# Notarial Duties and Functions

## Lecture Title: Legal Requirements to be adhered to during Drafting of Deeds and Wills

Lecturer: Not. Dr. Julianne Meli

Date: 17th December

Undergraduate Certificate in Notarial Law
Fundamentals for Office Assistants

# Quick re-cap of Last week's lecture…

# Form of the Act

***Article 30, NPNA:***

*(1) The original of every notarial act shall be **written, typewritten or printed** in dark, clear, easily legible and indelible characters, **without blanks or spaces** unless such blanks or spaces are lined, **without abbreviations, corrections, alterations or additions** in the body of the act and **without erasures**.*

*Every original act shall have **two margins**, one on the right-hand side and the other on the left-hand side. All **annotations and signatures** as are required by law to be made in the margin shall be made in whichever of the said sides is the outer side.*

# Formalities of Notarial Acts

***The Forms of Acts:***
***Article 28(1), NPNA:***

*Every notarial act must contain -*

- *the indication written out in words and in full by the notary himself, of the **day**, the **month** and the **year**, and in the case of a **will**, also the **hour** in which the act is signed;*

- *the name and surname of the notary*

## *The Forms of Acts:*

- **Parties details**: Name, surname, occupation, father's name, place of birth, date of birth, place of residence and identity card number – if a woman, whether spinster, married or widow. Those acts which require enrollment only: mother's name and maiden surname.
- **Attestors, witnesses, interpreters and agents details:** Name, surname, place of birth, date of birth, place of residence and identity card number.

***The Forms of Acts:***

***Article 28(1)(d), NPNA:***

*Every notarial act must contain the indication, written out, at least in the first instance, in words and in full, of any date, sum of money, amount or quantity of things forming the subject-matter of the act;*

# Signatures

*Article 634(2) :*

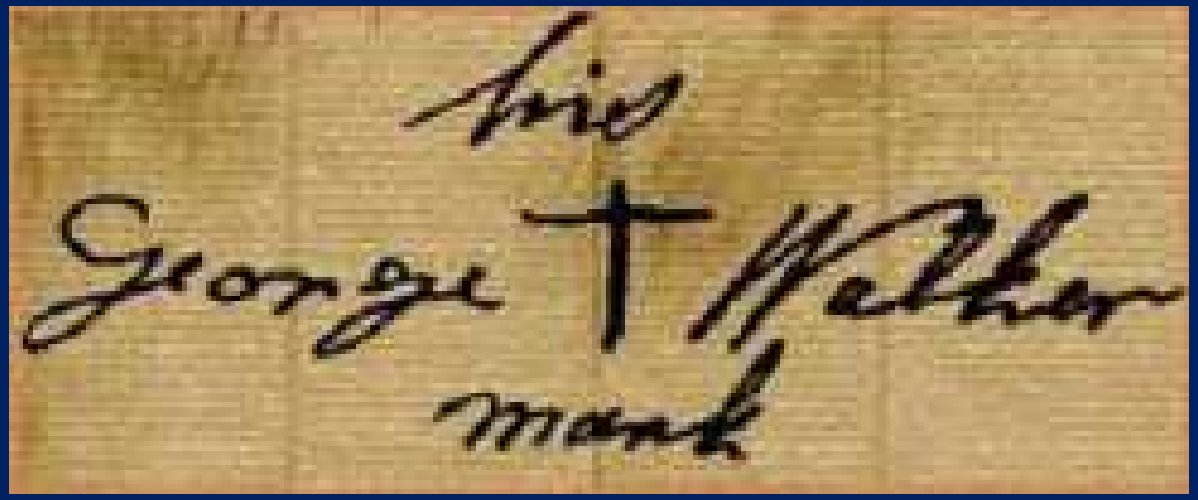
*Any signature or mark attested by an advocate, a notary or a legal procurator shall, unless the contrary is proved, be deemed to be genuine if in the attestation it is declared by the advocate or notary or legal procurator that such signature or mark was subscribed or set in his presence and, where the person cannot sign his name, in the presence of two witnesses whose signature appears on the act, and that he has personally ascertained the identity of the persons setting such signature or mark*

