WILLS AS A PANACEA TO SUCCESION DISPUTES, AND INHERITANCE SQUABBLES UNDER THE NIGERIAN LAW: AN OVERVIEW

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Abstract

It is believed and uncommon to see families torn apart, after the death a person who did not write a WILL, to stipulate, who are to be the beneficiaries of his or her bounties. Most societies have been essentially patriarchal, but in no area of political, social, and religious life, especially on that of women in the issue of inheritance. Wills as an instrument for testate succession under the Nigerian law, which was enacted, or borrowed has a great deal in bringing to the end the tussles that usually caused the deceased family, where a person died intestate. Making a will is very important in the Nigerian law, because, it is seen as a process where the head of the family, puts his house in order before his demise, In a contemporary world, when a person dies intestate (without making a will), it

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becomes a problem to his immediate family members, especially children and the spouse(s),and if the person married more than one wife. Here, they are subjected to the harshness associated with customary law, on inheritance which brings to the fact, that a woman inheritance can be condoned, which of course has been settled in the recent case of Ukeje v. Ukeje, where the Supreme Court gave a standing judgement in favour of women, granting them the right to inheritance. Making a Will becomes very imperative in this modern age, especially, where it is a polygamous marriage, to avoid the issue of harmful or dangerous distribution of assets of the deceased, in a manner which will not be beneficial to all concern. This paper therefore seeks to x-ray the importance of making a Will, and its advantages in the contemporary world.

Keywords: Wills, Inheritance, Succession, Testate, Intestate, Nigeria.

INTRODUCTION

Will as regards inheritance, which is commonly, or regards in aspect of customary law, Islamic law, recognized in the disposal of property by Will. A Will is a machinery whereby a person can in his lifetime, direct after his death. A Will, is also a testamentary document voluntarily made and executed according to law, by a testator with sound disposing mind, where he disposes of his property according to the Wills law and gives other directives as he may deem fit. Wills, takes effect after the death of the testator. The English Wills Act, is a statute of general application.

A Nigerian, subject to either Customary, or Islamic law, may make a will in accordance with English law, so long as the requirements of statute are observed., as was in the case of *Yinusa v. Adesubokun*[1] Where it was held by the Supreme Court that a Moslem may make a Will in accordance with the Wills Act freely dispose of his estate irrespective of any limitations imposed by Moslem law on the distribution of estate. A Will is revoked by the subsequent marriage of the testator, it can also be revoked any time before the testator is dead. The testator may revoke his Will by rescinding part or the whole of the Will. There are several ways to revoke a Will, but will limit it to some few of them.

Under the Wills Act of 1837[2], an earlier Will, may be revoked by a later one as long as the formal requirements are observed in the later case, such revocation may be affected by an express clause or by necessary implication from the wording of the Will. Revocation by marriage is provided for under Section 18 of the Wills Act 1837, and it automatically operate by law to revoke a Will. However, the Wills law accepts marriage celebrated in accordance with Customary Law from having such effect. From all intent and purposes, there is no revocation of a Will, by subsequent marriage of the testator.

Consequently, where the exercise of a power of appointment is involved, revocation by marriage is restricted only to those cases in which the instrument creating the power provided in default of appointment, the property is to devolve as intestacy. Revocation by writing declaring of an intention to revoke a Will is contained under Section 20 Wills Act 1837, and the document intended to be

[1] (1968) Suit No J03/67 NNLR 97.

[2] Section 20 of the Wills act 1837

revoked being a testamentary document must comply with Section 9 of Wills Act 1837, that WILL must be signed by the testator in the presence of two witnesses present at the same time. In any case, proper understanding of making a Will, revocation, execution, will be discussed as the work progresses.

THE EVOLUTION AND NATURE OF MAKING A VALID WILL

The Nigerian Legal System can best be describe as a combination of Nigerian legislation, English law, customary law, including judicial precedents. Nigerian colonial experience left her with a plural-legal system. In this regard, all the African States formerly under British administration share a common experience with regards to their legal and judicial systems. Nigerian legislation therefore, consists of statutes and subsidiary legislation. Statutes consist of Ordinance, Acts, Laws, Decrees and Edicts.

However, prior to the 21st century, the voluntarily passing of property to a relation or friend, other than from one immediate family at the exit of the original owner by reason of death is commonly placed. Liberty of alienation by will is found at an early period in England from where Nigeria borrowed most of her legal system framework.

