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EDITORIAL COMMENTS

I am pleased to present Volume 10 of the *University of Uyo Law Journal*. The Editorial Team has worked tirelessly to bring you this issue, comprising ten scholarly papers of nine articles and a statute review. This edition of the journal offers a range of topical and insightful ideas on themes in the fields of international investment arbitration, access to information law, trade dispute and industrial jurisprudence, insurance law, testamentary disposition, pension administration law, taxation law, international criminal law, and legal/constitutional theory. This is in accord with the aim of the *University of Uyo Law Journal* to provide a forum for the widest discussion of subjects on the law and contemporary issues of sub-national, national and global concern.

This edition opens with a paper by Osawe Omosede Andre, which examines the nexus between access to information law and corruption. It argues that corruption impact on access to public information as it works to promote secrecy. As such, any advancement towards opening governments to public scrutiny must foster anti-corruption efforts, which must of necessity validate the demand for openness in government actions and inactions as a right. Thus, the paper notes that a virile public information system will engender transparency that is necessary to expose corrupt acts, as access laws promote public right as well as serve as deterrent to corruption.

The joint paper by Francis Ohiwere Oleghe and Olusesan Oliyide examines the relationship between human rights and international investment arbitration using Weiler's concept of lost siblings. It argues that international investment arbitration (IIA) has elicited so much attention in recent times. So much so that the United Nations Commission on International Trade Law and the International Centre for the Settlement of Investment Disputes have engaged in programmes aimed at reforming the investor-state dispute settlement (ISDS) system, of which IIA is a subset. It makes the point that while the ISDS system has evolved with protection for investors, the experience of host states remains that of misgivings about the system's usefulness, which have resulted in agitations for its reform to give adequate consideration to human rights norms in ISDS cases. The aim of which is to strike a balance between investors' bilateral investment treaty (BIT) rights and their human rights obligations.

The papers by Ogancha Ogbole and John Inaku offer exposés on trade dispute jurisprudence. On the one hand, the former paper examines the constructions of 'trade disputes' and 'state trade disputes' under Nigerian labour laws and regulations. It argues that the recognition of the concept of state trade disputes under Nigerian labour law contributes in expanding the frontiers of trade disputes in the workplace, which poses recondite challenges for the current constitutional arrangement for labour jurisprudence in Nigeria. It therefore recommends the unbundling of labour, as an item under the Exclusive Legislative List, to pave the way for the involvement of state legislative assemblies if the notion of state trade dispute as conceived by Nigerian labour law is to be properly harnessed. On the other hand, the latter paper examines the impact of the finality of the decision of the Court of Appeal on labour and industrial disputes and how it impacts on the development of labour and industrial jurisprudence in Nigeria, in view of the level of expertise available to the Court of Appeal. It therefore proposes packing the Court of Appeal with judges from the National Industrial Court or, in the alternative, for the establishment of a National Labour Appeal Court, constituted of labour and industrial law experts, to hear appeals from the National Industrial Court of Nigeria.

Kehinde Anifalaje's paper considers the regulation of compulsory liability insurance in Nigeria as a means of public protection from the risk of death, bodily injury or loss of property. The paper examines the laws regulating compulsory liability insurance in Nigeria and the enforcement of the rights of third parties within the context of the common law rule of privity of contract. It argues that the current tort-based system of compensation coupled with some regulatory challenges patently constitute a hindrance to a timely enforcement of the right of third parties under the contract of insurance, and suggests, among other things, the institutionalisation of a no-fault system of compensation that would guarantee quick and effective compensation of persons, who suffer losses by means of death, bodily injury or loss of property.

Also advancing the need for improved public protection, Lilian Nwabueze's paper examines public protection through a change in approach towards better Wills by means of legislative amendment to Wills law to include the use of technological devices in communicating Wills; while and the paper by the duo of Onikosi Adedeji and Ahmed Muhammed-Mikaaeel examines the legal regime for pension administration in Nigeria, which it argues possess inherent lapses, including lack of direct prosecutorial power on the part of relevant agencies, unjust and insensitive

exclusion of the state and local government workers from coverage under the extant pension scheme and non-compliance of the pension scheme to Shari'ah.