***Article 28(k), NPNA:***

*If any of the appearers or any of the attestors does not know how to or cannot sign, he shall declare the cause of such inability or incapacity, and the notary shall **make a mention** of such declaration before the act is signed;*

Cross-marks:

When a person does not know how or cannot sign due to a physical inability:



## *Article 28(k), NPNA:*

*Signatures:*

- At the foot of the act, in the annexes and in the list, of the notary, the appearers, and attestors or interpreters (if required)
- Notary to initial every page
- Immediately after his signature at the foot of the act declare his capacity of Notary Public of Malta in English or in Maltese, either in writing or by means of a stamp or a sealed stamp

***Article 28(l), NPNA:***

*Signatures in Wills:*

*in the case of a public will contained in several sheets, the signature of the testator, interpreter, witnesses and notary in the margin of each intermediate sheet.*

*"Intermediate sheet" means every sheet which forms part of the act except that containing the final signatures.*

*(2) The signature of the witnesses in the intermediate sheets and annexes referred to in this article shall not be necessary if all the appearers are able to sign.*

***Article 28(1)(g), NPNA:***

*A mention of the titles and papers annexed to the act:*

*Any annexe not mentioned in the act or not duly signed, shall not be considered as forming part of the act except in so far as the truth of its contents results from the act itself*

*When the documents annexed to the act exceed five in number, disregarding for this purpose the copy of the notice filed at the office of the Commissioner of Inland Revenue subsequently to the completion of the act in terms of the Duty on Documents and Transfers Act and the Income Tax Acts or any enactments substituting the same, the notary **may** make a list thereof, separate from the act, and annex it to the act, making an express reference to such list in the act; in any such case the list shall be signed in the same manner as the act, and the signatures on the annexed documents shall be dispensed with.*

# *The Forms of Acts*

## *Article 28(1)(h), (i), (j), NPNA:*

*Declarations:*

- *Statement that the Notary has duly explained contents*
- *Statement that act is published in presence of witnesses (where required)*
- *Indication of island, city or village and the house or other place where act is published*

***Declarations:***

- “ Done, read and published, after due explanation to the appearers by me the **undersigned** Notary in terms of law, here in Malta, Valletta, Republic Street, number one hundred and thirty-five (135). ”

- “ Maghmul, moqri u ppubblikat minni Nutar **sottofirmat**, prevja d-debita cerzjorazzjoni skond il-Ligi lill-komparenti, hawn f’Malta, il-Belt Vallletta, Triq ir-Repubblika, numru mija u hamsa u tletin (135). ”

# Interpreter:

## *Article 36, NPNA:*

*(1) The interpretation of an act into any language, when required for the intelligence of all the parties shall be made by the notary, or, if the notary does not know the language understood by the parties, by an interpreter chosen by the parties.*

*(2) The interpreter must have all the qualifications required for a witness and shall not be one of the attestors.*

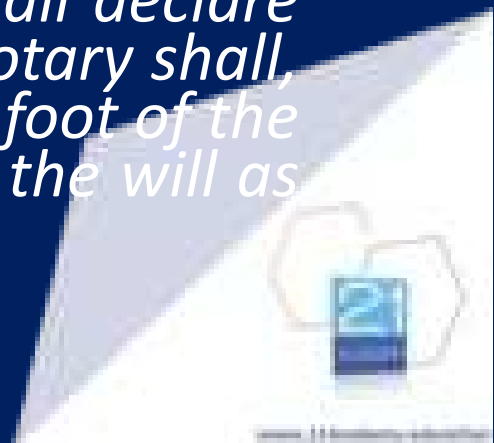
*(3) The interpreter must take the oath before the notary to perform his duties faithfully, and a mention of the taking of such oath shall be recorded in the act.*

*(4) The interpreter shall sign the act as provided in article 28(1)(k) and (l).*

## *Article 669, CC:*

*(1) Where a person who is totally deaf, but can read, desires to make a public will, he shall read such will himself in the presence of the notary and the witnesses, and the notary shall, before the will is signed by himself and the witnesses, enter, at the foot of the will, a declaration to the effect that the will has been so read by the testator.*