To judge from the words of a Law Canute, intestacy appears to have been the exception at that time. However, this may be after the Conquest a distinction, the result of feudalism to use a convenient, if inaccurate term arose between real and personal property.

To Sir Edward Coke, that an estate which has stayed for some term of years, should be disposed by a Will, except otherwise in Kent,

especially in the city of London, where the pre conquest law was preserved by special indulgence.

In comparatively recent times, a Will of lands bore traces of its origin in the conveyance to use *inter vivos*. On the passing of the Statute of Users lands again became non-devisable, with a saving in the statute for the validity of Wills made before 1 May, 1536. The inconveniences of this state of things soon began to be felt, and was probably aggravated by the large amount of land thrown into the market after the dissolution of the monasteries. Thus, as a remedy, an Act was passed in 1540, which came to be known as the Statute of Wills and a further explanatory Act in 1542-1543.

In African traditional setting, the people evolved a suitable method of disposing their properties, however, the methodology varies from one community to another and was usually unwritten In *Eshughayi Eleko v Government of Nigeria*[3]. The existing native law and custom with reference to the law of inheritance was that any family members or friends could inherit the deceased property to the neglector exclusion of his biological children. *Adesubokun v. Yinusa*[4]. Common law in the 17th Century removed restrictions on the rights of testamentary alienation by series of stature and after the year 1725, a testator might freely dispose of his personal estate notwithstanding any custom to the contrary in any district.

Prior to 1540, making a Will did not require any formal procedure during that period Wills or real property were not allowed. The Wills law in 1540 has provision for only testamentary disposition of land if the Will was in writing. By 1837, the Wills Act was

[3] (1931) A.C 673

[4] 1971) ALL NLR @225, 77

enacted and provided the requirements for writing Wills of both personality and reality. However, some scholars and researchers have not been able to come up with a complete or generally accepted definition of the Will. A Will could be said to be written legal statement or voluntary declaration of a testator's wish on how his or her property(s) could be distributed after death. To Swinburne, one of the English writer on Will, he is of the opinion that a Will, is a lawful disposition of that which any one would have done before his death. To Odike,[5] says that a Will basically deals with personal property of the deceased testator, it is usually called a device but when a will deals with the personal and real estate of the deceased, it is popularly called the last Will and testament. The celebrated nineteenth Century English writer Jarman , who said, that a Will is an instrument by which a person makes a disposition of his property to take effect after his death, and which is in its nature ambulatory and revocable during his lifetime.

The ambulatory nature of a Will, is that a Will becomes effective only upon the death of the maker, and can only confer benefit upon the beneficiary after the death or demise of the maker.[6] According to Webter Dictionary[7]. Here Will is defined as one's property to be dealt with after one's death. To Lord Penzance in the case of *Lemage v. Goodban*[8], defined Will to be an aggregate of one's testamentary intentions so far as they are manifested in writing duly

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5 The Principal and Practice of Nigerian Legal System 2nd Ed pg 532,(2016) p 14

6 Anthony R, v. Mellow. The Law of Succession (London: Butteworth 3th Ed (1977).

7 (2004)pg 1125.

8 (1865) L.R.I.P. and D. 57 @ 62.

executed according to the statute. This Scream J, in Re fuld[9]. Clarified succinctly as follows:

> Darkness and suspicion are common features in Will cases because it is often difficult and sometimes impossible to discover the truth, the law Insists on two types of safeguards in Will cases because of its double safeguard nature. The first type of safeguard is part of the substantive law, the requirement of proper form and the execution. Such requirements are no mere technicalities they are the line of defence against fraud upon the second line of defence: It will be revoked when there are circumstances which give rise to suspicion reasonably arises, the court will allow inference, presumptions, as they are sometimes called, to drawn from the regularity of the testamentary instrument upon its face, or they fact of the execution. But if there are circumstances, whatever be their nature, which reasonably gives rise to suspicion, the court must be on its guard. It must ensure that the burden of proof rests upon the party propounding the Will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

[9] (1965) 6 ALL E. R 776.