The focus then moves to taxation law, in which Uche Jack-Osimiri, Anthony Ekpoudo, Rowland Ipoule and Amara Ijeomah comprehensively examine jurisdictional issues that emanate in the administration and practice of tax laws, arising from the jurisdiction of the National Assembly and State Houses of Assembly to exercise legislative power to promulgate tax legislation within the limits conferred by the Constitution. It proposes certain measures to bring about reforms for the smooth administration and practice of tax laws in Nigeria. Glory Okebugwu's paper thereafter examines the investigative and prosecutorial approaches in combating transnational crimes under international law. It argues for a neutral body that will ensure balance of conflicting interests in the investigation and prosecution of transnational crimes, as transnational crimes universally present certain challenges to national criminal justice systems. The paper, therefore, recommends the collective involvement of the international community, as well as the adoption of more proactive investigative approaches with long term control guarantees with human rights considerations.

The paper by Olanrewaju Aladeitan and Adeboro Adamson focuses on the loss of proprietary interest by a private entity on the basis of overriding public purpose in the context of a liberalised and privatised regime, which raises critical legal issue regarding the extent to which the legal framework for the acquisition of land for energy infrastructure development impacts on the rights of a landowner and the correlation to the effective performance of the Nigerian Electricity Supply Industry (NESI). The paper proposes a legal regime that is fair and balanced for operators/investors in sector, as well as for other stakeholders. The final paper, a statute review by Ekokoi Solomon, evaluates the Akwa Ibom State Map Establishment Law 2023. It argues that the AKS map law appears to be inconsistent and out of step with the constitutional provisions on boundary adjustment. This, the paper argues, is in view of the nature of the extant constitutional order, which requires the exercise of legislative power to promote the integrity of the legal/constitutional order.

There is evidently a wealth of good reading, thoughtful analyses and helpful materials in this volume of the journal. In effect, the authors have worked diligently to provide innovative perspectives on the issues covered by their papers, which have sub-national, national and international

concerns. We therefore welcome constructive feedback and suggestions on the issues covered in this edition. If there are any questions, comments or concerns, please do well to contact us at facultyoflaw@uniuyo.edu.ng

With gratitude to members of the Editorial Team and our external reviewers, who volunteered their time and intellect to enhance the quality of the papers selected, I welcome readers to turn the pages of this volume of the journal and embrace the wealth of information and knowledge contained in them.

Prof. Mojisola Eseyin
LLB (Ago-Iwoye), LLM (Uyo), PhD (Calabar)
Editor-in-Chief, University of Uyo Law Journal
Email: mojisola.eseyin@uniuyo.edu.ng

Development of Formal Requirements for Wills: Towards a Change for Better Wills

*Lilian Ifeoma Nwabueze**

ABSTRACT

Formal Wills are defined by statute because statutorily specified formal features are needed to give them validity. The features which include writing and proper execution were not all conceived simultaneously with the notion of testamentary disposition as we have them today. The statutory journey of these features may have begun before the birth of Wills under the 1837 Wills of England. This article traces the use of formal features in testamentary disposition to meet the yearnings of persons who desired their last wishes to be honoured. Change, which is a prevalent feature in the development of Wills, appears to be undermined after the Wills Act, despite the shortfalls in the application of the statutory requirements. This paper analyses the subject, and notes that formal features can be made self-proven and all-encompassing when communicated through technological means. The paper asserts that change in the direction of technology is required for Wills made under the digital era. It proposes the incorporation of technological changes into Wills and recommends amendment to the provisions on the Wills law to include the use of technological devices in communicating Wills.