*(2) Where, however, such deaf person cannot read, he himself shall declare his will in the presence of the notary and the witnesses, and the notary shall, before the will is signed by himself and the witnesses, enter, at the foot of the will, a declaration to the effect that the will is in accordance with the will as declared by the testator.*



***Article 37, NPNA:***

*(3) Such interpreter must possess the qualifications required for a witness and shall take the oath as provided in article 36(3), and a mention of the taking of such oath shall be recorded in the act.*

*(4) Such interpreter may be chosen from among the parents or relatives of the deaf person, but shall not, at the same time, act as a witness or as one of the attestors.*

*(5) The interpreter shall sign the act as provided in article 28(1)(k) and (l).*

## *Article 38, NPNA:*

*Saving in regard to wills, the provisions of articles 597 and 668 of the Civil Code, where any of the appearers is **dumb, or deaf and dumb**, besides the rule laid down in the last preceding article as to the presence of the interpreter the following rules shall be observed:*

*(a)the appearer who is dumb, or deaf and dumb and **can read and write** shall himself read the act and write at the end thereof, before the signatures, that he has read it and found it to be in accordance with his will;*

*(b)if such appearer **does not know how to or cannot read and write**, it shall be necessary that his sign-language be understood also by one of the witnesses, or, otherwise, that a second interpreter be present at the execution of the act in accordance with the rules laid down in article 37(2), (3), (4) and (5).*

***Article 39, NPNA:***

*(1) Where, in the publication or the drawing up of an act an interpreter has been employed, the notary shall, before the act is signed, state that such interpreter was chosen with the consent of the parties, or as the case may be, by the Civil Court, Second Hall, and that he took the oath to perform his duties faithfully.*

*(2) In default of compliance with the provisions of sub-article (1), the act is* ***voidable*** *on the demand of the party in respect of whom the employment of an interpreter was required.*

*(3) The said demand shall no longer be competent after the lapse of one month from the date of the publication of the act, or if the said party shall have given execution to the act.*

# *Article 30, NPNA:*

*(2) Where it is necessary to **remove, vary or add any words <u>before</u> the act is signed** by the appearers, the attestors, interpreter and witnesses, the notary shall make such removal, variation or addition by means of **a numbered mark** in the place where such removal, variation or addition is to be made and **a note at the end of the act, but before the final signatures, numbered so as to correspond to the relative mark**; and in any such case, the notary shall cancel the words which it is desired to remove or vary, in such manner as to **leave the words cancelled still legible**, and the note at the end of the act shall state the **number of words so cancelled** or, as the case may be, that other words are **substituted for those cancelled**, and containing immediately after, the words so substituted.*

# *Article 30, NPNA:*

*(3) In the case of a mere **addition of** words, the notary shall make a **numbered mark** in the place where the addition is to be made and a **note at the end of the act, but before the final signatures, numbered so as to correspond to the relative mark**, and containing the expression "**words added**", "**adde**" or other similar expression and, immediately after, the words to be added.*

*(4) Any cancellation, addition or variation made otherwise than in the manner aforesaid shall be considered **as if it had not been made**.*

***Article 44, NPNA:***

*It shall not be lawful to make any alteration in the act after it has been published and signed, as provided in the last preceding article.*

***The rescission, variation or cancellation of an act must be made by a separate act.***

# The Notarial Corrective Act

Article 45A, NPNA:

(1) Without prejudice to the rights already acquired by third parties and subject to the provisions of this article, a notary shall have, with regard to an inter vivos act in his records, in this article referred to as "the original act", the right to make at any time, a declaratory act rectifying any of the errors or omissions contained therein. The declaratory act, in this article referred to as a "notarial corrective act", shall be preserved and registered in the records of the notary.

The Notarial Corrective Act

Article 45A, NPNA:

(2) A notarial corrective act shall not affect the intention of the parties, their consent given in the original act or any of their personal or real rights emanating therefrom

# The Notarial Corrective Act

Article 45A, NPNA:

(5) The errors or omissions that may be the subject-matter of a notarial corrective act are the following:

(a) typing or spelling errors;

(b) mistaken numbers in documents of identification;

(c) discrepancies between words and figures;

(d) mistaken currency conversions;

(e) mistakes in tax calculations;

(f) mistakes in the root of title; and

(g) any other matter which the Minister responsible for notarial affairs may by regulations determine.