WHY MAKE A WILL AND THE DEFERENT TYPES OF WILLS

The importance of making a Will cannot be over emphases, it is like bringing to end the life of him or her who is making the will. In making of a Will, the person want to diverge his / her property in a way or manner. In which he/she want the property to be shared to the beneficiaries of his WILL properly. It will be a peaceful instrument for the testator to make a will, especially in a polygamous home, to know the beneficiaries of the property, and to avoid the issues of rancour in the family, to leave behind a good legacy after the testators demise. This where the testator will freely dispose his property in accordance to the Wills Law/ Acts of various states.

However, there are many classifications of Wills, in the legal system, *vis-a vis,*

a. Holographic Will.
b. Nuncupative Will
c. Conditional Will
d. Multiple Will
e. Mutual Will
f. Joint will
g Codicil as a Will.

HOLOGRAPHIC WILL

This is a Will that is written, dated and signed by the testator himself, without attendant attestation of witnesses. This kind of Will does not comply with the provisions of the Wills Act, and thus remains null and void. The legal implication is the maker will be taken to have died intestate, but under the Roman law, this Will is deemed to be a valid Will.

NUNCUPATIVE WILL

This is also called oral Will. It is a Will made in contemplation of imminent death especially from a recent illness or injury. Generally, most customary Will is nuncupative in nature. However, under the Wills Act. The amount that may be conveyed though a nuncupative rule is limited. Moreover, only personal properties are allowed to be so conveyed or disposed. Nuncupative Will is thus a statement made orally, but for it to be valid in law, at least two, or more witnesses must show that they were present and heard the testamentary words. Here, under the Act one can only dispose of personal properties and even at that, the amount is limited.

CONDITIONAL WILL

This is also called contingent Will. A Will which normally provides that it will take effect upon the happening of an event. For example, " I leave the rest of my property to my beloved niece if she marries, in this case the niece will only inherit the testator's property when she is married. See the case of *Eaton v. Brown*[10]. The court held that a conditional will is valid even though the testator's death does not result from the condition mentioned in the Will. The court there was of the view that the condition is the inducement for making the Will, rather than a condition precedent to its operation.

MULTIPLE WILL

This is also known as duplicate Will. It is a Will made or executed in several copies and each copy is properly executed according to the Will's Act. It is possible when a testator draws his Will in duplicate and executes each in accordance with the legal requirements

[10] (1904) 193 US 411, 24 sCt 487.

MUTUAL WILL

This is also called reciprocal. Counter of double Will. It is a Will which parties made mutual based on understanding. Mutual Wills are popular, with parents (husband and wife). A mutual Will is usually made in a separate document containing a reciprocal provision in the interest of a partner. In a mutual Will, each testator gives interest to the other. Mutual Will does not take effect until one of the testators dies.

JOINT WILL

It is a single Will, executed or made by two or more persons, and jointly signed by them. It is also called a Co-Will, and usually made to dispose off joint property, or property own separately by the testator to a name beneficiary or beneficiaries. For example, when there are several interest in a property like a family property, the joint owners can jointly make a Co-Will to take care of its disposition under the Will's Act

CODICIL AS A WILL

This is a testamentary disposition made in addition to an existing Will, a codicil must relate to the Will it intends to amend. Apart from that, it must be signed and witnessed just like an ordinary Will, and all the applicable rules relating to a valid Will also apply to it thus: A codicil Will is used to:

a. Revoke a previous Will
b. Revive or validate a Will.
c. Add provision to a Will
d. Correct any error in already existing Will
e Amend, vary or alter a provision of a Will earlier written
f Republish a Will..

THE LEGAL FRAMEWORK GOVERNING THE MAKING OF WILL'S IN NIGERIA

The Wills Act of 1837,[11] which applies to most states of the federation, because it was a statute of general application in England by 1st January 1900, seems to suggest that a testator has uninhibited liberty in disposing of his property by Will, the section provides thus:

> It shall be lawful for every person to devise, bequeath or dispose of by his Will Executed in manner hereinafter required all real estate and all personal estate which he shall be entitled to, either at law or in equity at the time of his death.

Both in Nigeria and in England, it was the law and practice that a testator has unfretted discretion in disposing his property by Will. Over the year, societal norms and culture changes, the states in each of these countries questioned the wisdom of giving the testator absolute discretion, but because the enactments were not in force in England by 1th January 1900, were not enforceable in Nigeria. However, the following are the legal framework governing the making of Wills in Nigeria:

a. The Wills Act 1837
b. Wills Amendment Act 1852
c. Wills (soldier and Sailors) Act 1918.
d. Court of probate Act 1852
e. Law of Property Act 1925
f. The Wills Law 1958.
g. Wills law 1990
h. Wills Edict of Oyo State 1990.

