteration enables the will to be treated as properly made;
- (c) if there are two or more systems of law in force within any state or territory that relate to the formal validity of wills, the internal law of the state or territory shall be ascertained for the purpose of subparagraph (iii) of paragraph (a) of subsection (4) as follows—
  - (i) if there is in force throughout the state or territory a rule indicating which of those systems can properly be applied to the case in question, that rule shall be followed;
  - (ii) if there is no rule such as is referred to in subparagraph (i), the internal law shall be the system with which the testator was most closely connected when he made the will or when he died, as the case may be.

(6) The meaning of any word, expression or provision in a will shall be ascertained according to the internal law of the country in which the testator was domiciled when he made the will and in accordance with such internal law as it then existed, unless a contrary intention appears from the terms of the will or from any admissible extrinsic evidence.

(7) The essential validity of a will, namely the validity and effect of rights, interests and obligations created by the will and the right of persons not specified in the will to receive any benefits thereunder, shall be determined according to the internal law of—

- (a) the country in which the testator was domiciled when he died, to the extent that the will disposes of movable property;
- (b) the country in which the immovable property concerned is situated, to the extent that the will disposes of immovable property;

and the question shall be determined according to such internal law as it existed when the testator died:

Provided that the question whether or not a person who has accepted a benefit under a will is obliged to divest himself of any of his own property that has been disposed of to another person under the same will shall be determined according to the nature of the property accepted by him under the will and without regard to the nature of his own property that has been disposed of by the will.

- (8) The question whether or not a will has been wholly or partially revoked or rendered void—
- (a) by the dissolution or annulment of the testator's marriage or by the testator's subsequent marriage shall be determined according to the internal law of the country in which the testator was domiciled immediately after the dissolution or annulment of the marriage or the subsequent marriage, as the case may be;
  - (b) by the destruction of the will or part thereof or by the making of a subsequent will or through any other cause not mentioned in paragraph (a), shall be determined according to the internal law of—
    - (i) the country in which the testator was domiciled when the will was allegedly revoked or rendered void, to the extent that the will disposed of movable property;
    - (ii) the country in which the immovable property concerned is situated, to the extent that the will that was allegedly revoked or rendered void disposed of immovable property;

and the question shall be determined according to such internal law as it existed when the event or act which allegedly revoked the will or rendered it void took place.

(9) This section shall not affect the validity of any will or part thereof which, but for this section, would be valid.

### 23 Theft, concealment and destruction of wills

- (1) Any person who—
- (a) during the lifetime of the testator and without his specific authorization; or
  - (b) after the death of the testator;

alters any wording in a will, steals, wilfully conceals or wilfully destroys any will shall be guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment.

Subsection as amended by s. 5 of Act 21 of 1998 and s. 4 of Act 22 of 2001.

- (2) A prosecution for an offence in terms of subsection (1) shall not—
- (a) prevent the institution of civil proceedings against any person in respect of the theft, concealment or destruction of the will concerned; or
  - (b) render any person immune from any liability or disability which he may incur under this Act or any other law as a result of or arising out of the theft, concealment or destruction of the will concerned.

### 24 Savings

- (1) The following Acts and statutory provisions—
- (a) the African Wills Act [*Chapter 240 of 1974*]; and
  - (b) section 9 of the Administration of Estates Act [*Chapter 301 of 1974*]; and
  - (c) section 2 of the Deceased Estates Succession Act [*Chapter 302 of 1974*]; and
  - (d) section 5 of the Law of Inheritance Amendment Act [*Chapter 304 of 1974*]; and
  - (e) the Wills and Attesting Witnesses Act [*Chapter 306 of 1974*];

as they existed on the 31st December, 1987, shall continue to apply in respect of wills that were made before the 1st January, 1988, to the extent that this Act does not apply to them.

(2) Where a will made before the 1st January, 1988, contains a provision, commonly called a reservatory clause, which permits the testator to make alterations and additions to the will without attestation, any such alterations or additions made in terms of the reservatory clause on or after the 1st January, 1988, shall be valid and effective notwithstanding that the formalities prescribed in this Act for the making or amendment of wills have not been observed.

(3) Notwithstanding section *four*, a person who is under the age of sixteen years and who has made a valid will before the 1st January, 1988, may amend that will on and after that date in all respects as if he were over the age of sixteen years.

(4) No provision of this Act shall be construed as rendering invalid any will or part of a will which was valid immediately before the 1st January, 1988.