# The Notarial Corrective Act

Article 45A, NPNA:

(8) The notarial corrective act shall not be effective against third parties until the relative note has been filed in the Public Registry.

(13) Any notarial corrective act purporting to add, reduce, modify or cancel any real or personal rights or to affect the privileged or hypothecary standing or ranking of any creditor shall be null, and may be rebutted in terms of sub-article (11).

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# Wills

Article 585 of the Civil Code provides that “an inheritance is the estate of a person deceased, and it devolves either by the disposition of man or, in the absence of any such disposition, by operation of law”.

In a nutshell, the law is saying that one’s estate devolves unto either by a will (a disposition of man) or else by operation of the law, namely according to the rules of intestacy in force at the time of the person’s death.

Article 588 provides:

"a will is an instrument revocable of its nature, by which a person, according to the rules laid down by law, disposes, for the time when he shall have ceased to live, of the whole or of part of his property.

From this definition, a number of comments can be elicited.

Firstly, one must point out the fact that a will is always revocable. A person can always revoke a will freely even if in the said will, he himself had bound himself not to revoke the will. At times, most notably in unica charta wills, there may be certain repercussions that one suffers if he changes a will but nevertheless the freedom to change or revoke a will remains.

Secondly, the law itself gives an indication that one is not always entirely free to dispose of his assets as he deems fit by saying “according to the rules laid down by law”. There are certain instances where one is bound by certain restrictions (as we shall be seeing when discussing the reserved portion).

Thirdly, it makes it clear that the testator may dispose of either the whole of his property or part thereof. Thus, it‟s perfectly legitimate for a testator to dispose of part of his property and let the rest devolve in terms of his heirs-at-law.

Intrinsic conditions for the validity of a will:

Capacity to make a will:

Article 596 (1) begins by saying that “any person not subject to incapacity under the provisions of this Code, may dispose of, or receive property by will.” In other words the general requirements of capacity under the law of obligations apply to the capacity to dispose or receive property by will.

Article 597 specifies additional prohibitions with respect to certain persons who are incapable of making wills (therefore it does not apply to receiving property by will).

Art 597 (a): Persons who have not completed their sixteenth year of age - The law presumes that a person who has not yet completed his sixteenth year of age, cannot have sufficient maturity to make a will.

Art 597(b): Those who even if not interdicted, are not capable of understanding and volition, or who because of some defect or injury are incapable even through interpreters of expressing their will."

Art 597 (c) Those who are interdicted on the ground of insanity. As long as the decree of interdiction is not revoked, any will made by such a person will be invalid. Lucid intervals will not be considered to make a will valid. Thus, even if there is ample proof that the person was capable of will and volition at the time of the will but was still interdicted, such will is invariably invalid.

Art 597 (d) Those who, not being interdicted, are persons with a mental disorder or other condition, which renders them incapable of managing their own affairs at the time of the will.

It has become common practice that when an elderly person makes a will, a psychiatrist's certificate confirming the mental sanity of the testator is attached to the will. Whilst such certificate has its weight, it does not mean that failure to attach such certificate will render a will null or less valid. As the third principle clearly states, the insanity must be proven and the lack of such certificate is certainly no proof of the testator's insanity. Arguing *a contrario sensu*, the fact that a certificate is attached does not automatically mean that the will may not be successfully challenged on the basis of the testator's insanity.

Another incapacity is created by Article 611 (1) which provides “the members of monastic orders or of religious corporations cannot, after taking the vows in the religious order or corporation, dispose by will.” When such persons are released from their vows, they shall again acquire the capacity to dispose by will. Furthermore, under the same article, we find that such persons cannot receive under a will except small life pensions.

# Types of Wills:

Wills can be either ordinary or privileged.

Ordinary wills are then sub-divided in:

- public wills
- secret wills,

Privileged wills are then sub-divided:

- Wills made at sea
- wills made in places where communications have been interrupted.

There is then a special type of joint will made between spouses known as the **unica charta** wills.