[11] Section 3 of the Wills Act.

Subject to Section 3 of the Wills Act, which provided that, it shall be lawful for every person to devise, bequeath, all property or dispose by Will executed in manner hereinafter required, all real estate and all personal estate, which he shall be entitled to, either at law or in equity at the time of his death. The major provision above stipulates that all property may be dispose of by a will.[12] Which provides for the age required for making a Will. The provision in[13]specially says that every Will shall be in writing and signed by the testator in the presence of two witnesses at the same time. Concerning any soldier being in actual military services or any manner or seaman being at sea,. Thus,[14]provides that they may dispose of his personal estate as he might do before the making of this Act. The Wills Act of 1837, also provides in[15] that no Will is to be revoked but by another Will or codicil or by a writing executed like a Will or by destruction. Section 24, also provided that every Will shall be constructed to speak from the death of the testator.

WILLS AMENDMENT ACT 1852

This Will stipulated the position of the signature of a Will to be signed at the foot or end of the Will, by the testator or some other person in his presence or by his direction. Section 3 provides for the position of the signature of the witnesses on a Will.

COURT OF PROBATE ACT, 1857

This Act provided in[16] that the court of probate may require the attendance of any party in person, or of any person whom it may

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12 Section 7 of the Act.

13 Section 9 of the Act

14 Section 11 of the Act.

15 Section 20, of the Act.

16 Section 24

think fit to examine or cause to be examined in any suit or to her preceding in respect of matters or causes testamentary, and may examine or cause to be examined on oath or affirmation as the case may require parties and witnesses by words of mouth.

WILLS(Soldier and Sailors) ACT 1918

Section 1 of this Act clears doubts as to the construction of a Will by soldiers, it provides that despite the Wills Act of 1837, soldiers in active military service make a Will irrespective of their age. The B part of the section provides for the validity of testamentary disposition of real property by soldiers and sailors.

LAWS OF PROPERTY ACT 1925

The provision of the law of property Act subject to[17] relates to Wills in contemplation of marriage, the Act provides that a will expressed to be made in contemplation of a marriage shall notwithstanding anything in Section 18 of the Will Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnization of the marriage contemplated.

THE WILLS LAW 1958

Section 3(1) provides as follows;

> Subject any customary law relating thereto, it shall be lawful for every person to devise, bequeath or dispose of by his Will executed in manner hereinafter required all real estate and all personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not devised, bequeathed and disposed of would devolve

[17] Section 177 (1).

> upon the heir at law, or if he become entitled by descent, of his ancestor, or upon his executor or administrator.

Moreover, as required in[18]. It required for the specific age for a valid Will, section 6 provides that a Will must be writing, that no Will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned. That is to say, it shall be signed at the foot or end thereof by the testator or by some person in his presence and at his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and subscribe the Will in the presence of the testator, but no form of attestation shall be necessary.

Interestingly, Section 15 of the Act provides that any Will made by a woman shall be revoked by his or her marriage, other than a marriage in accordance with customary law, except a Will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her executor or administrator, or the person entitled as his or her next of kin under any written law relating to the distribution of the estate or persons dying intestate.

WILLS LAW 1990

The Wills law 1990, provides in,[19] states the power to dispose of property by Will, and Section 6, provides that no Will made by any person under the age of 18 shall be valid, and section 4 of the same Will provides for the necessary requirement needed for the

[18] Section 5, Section 6 of the Wills law of 1958.

[19] Section 1

execution of a Will, which specifically includes that it must be in writing, it must be signed by two or more witness at the same time etc. Section 6, of that same Will went further to include that soldiers, seaman, can make a Will not taking into account of the age necessary for the validity of a Will as provided by the Wills Act 1837. It also provided in [20].That a Will is not necessarily void simply because of incompetency of attesting witness, and Section 11, provides that a Will can be revoked by a subsequent marriages. Etc.