Keywords: Formal Wills, formal features, instruments of testamentary disposition, technological changes, digital Wills

I. INTRODUCTION

Testamentary disposition is a product of change. Prior to its conception, the assets acquired by the dead during his lifetime was distributed according to the discretion of those alive and who share blood affiliation with the deceased or in line with the cultural practices of the deceased during his lifetime. Neither may truly represent the wish of the owner of the assets, who died intestate, nor meet the needs of his decedents.[1] Yet, the rules and cultural beliefs are followed without objections.

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* University of Delta, Agbor, Nigeria. E-mail: liliannwabueze@gmail.com

[1] ML Fellows and others, 'An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes' (2010) 85 *Indiana Law Journal* 409, 410.

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The cultural rule of intestate succession is as old as man. Its foundation seems tied to customs so, may not have been alien to the deceased whose intestate estate is subjected to its application or strange to his decedents whose traditional practices are re-echoed by their own people.[2] The notoriety of the rule in the dispositive scheme of the property of the dead is visible in its mild inclusion in the statute on Wills as a customary practice which testators ought to respect.[3] Judicial interpretation to the provisions of that sub-section of the Wills law is to the effect that the laws on Wills allows a testator to dispose off of his property as he may wish but to the extent that the distribution of the specific property subjected to customary law is done in accordance with the customary practices elected and followed by the testator while alive.[4]

The judicial and statutory recognition of the rules of intestacy is strengthened by the dissenting opinion in *Idehen v Idehen*,[5] which in summation is that where a person dies without leaving a Will, customary law becomes the applicable law for the distribution of his intestate estate.[6] In spite of the universally acceptable application of the rules of intestacy, effort towards the modification of its content to reflect the donative desires of the deceased appears unknown and unrecorded for a very long time. Thus, unlike a life insurance policy or the record of service form in which the insured or an employee wilfully states his or her next of kin or who will inherit whatever is due to him when death occurs, intestacy rules have, to a large extent, remained silent over the wishes the dead may have nursed over his assets when he struggled to acquire them.[7]

The above seems to have accounted for the yearnings for a change and the preference for a medium which will address the weaknesses of the customary rules relied upon for the disposition of the property of the dead. Testamentary disposition appears to be the solution much sought after. With Wills, testators could pour out their hearts in form of wishes and have same represented in a permanent form with the assurance that those wishes would be honoured after their demise.

The use of testamentary disposition by the living to settle his affairs after his demise appears to have developed in stages over the years with each stage becoming an improved version of the previous instrument which

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[2] IE Sagay, 'Customary Law and Freedom of Testamentary Power' (1995) 30(2) *JAL* 173.
[3] Wills Law of Western Nigeria 1958 s 3(1).
[4] *Idehen v Idehen* [1991] 6NWLR (Pt 198) 382.
[5] ibid (Ogundare JSC).
[6] ibid 406.
[7] Fellows and others (n 1).

noticeable flaws would have been eliminated. The actualisation of testamentary intentions seems to have been the push for the development in the features of Wills at various stages. Thus, when elaborate formal features became mandatory statutory requirements for the validation of last wishes, it was to promote testators' desires that would be made open when they have gone to the world beyond. Though, they cannot be seen physically or be heard in the form known to the living hitherto to their demise, their intentions ought to be a priority at the time of the unsealing of the will made before death.[8]

The intentions of persons who lived before the enactment of laws on the distribution of the assets who wished to have an input on those their belongings will go to and the quantum each may take were expressed orally before their witnesses under approved procedure.[9] First, the declaration of testamentary wishes by the testator must be made in either of the two occasions when the people gathered in Rome on yearly basis.[10] Then, the testator must declare his wishes before a minimum of six persons.[11] Five of the witnesses would confirm the declaration he made after his demise while one would supervise the distribution of the testator's assets to ensure that his oral wishes were followed.[12]

Despite the above, oral Wills had its attendant's legal implications, namely; the absence of objective evidence which will serve as proof to the intentions that were expressed orally by the deceased, the difficulty in ascertaining the truth of what is claimed by those who say there is an oral Will, the unavailability of proof that would link a testator to the wishes claimed to have been made by him—all would have contributed to its lack of popularity among majority of the population at that time.[13]

It may not be wrong to presume that if the pre-writing era had witnessed today's advancement in technology, the proof of oral Wills would have been less laborious than what they experienced then, because appropriate technological devices would have been employed to record and

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[8] *Igboidu v Igboidu* [1999] 1 NWLR (Pt 585) 27.