The terms “public“ and “secret“ will can be misleading. The content of a will is always secret, known only by the testator himself, the notary, the witnesses and any person authorised by the testator to be given a copy of the will.

So what is the distinction?

The distinction lies in the form and manner in which the wills are drawn, and secondly and perhaps more importantly, is the fact that any person can check whether a person has made a public will by doing a search in the Public Registry. That is the “public” element of a public will. One can for example go and check whether his relative has made a will even though s/he is still alive.

On the other hand, in case of secret wills, one can only make the said search upon presentation of this person’s death certificate, which means that there is no way that one can get to know whether a person has made a secret will during his lifetime.

# Public Wills (Articles 655 and 670)

- Received and published by a notary in the presence of two witnesses.
- The provisions of Chapter 55 (2)regarding notarial instruments apply, even in regard to the signature of testator, according to whether he knows how to write or not.
- The signature of witnesses can never be dispensed with.
- The heirs, legatees, or their relations by consanguinity or affinity within the degree of uncle or nephew inclusively, shall not be competent witnesses.
- The will is then enrolled (insinwat) by the notary in the Public Registry within 15 calendar days.
- Any person can make searches in the said Public Registry to see whether a particular person has made a will, but of course, he cannot access the contents of such will
- What happens if the public will is not enrolled in the Public Registry? The will would still be valid but there would be a problem as to how beneficiaries would get to know about it. The notary can furthermore be liable for his negligence.

## Secret Wills (Articles 656- 671)

- May be printed, type-written, or written in ink either by the testator himself or by a third party.
- When the testator knows how to, and is able to write, he shall sign the will at the end.
- If he does not know how to write, or cannot write, then he shall require the assistance of a judge or magistrate.
- The paper on which the secret will is written, or the paper used as its envelope, shall be closed and sealed.
- The testator shall deliver the secret will to a notary or to the registrar of the court of voluntary jurisdiction in the presence of a judge or magistrate.
- Upon delivery, the testator shall declare that the paper contains his will. The will shall be deemed to have been made on the day on which it was so delivered.
- The notary receiving the secret will shall draw up the act of delivery on the paper itself on which the will is written or on the paper used as envelope which shall then be signed by the testator, the witnesses and the notary himself.

- A notary who receives a secret will shall, within four working days to be reckoned from the date of delivery, present such will to the court of voluntary jurisdiction for preservation by the Registrar. If he fails to do so, he can be condemned to interdiction from his office for up to two years, and to a fine of between €232.94 and €2,329.37.
- As of 15th August 1981, spouses may not make an unica charta secret will.
- Anyone can make searches in the court of voluntary jurisdiction to see whether a deceased person had made a secret will upon presentation of the deceased‟ death certificate.

## Privileged Wills:

There are generally speaking two types of privileged of wills; those made in places where communications are interrupted, and those made at sea.

These wills are “privileged” because due to the circumstances in which these are made, certain formalities normally required are relaxed. The principle in privileged wills is that these wills are always provisional and for this reason, the law is less rigid than usual.

Situations where privileged wills may be allowed include, wills made on an aeroplane, wills made by soldiers whilst away from home, wills made by people who are in imminent danger of dying etc.

## Unica Charta Wills:

Article 592 (1) provides “an unica charta will is a will made by husband and wife in one and the same instrument”.

Despite this, when such will is revoked by one of the testators with regard to his or her estate, it shall continue to be valid with regard to the estate of the other- Art 592 (2).

Article 592 (3): “a will unica charta is drawn up in a manner that the provisions with regard to the estate of one of the testators are drawn up in a part separate from those containing the provisions of the other spouse.”

592 (4) then goes on to say that if the unica charta will is not drawn up in this manner, it will still be valid, but the notary drawing up the will is liable to a fine. Whilst this might seem to be a matter of form rather than of substance, there is a very good reason for this. In the past, unica charta wills were drawn up in a manner that to be able to read the provisions of one of the spouses, you also had to read the provisions of the other spouse. Thus, when one of the spouses died and there was the opening of the will, all interested parties could easily get to know what dispositions the surviving spouse had made in her will. This totally destroyed the element of secrecy which is usually afforded to the content of a will.

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