# Can your will compromise your wish to create a testamentary trust?

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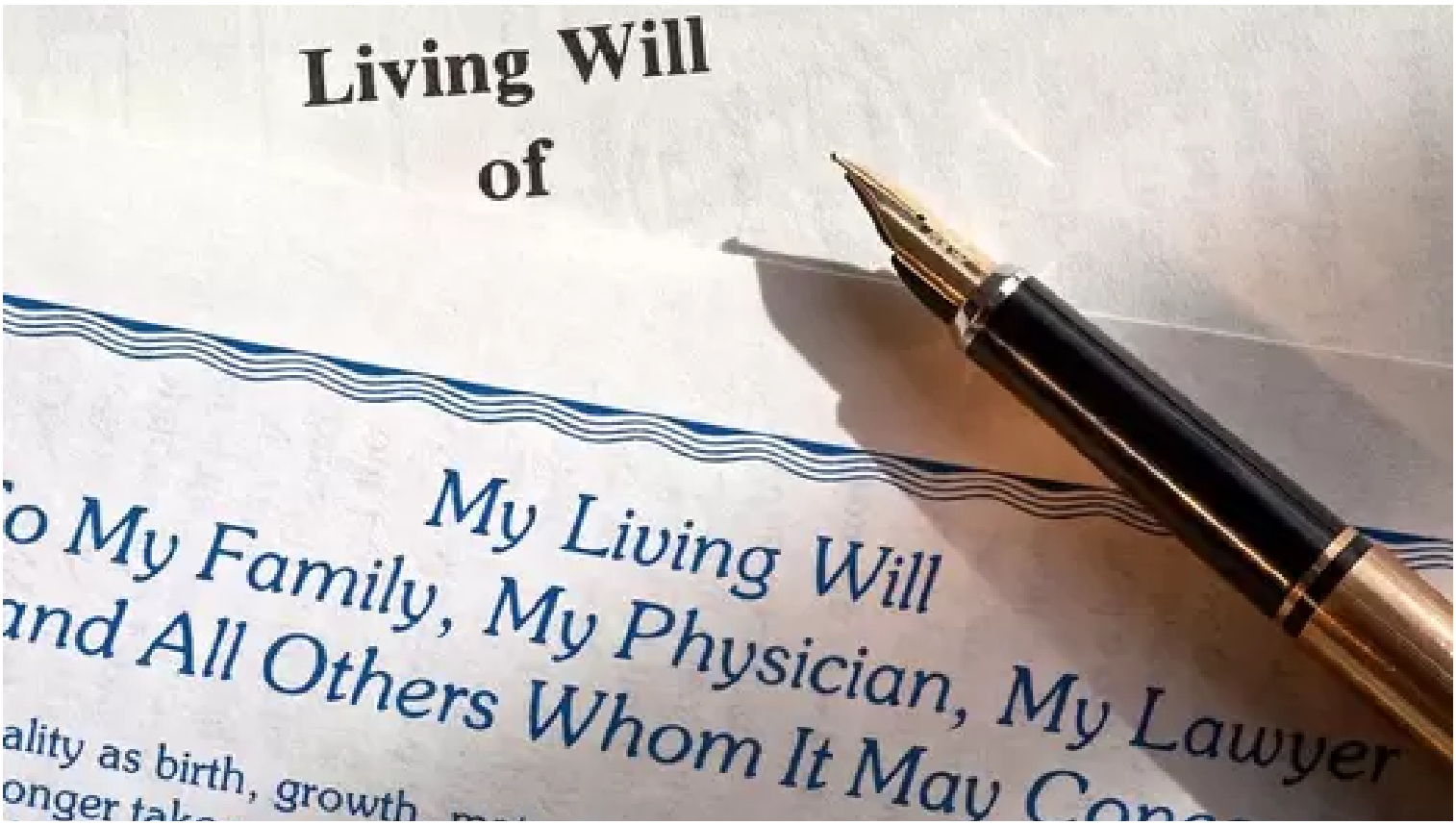


JOHANNESBURG – Most people delay addressing their wills because it is an emotional document to prepare.

However, proper estate planning includes the drafting of a will, which complements your estate plan. It is critical to comply with all the requirements to draft a valid will, otherwise it may be open to attack.

Often people who believe they should inherit, but do not, will try and find a loophole to invalidate a will. If you intended to create a testamentary trust, this may also not happen. The court will always consider what the intention of the testator/testatrix was.

Although it is critical that all the formalities relating to the making of a valid will must be complied with, the Wills Act 7 of 1953 provides for instances where certain formalities have not been strictly complied with, but the intention of the testator/testatrix is clear, as this is of paramount importance. One would, however, have to apply to court to have the will, or amendment thereof, declared valid.

This act prevents the last wishes of the testator/testatrix from being rendered invalid by non-compliance with technical formalities (Section 2[3]). The testator/testatrix however had to substantially comply with the requirements for a valid will, so one would only be successful in the event of minor omissions which may invalidate the will. This section makes provision for instances where, for example, only the last page of the will was signed by all, where not all witnesses were present at the same time when the will was signed by the testator/testatrix (Katz v Katz case of 2004), or where only one of the witnesses attested to the will.

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The following requirements have to be complied with in order to be successful under this section:

The document must be drafted or executed by the deceased, who intended it to be his/her will or an amendment of his/her existing will. The court interprets this narrowly - the testator/testatrix must have personally created the document, but it may be dictated. If it had been prepared by a third party such as a lawyer, accountant or bank, on written or verbal instruction, it would not be accepted, even though it was signed by the deceased (De Reszke v Maras case of 2003).

The document must have been intended by the deceased to be his/her will.

If a person drafted, or caused it to be drafted before his/her death, with the intention to revoke his/her will or a part of it, the court shall declare the will, or the part concerned, to be revoked (Section 2A of this Act).

It is clear that this section allows for the deceased to have caused such a document to be drafted by someone else. If you are not successful under Section 2(3) of this Act to have a new will accepted, you will also not be successful under section 2A to utilise such new (invalid) will to revoke a previous (valid) will, if the court finds that it was the intention of the deceased to replace the existing (valid) will with the new (invalid) will. So without the new (invalid) will being accepted, it cannot just be used to revoke (cancel) a previous will (De Reszke v Maras case of 2003). The court found in that case that the revocation clause was not severable (detachable) from the rest of the (invalid) will and could, therefore, not be enforced on its own.

Be mindful when you draft your will, especially if the plan is create a testamentary trust upon your death. If the will is not accepted by the Master, the testamentary trust will also not be created.

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