

Making a will during the COVID- 19 pandemic

ETHAN BRINCAT

In this article, **Ethan Brincat** examines how the COVID-19 pandemic, and the Public Health measures brought on by said pandemic, have affected the workload of Maltese notaries, and more specifically, how the procedure regulating wills has also been affected.

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Ethan Brincat recently graduated from the University of Malta with an LL.B, and is currently reading for a Master of Notarial Studies Degree.

The current pandemic of Coronavirus Disease 2019 (COVID-19) has slowed down many aspects of civilian life, including the notarial profession. Both voluntary as well as mandatory measures of isolation, quarantine, and social distancing have hindered many peoples' will to convene and formulate or conclude non-essential notarial acts. Moreover, many notaries have either severely restricted their operations or suspended them completely. The law even allows notaries to refuse to render their services, with a pandemic like the ongoing one being a very valid reason for doing so. However, the law provides for an important exception to the notary's discretion to refuse to give his services: wills.¹

Of all written instruments that a notary can receive, wills are perhaps the most sensitive. One reason for this is that a person can only dispose of his inheritance, that is his estate at his death, by a will. If the deceased does not leave a will that is valid at law in order to dispose of his property, then the law disposes it for him.² The law provides that:

‘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 a part of his property.’³

This is the ordinary type of will which needs to be enrolled in the Public Registry within fifteen days from when it is received by the notary⁴

Therefore, because, in general, only notaries can receive wills, a notary cannot refuse a person's request to make a will, which is the only legal avenue available to him with regards to the disposal of his inheritance. If a notary refuses to receive a person's will, then that person has no legal way of disposing of his property after his death and then his property would have to devolve by operation of law.

Besides the ordinary will, with its importance in being the only way through which one can dispose of his inheritance and the notary's inability to refuse to receive one, the law goes further by providing for privileged wills. Two types of privileged wills are contemplated in the Civil Code: wills made in places where communications are interrupted; and wills made at sea. The former shall be discussed throughout the remainder of this paper.

If ‘the public authority’ orders the interruption of communications, per-

1 Laws of Malta, Chapter 55 ‘Notarial Professions and Notarial Archives Act’, Article 11, Sub-article (1).

2 Laws of Malta, Chapter 16 ‘Civil Code’, Article 585 and 586.

3 Ibid., Article 588.

4 Notarial Profession and Notarial Archives Act, Chapter 55, Article 25, Sub-article (1).

haps to contain the spread of a deadly disease like COVID-19, and it is difficult to have an ordinary will made before a notary, a privileged will may be made instead. Whereas an ordinary will can only be received by a notary, a privileged will in places where communications are interrupted may be received not only by a notary, but also by a judge, magistrate, parish priest, or ‘other ecclesiastic in holy orders’.⁵

This curiously leaves out advocates, who are by far the most numerous within the legal profession, and legal procurators, while entrusting clergymen. The latter may be a remnant of the time when clergymen played a key role in the registration of public records in Malta and Gozo. One should note that before the foundation of the Public Registry on 3 August 1889, with its records dating back to 1863, the Church was the main public recordkeeper.⁶ This privileged will must be received by any of the aforementioned persons in the presence of two witnesses, who have to be eighteen or older, just like in the case of ordinary public wills.⁷ The person receiving the privileged will must sign it and, if practicable, so must the testator and witnesses. If the latter cannot, ‘a declaration stating the reason for which such signatures have not been affixed’ must be provided. Failing these formalities, the will is null.⁸

If the testator is still alive, such a privileged will becomes void after two months from when communications are re-established and would thereafter need to make an ordinary will if he still wants to dispose of his inheritance according to his wishes.⁹ If the testator dies after the privileged will is made but before the re-establishment of communications, the privileged will is binding. Likewise, if he dies after communications are re-established but before the lapse of two months, then it is also that privileged will that shall govern his succession.

Despite the two-month validity of this privileged will, the notary, judge, magistrate, or clergyman only has one month from when communications are re-established to deposit the privileged will he has received.¹⁰ Just like a secret will, a privileged will is deposited in the Civil Court (Voluntary

5 Civil Code, Chapter 16 of the Laws of Malta, Article 673.

6 ‘Public Registry Office’ (Identity Malta)
<<https://identitymalta.com/unit/public-registry-office/>> accessed 14 April 2020.

7 Civil Code, Chapter 16 of the Laws of Malta, Article 655; and Notarial Profession and Notarial Archives Act, Chapter 55 of the Laws of Malta, Article 25, Sub-article (3), Paragraph (c).

8 Civil Code, Chapter 16 of the Laws of Malta, Article 673.

9 Ibid., Article 674.

10 Ibid., Article 675, Sub-article (1).

Jurisdiction Section).¹¹ The testator may withdraw his privileged will at any time before it is deposited in court. If such person fails to deposit the privileged will, they are liable to punishment if civil proceedings are instituted against them.¹²

Before COVID-19, the provisions on privileged wills made in places where communications are interrupted might have seemed like dead letters owing to the fact such scenarios were rapidly fading out of living memory. However, for as long as they remain on the statute book and are not repealed in any way, a person in such a situation may still avail himself of them and make a privileged will. Naturally, the ordinary will remains by far the more ideal form of will and, for as long as COVID-19 remains under control, should be the form more resorted to.

¹¹ Ibid., Article 656.

¹² Ibid., Article 675, Sub-article (2).

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