[9] K Abayomi, 'Concept and Characteristics of Wills' in AA Utuama and GM Ibru (eds), *Laws of Wills in Nigeria* (Shaneson CI Ltd 2001) 1.

[10] CS Ellart, 'The Late Roman Law of Inheritance: The Testament of Five or Seven Witnesses' in B Caseall and SR. Haebner (eds), *Inheritance, Law and Religion in the Ancient and Medieval Worlds* (Association des amis dis Centre d'histoire et Civilisation de Byzance 2014) 229.

[11] ibid.

[12] ibid.

[13] M Kimberley, "Technology and Wills: The Dawn of a New Era' (Covid 19 Special Edition 2020) <s.3.amazonnaws.com> accessed July 2021.

retain information which will aid the Court and others in determining the true intentions of testators. But societal development comes in stages. From the mere use of words without more to the stage where thoughts are put in organised form and expressed on paper with the use of pen for the purpose of communicating ideas to persons other than the immediate generation, and to the stage where a more sophisticated means other than writing with pen on paper is preferred.[14] The latter stage may have been envisaged during the pre-writing era but not its applicability.

This paper examines the progressive changes in formal features contained in the laws for the disposition of property as well as their limitations and makes a case for better Wills in today's advanced world by the continual application of the change theory to the statutory requirements for Wills. The aforementioned is discussed under five parts including the introduction which is contained in part I. Part II evaluates the local content provisions in the laws on Wills. Part III focuses on the impediments to the provisions on the laws on Wills and part IV explores a new legal regime for Wills. The conclusion is contained in part V.

II. THEORETICAL AND CONCEPTUAL ISSUES ON LOCAL CONTENT PROVISIONS UNDER THE WILLS ACT

Pre-death disposition of property has always been of great interest to mankind. Each developmental stage in the society has its mode of communicating the desires of owners of properties on how what they worked for throughout their lifetime would pass unto their descendants. The greatest concern of man at each stage appears to be how the wishes made by him would be preserved until the contents are made known to those concerned. Hence, the need for statutory requirements that will give legal backing to the wishes so made. Formal features became imminent in the validation of Wills for the benefit of testators.[15] However, the features which over the years have undergone changes must continue in that line in the present generation to remain relevant as conceived; otherwise, it may lose significance in no distant feature.

Wills made under the digital era requires more than mere communication of formal features of Wills in analogue form. The new dispensation demands further processing of the same features to give a transparent, self-proving and reliable representation of the essence for the

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[14] R Claiborne, '*The Birth of Writing in the Emergency of Man*' (Earlier vol, Time Life Int 1974).

[15] *Ezenwere v Ezenwere* [2003] 2 NWLR (Pt 807) 238-248 paras E-F (CA).

inclusion of the statutory requirements in Wills[16]. Formal features communicated through digital form appears to be the immediate solution to most of the doubts associated with Wills which the maker may or may not have envisaged at the time he made his Will and which the framers of the Wills Act inadvertently failed to consider while putting the law together. The product of such Will will promote testamentary intentions better than its conceived form today.