WILLS EDICT OF OYO STATE

Section 3(1), of the Wills Edit of Oyo State, provides that it is lawful for every person to bequeath or dispose of by his Will, executed in accordance with this Edict all property to which he is entitled, either in law or in equity, at the time of his death. While,[21] provides that subject to the provision of Section 8 of the Edict, no Will, made by any person under the age of eighteen years shall be valid. Section 6, provides for the position of seamen, mariners, and crew of commercial airlines in making of Wills with proper regards to their capacity.

CAPACITY TO MAKE A WILL

The capacity to make a Will, its not the same thing as the right to make a will, it is not a natural right which everybody possesses, it is a privilege granted by law to contain categories of persons. Hence, some group of persons who in the real face of event are considered and recognized by the law as far as making of a Will is concerned. In this paper, some of the privileged few, will be considered.

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[20] Section 7.

[21] Section 5.

a) Infants

At Common law, a person who is under 21 years of age can hold land or other properties, but any disposition of it by sale or gift is voidable, provided it is avoided before he attains full age, or within a reasonable time thereafter.[22]. Under customary law, a person not recognized as of full age may have interest in land as beneficiary, but the property is vested in a trustee or trustee or trustees, who may be call personal representative or an administrator.

An infant under the common law age now has been reduced to 18 years, but under common law, it is not so, because maturity of persons is often determined by puberty and the age of puberty is not the same for every individual because some persons mature faster, while others do not. The customary law, does not permit an infant to hold in property to the same capacity as an adult. Therefore, they are not permitted to dispose f property by the way of Will.

b) Lunatics

The term "Lunatics"[23] Includes an idiot and any person of unsound mind. A contract cannot exists except there is an agreement as far as the respective parties to the contract of making a Will is concerned, there must be a consensus *ad idem.* Customary law does not permit a lunatic to make a Will, but the general rule is that a lunatic is only permitted to make a Will, only during his lucid period, when he possesses and an act of discern between good and bad in relation to his property and to determine for himself, who exactly lays claim to his possession, and who benefits from the

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[22] (1893) Edwards v. Carter A. C. 360.

[23] Lunacy Act, Cap 112. Section 2 LFN 1958, & Lunacy Law Section 2 Cap, 18 Laws of Eastern Nigeria, 1963..

property after his death. An good point was raised in the case of *Battinsingh v. Amirehand*[24].Where Lord Normand, of the privy council, said that if a testator has given instructions to a solicitor at a time which he was able to appreciate what he was doing, and if the solicitor prepares the Will, in accordance with these instrument, the Will, will hold though at the time of execution is capable of understanding that he is executing a Will, which has instructed.

The testator, as a matter of necessity most possess a sound mind, so as to enable him understand the nature of his act in which he is involved. If the testator is of unsound mind, that will invalidate his Will. The relevant time for determine the testator's mental capacity, is the time the Will is made.[25] If for instance, the Will was executed during the testator's lucid intervals, it remains valid though the testator subsequently becomes of unsound mind. But, if evidence of his unsoundness of mind is adduced, the burden of establishing his capacity falls on the party, who sets up the Will. One is of a sound mind for testamentary purpose, only when he can understand and carry in his mind, and be able to remember the following:

1. The nature and extent of his property.
2. The persons of whom he wants to benefit from his bounties.
3. The disposition which he is making of his property.
4 Forming an orderly desire as to the disposition of his property.

c) Aliens, Convicts, and Illegitimate Persons

The Nigerian statutes, did not have an uniform definition of who an "Alien" is but defined in the Western Region Law as a person who

[24] (1948) 1 ER 152 PC.

[25] *Federal Administrator General v. Johnson* (1960) LLR 290, *Balonwu v. Nezianaya (1959) 3 ENLR. Section 69 (2) of Succession Law Edict 1987.*

is not a native of Nigeria.[26], and in the Eastern Region , it is defined as a person neither of whose parents was a member of a tribe or tribes indigenous to Nigeria. [27] However, an alien under the enactments is not synonymous with a person who is not a Nigerian citizen. Obviously, the statute never intended to treat such persons as aliens, simply because her parents originate from outside Nigeria. In *Bankole v. Williams*[28] Here rights to acquire and dispose of property, this is the outcome of deliberate government policy dating back to the early beginning of modern government in the country[29]

A convict, is a person who have been found guilty by a court of competent jurisdiction, the law is that a convict cannot make a Will neither can he benefit from a Will as a beneficiary pending the completion of his sentence. However, an illegitimate child is a child who is born outside wedlock, such a child under the customary law cannot even make a Will, or benefit from the property. But under the statute, there is nothing like illegitimate child since the 1999 Constitution (as amended), under Section 42(2) has abolished that

d) Illiteracy/ Blindness

An illiterate or a blind. Person cannot make a valid Will, unless the Will so made has a *jurat* or attestation clause, stating the person's conclusion of blindness or illiteracy. For example, signed by the above A B, a blind person as his last Will, after it had been first

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[26] Section 2 of the Native Land Acquisition Law 1952.

[27] Section 2 of the Acquisition of land by Aliens Law 1958.

[28] (1965) 1 ALL NLR. 153.

[29] The Native Lands Acquisition Proclamation 1903 of Protectorate of Southern Nigeria. The Native Land Acquisition Ordinance

read over to him and he appeared perfectly to understand and approve same in the presence of both, being present at the same time, at his request and in the presence of each other have here unto subscribed our names as witnesses. A Will validly made can be vitiated by fraud, mistakes and undue influence. In *Monevpenny v. Brown*[30]. The deceased testator made his Will on his sick bed with his wife directing him and influencing him. The court held that the Will is invalid. Moreover, in the case of an illiterate testator, the normal practice is the use of thumb prints, with the testator's name written beneath the mark.

e) Undue Influence

To write a Will should be voluntary. Thus, a Will written as a result of inducement is invalid. Similarly, a Will made as a result of deceit, fraud or mistake is invalid. Fraud is something that misleads the testator. For example, something that induced a testator to make or revoke a gift or exclude a person from a proposed Will, mistake involves making allusion to an on existing thing or person, and because of the above assertion, mere persuasion has been seen as not being enough to constitute undue influence. *Hall v. Hall*[31]

f) Suspicious Circumstances

Suspicious situations may occur, where there is a fiduciary relationship between the testator and beneficiary, especially where testator is the weaker party, and the beneficiary is the stronger party. For example, where the solicitor who prepared the Will is a substantial benefactor of the Will. The existence of suspicious circumstances does not invalidate a Will, but if the validity of the Will is challenged, the burden of proving the validity of the Will by

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30 (1711) 2 ER 651.

31 (1948) PD 481.

clearing the suspicions is on the profounder of the Will, and that is to say that, the stronger party who stands to benefit from the weaker testator must establish that he never influence the testator.[32]

g) Married Women

Married women lacked the testamentary capacity to made a valid Will, under Section 8 of the Wills Act, 1837. This has been altered by Section 1 of the married women property Act of 1882 and Section 3 of the married women property Act, 1952, which applies in Lagos, Ogun, Ondo, Edo States, and Succession Edict, 1897 of Anambra State, do not limit the testamentary capacity of married Women..More so, according to Section 15 of the Will's Act, a gift to a witness or the testator's husband or wife is void, even though the other gifts in the Will are valid, but there are still some exceptions to the rule, such as (i) A gift made to a witness in a privileged Will is valid, (ii). Where the gift to the witness is subsequently confirmed by another Will, or codicil. (iii). Where the beneficiary signed as trustee and not as witness and (iv), where the Will was made before marriage.

However, Section 18 of the Wills Act, has it that where a person makes a Will, and subsequently contracts a valid marriage under the Act, the Will he made prior to the marriage will be the operating of law automatically, become revoked. This principle of law was established to enable the person making the Will to make provision for the new spouse. Thus, in *Jadesimi v. Okotie Edoh*[33] Where the court held that section 18 of the Wills Act, does not apply to a customary law marriage.

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32 (1959) 1 ALL ER 552 *Wintle v. Nye*.

33 (1996) 2 NWLR (pt 429) 128.

LEGAL REQUIREMENTS OF A VALID WILL, AND ITS EXECUTION

The requirements for the validity of a valid Will are contained in the Wills Act and the Wills Law of various States in Nigeria. These have further been given judicial recognition in plethora of authorities[34]. And in the case of *Mudasiru v. Abdullahi,*[35] the Supreme Court quoted Section 4 of the Wills Law of Lagos State.[36]. That a Will must be:

a. In writing.
b Must be signed by the testator in the presence and by his discretion.
c. The testator makes or acknowledges the signature in the presence of at least two witnesses who will be present at the same time.
d. The witnesses attest and subscribe to the Will in the presence of the testator but no form of attestation or publication shall be necessary.

a) Writing of a Will

No Will shall be valid, unless it is in writing.[37] The view was adopted by the court in *Apative v. Lord St, Leonards.*[38] A written Will validly executed and subsisting unrevoked will not be void if lost, destroyed by accident or maliciously provided satisfactory evidence substantiates that it was not intended to be revoked.