A. The Law on Disposition of Property before the Wills Act

Perhaps, the earliest statutorily recognised instrument for the communication of last wishes was the Copper and Scales Rules.[17] Under the system, the owner of property would transfer his immovable property to his chosen beneficiary in the presence of a number of witnesses ranging from five to seven who would also witness the payment of some token to the transferor by the transferee. Both the legal and equitable interests in the property so transferred pass immediately to the transferee.[18] The transferor has no right to revoke the transfer which is done in the open.[19]

The scales rules of devolution of property maintained the need for witnesses to be present at the occasion and for their signature and/or mark of authentication to be visible on the instrument of transfer.[20] The above requirements are some of the formalities still found in most statutes on Wills in different jurisdictions with or without modifications.[21] Formal requirements for Wills may really have begun in Rome as seen in the specifications for valid instruments of transfer.[22]

The scales rules and the happenings in England at the time of the operations of the rule may have laid the foundation for the need for a comprehensive and standard law that would guide all bequests and devises.[23] The Norman conquest of 1066 which imposed feudal system and prohibited the devise of land in Wills was the first to awaken among the people the consciousness for legal backing in the devolution of their

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16 GW Beyer, 'Videotaping the Will Execution Ceremony – Preventing Frustration of the Testator's Final Wishes' (1983) 15(1) *St Mary's Law Journal* 37.

17 CI Nelson and JM Starck, 'Formalities and Formalism: A Critical Look at the Execution of Wills' (1979) 6 *Pepperdine Law Review* 331 (Copper and Scales rules hereinafter referred to as the Sale rules).

18 ibid.

19 ibid.

20 HS Maine, *Ancient Law* 166-209 (10th edn, 1884) 198-202.

21 Nelson and Starck (n 17).

22 ibid.

23 ibid

property.[24] Added to that is the exclusive right of inheritance which by custom was reserved for the eldest sons in the family and that removed from the owner of property the freedom to decide and elect who would take their possession.[25]

There was so much discontent among the people following the application of the feudal system and they found a way out through the instrumentality of the 'use.'[26] The 'use' was a devise employed by the Chancery to enable a person to transfer his immovable property as he would wish while alive and it would take effect immediately.[27] Like the tripartite structure in a trust,[28] those needed to bring the use into existence were the conveyor, the beneficiary and the holder of the legal document of the property in question.[29] While the beneficiary took immediate physical possession of and equitable interest in the property conveyed through 'use', the holder of the legal document was disallowed from carrying out acts that would jeopardise the equitable interest of the beneficiary otherwise, all parties would forfeit the rights derived from the instrument and same would be vested on a bonafide purchaser whether or not he had knowledge of the arrangement over the property prior to the sale.[30]

The 'use' made it possible for owners of real property to transfer same to beneficiaries who would assume immediate physical possession during the lifetime of the former.[31] It also guaranteed peaceable enjoyment of the property transferred to the beneficiary but that was as far the latter kept the rules of the transaction.[32] In spite of the above, the use had its limitations. One of which was the inability of the instrument to vest on the named beneficiary, the legal and equitable interest in the property transferred at the time the owner of the property would have wished those rights to pass.[33] For example, the use was only suitable for the transfer of gifts which took effect while the transferor lived. The instrument could not be used to devise and bequeath gifts which would pass wholly after the demise of the owner of the gifts.

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[24] Maine (n 20).
[25] Nelson and Starck (n 17).
[26] Sweet, 'A Song of Uses: Some Reflections and a Moral' (1819) *35 L Q Rev* 127.
[27] ibid.
[28] OF Emire, *Law of Trust and Trustees* (Jeroiliromah 1999) 67; the trust structure involved the settlor, the trustee and the beneficiary.
[29] Nelson and Starck (n 17).
[30] ibid.
[31] ibid.
[32] ibid.
[33] ibid.