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[34]Ize-Iyamu v. Alonge (2007) ALL FWLR (pt.371) 1570.
[35] (2011) 7 NWLR (pt1254) 592.
[36] Cap. W2 Laws of Lagos State, 2004.
[37] The Haque Convention (1961) Article 1 (a- d)
[38] (1944) 17 NLR 49.

b) The Signature of the Testator

The signature of the testator or someone directed by him, in his presence is imperative for the Will to be valid. Section 1 of the Will Act (Amendment Act) of the 1852, provides that the position of the testator's signature must be at the foot or end of the Will. Section 7 of the Wills law of 1958, provides that a Will is deem to be valid if the signature is placed at or after, or under or beside or opposite to the end of the Will. In *Smee v. Bryer*[39] Probate refused to grant a Will, which left no room for signature at the end of the third sides and was signed in the middle of a blank fourth side. Section 4(1) (b), should be read in conjunction with Section 4(2) of the Wills Law of Lagos State, which states that:

> No signature under this section or under any other provision of this law shall be operative to give effect to any disposition or direction which is underneath or follows it nor shall it give effect to any disposition or direction inserted after the signature shall be made.

c) Attestation

The witness to a Will shall attest and subscribe to the Will in the presence of the testator.[40] The witnesses are expected to sign after the testator had signed, as it is not permissible for them to sign before the testator and therefore merely acknowledge their signature. Any person, even a minor, can act as a witness provided that he is mentally capable of comprehending what is expected of him/her. The witness is there as an independent witness that the testator signed the Will freely and voluntarily. Any gift to the

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[39] (1848) 1 Rob Ecc 616 at 623)

[40] Section 8 of Will Law Lagos State, Cap W2. 2004. & Section 12 of the Wills Law of 1958.

witness of the witness spouse will be invalid and the property that would have gone to them will form part of the residue of the estate under the Wills Act.[41]

d) Acknowledgement

The testator must make the signature in the presence of at least two witnesses present at the same time. Where, his signature is by someone else in his presence and by his directives, the testator must acknowledge such signature in the presence of at least two witnesses present at the same time. Acknowledgement is the intention of the testator to wilfully devise his estate to his beneficiaries as indicated by him in his Will.

e) Mental Element

Making of a Will is not a legal requirement but voluntary, this implies that there are no sections as to inability of a person to make one, since it is rather a privilege. A mentally retarded person cannot make a Will, while his insanity subsists, since the validity of a Will could be barred for want of the *animus testandi* (full and free intention to make a Will),on the part of the testator. The absence of the *'animus testandi'* (and essential quality) render the Will unenforceable. What determines the result of case depends largely on whether the Will has good intention of being rational on face value? The test for mental capacity to execute a Will was propounded by Cocknurn CJ in the case of *Banks v. Goodfellow.*[42] Where he said:

> As to the testator's capacity to make a Will, he must in the language of the law have a sound and

[41] *Ibid* Section 15 of the Wills Act and Section 8 of Wills Law Lagos State Cap W2. 2004.

[42] (1870) L R. 5 QB 544 @ 565.

> disposing mind and memory---- he ought to be capable of making his Will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of the persons who are the objects of his bounty and the manner in which it is to be distributed between them--- it is sufficient if he has such a mind and memory as will enable him to understand the element of which it is composed and the disposition of his property in its simple form.

REVOCATION OF A WILL

A Will remains ambulatory until the death of the testator and therefore once the testator remains alive, the Will is subject to change at any time during his life time.. Under the Wills Act.[43]
Section 17 of the Wills law and Section 81 of the succession edict 1987, provides that a Will shall be revoked in different ways:

a. By Subsequent Will or Codicil.
b Revocation by Writing.
c. Revocation by Destruction of the Will "*Animus Revocandi"*

Here, if the testator or his agent carrying out his instruction, while he is present, burns, tears, or destroys the Will with the intention to revoke it, the Will or the revocation is considered effective.[44] As well as in the Estate of *Goods Dadds 1857 Dea & SW 290.* In the case of Estate of Brassington. The condition here is that *Animus Revocandi* existed at the time of destruction and that the destruction took place in the presence of the testator. The destruction maybe in

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[43] Section 20 of he Will Act, 1837.
[44] Section 20Wills Act 1837.

form of writing, cancelling across the Will, or cancel the signature and dispose of his Will into the dustbin.[45]

REVOCATION BY SUBSEQUENT MARRIAGE OF A TESTATOR

A Will made by a testator will be revoked automatically by any subsequent marriage contracted by him or her after the making of the Will. This rule is seen under the Wills Law of Lagos State.[46], which states that every Will made by a person shall be revoked by his or her marriage. It is also provided for in the Wills Act, and in the Wills Law of 1958.[47] The rationale behind this rule is that there is no moral obligation on the part of the testator to provide for his new family as well as his old family. There is an exception to this rule, this occurs where the Will is made in contemplation of marriage, the Will cannot be revoked by the solemnization of that marriage contemplated.[48] This was affirmed by the court in the case of *Jadesimi v. Okotie- Eboh*[49] It is worthy to note that a void marriage that is deemed in law to be *void abinitio* will not affect the validity of the Will. But a voidable marriage that is valid initially, but later held to be nullity will revoke a Will. Divorce does not revoke a Will, the Will would continue to be effective unless the testator subsequently remarries or makes a new Will.

RECOMMENDATIONS

Will as a creation of law, its importance cannot be over emphases in our various communities, even all over the world, especially in

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45 Cheese v. Lovejoy (1977) 2 PO 251 at 253.

46 Section 11 of The Wills Law of Lagos.

47 Section 18 of the Wills Act and Section 15 of the Wills Law of 1958.

48 *Ibid. p 10.*

49 (1996) 2 NWLR. (pt 429) Pg 128.

an environment where the issue of polygamous marriages still exists, when it comes to inheritance, which are left to the whims and caprices of close relations and to the custom regarding to inheritance. Drawing from the above, there is no gain saying that Wills are *Sin Quo Non,* to the Nigerian society standing on this premise, there is need for Nigeria to have a uniform body of rules governing the making of Wills in Nigeria, this is because, devise laws on Wills makes one to ask the question of which law should apply to Will made under the Wills law of Lagos State, which execution is sought in a court outside the jurisdiction of that state, whether it is the law where the Will is made, or law where the execution of the will is sought.

For instance, under the Wills law of Lagos, it states in Section 3, that the age capacity of a person making a Will is eighteen years, while Section 7 of Wills Act (operative in the Eastern/ North Nigeria and Section 5 of the Wills law 1958 cooperative in the Western State), provides that the age capacity to make a Will is Twenty-one years. Based on the above stated contradiction, I therefore recommend for one unified body of enactment to regulate the procedures and practice of Wills generally in Nigeria.

CONCLUSION

Making of Will, is no doubt the most important aspect of inheritance and the disposition of real and personal property of a person who died intestate, having left more than one person in the inheritance of his property, thus, the making of Will. Will in great extent reduce the struggling for selfish interests. The making of Will is observed mostly from the developed world, where the importance is well felt, than the developing world, Nigeria inclusive, is regrettable. The apparent difficulty in creating a Will is

directly associated with the low literacy level of the developing nations.

However, a lot of people, even in those circumstances see the need for making a valid Will, to create a conducive atmosphere when they die. The absence of not making a Will, have caused a lot of problems among some families, especially from the sharing of properties of the head of the family, thereby causing serious economic disadvantages and abject poverty as the property are diverted into the hand of long distance relations, who may not even care for their children's welfare. The issue of women inheritance comes in handy here. The position of women in the society also create some problems in African families, where the law does not recognise female as having equal rights as their male counterparts in the disposition of the family property, which tends to exclude them. At that time, most African societies have the belief that females are the property of the men, as they are also shared as other items or property. Thus, in the celebrated case of *Ukeje v. Ukeje*[50] That issue of female inheritance has been laid to rest in the Nigerian Legal System.

[50] Ibid. (2014) 11 NWLR (pt1418 at P384.