Again, the inadequacy of the instrument necessitated the need for another law that would address the desires of the people, namely; the freedom to make Wills.[34] The agitation gave birth to the Statute of Wills of 1540.[35] The law made it possible for persons to give out their immovable properties while alive but the property would pass on to the person chosen after the death of the owner of the property.[36] The validity of the devise made under the 1540 Statute, was determined by one requirement which is the writing formality.[37] It was immaterial whether the devise was in the handwriting of the testator or another, whether it was signed by him or another because the requirement was needed only as a proof of transfer of title and not to show the authenticity of a testator's wishes.[38]

A more elaborate requirement for Wills appear to have been laid down by the framers of the 1677 England Statute of Frauds through its provisions on writing and witnessing.[39] Section V of the Statute of Fraud provides that the devise of immovable property must be in writing. Section XIX of the same law states that the gift of movable property worth more than thirty pounds in a Will shall be made in writing. The law also stipulates that the revocation of the above shall only be effective when it is in writing and witnessed by three persons who may or may not have actual knowledge of what they were witnessing.[40]

The application of the provisions of the Statute of Fraud was demonstrated in *Cole v Mordaunt.*[41] In that case the surviving spouse of the maker of the Will claimed that through an oral Will, her late husband left all his property to her after he revoked an earlier oral Will which profited the children of his first marriage.[42] The Court refused to give validity to the oral Will the deceased's wife claimed her husband made because the standard set in the statute of fraud for the revocation of Wills was not followed.[43] The case showed the usefulness of the application of standard requirement in the determination of cases on Wills.

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[34] Sweet (n 26).
[35] Statute of Wills, 1540, 32 Henry 8C 1 (1540) (hereinafter referred to as the 1540 Statute).
[36] ibid.
[37] W Holdsworth, *A History of English Law* 539 (5th edn, 2nd Impression 1973).
[38] ibid.
[39] Statute of Frauds 1677, 29 Car 2, C 3 (1676-77) (hereinafter referred to as the Statute of Frauds).
[40] ibid.
[41] (1926) AC 109 cited in W Rollison, *The Law of Wills* (1939) 41.
[42] ibid.
[43] ibid.

In *White v Trustees of the British Museum*,[44] the Court held that the Statute of Fraud has no specific format for certifying Wills. In the instant case, William White made his Will in accordance with the provisions of the Statute of Fraud by having three witnesses, only one testified in Court that William acknowledged his signature on his Will before him.[45] The other two witnesses stated that they appended their signatures on the document William showed to them but knew nothing about the content of the document.[46] The signatures of the witnesses were held valid as implied acknowledgment of the Will made by the testator and that was sufficient to meet the provisions of the law.[47]

Therefore, while the Statute of Fraud proved effective in detecting frauds of a peculiar nature, its unclear provisions particularly with the attestation of Wills may have provided avenue for other acts of deceptions in the disposition of the property of a deceased person through the instrumentality of Wills. Moreover, the distinction created by the law in the forms through which immovable and movable property of certain value can be transferred may have created more confusion than it sought to solve.[48] The confusion led to an increase in the number of cases before the Court because while one single instrument succeeded to convey a testator's personal gifts to the beneficiaries named therein where only one witness confirmed the Will, those listed to benefit from the immovable property stated in the Will failed to get their gifts.[49] The Court provided the reason for the above in *Seldon v Coalter*,[50] where it held that an unexecuted Will was good for the distribution of a testator's movable property but bad for the devolution of his immovable property.[51]

The statutory distinction created by 1677 Statute of Fraud in the disposition of different property of a testator made it problematic to identify and distinguish genuine attempts to make written Wills from

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[44] 130 Eng Rep 1299, 6 Bing 310 (1829).
[45] ibid.
[46] ibid.
[47] ibid.
[48] The Statute of Fraud provides that a Will communicating immovable and movable property worth more than thirty pounds shall be in writing and witnessed by 3 or 4 persons while all other movable property need not follow suit.
[49] *In re Elock's Will*, 15 S C T 39, 44 (S C App 1 Eq (1826); see also *Williams v Walton* 2 Dl Cas 193, 195 (Com Pl 1803).
[50] 4, Va 553, 519 (Va Gen Ct 1818).
[51] ibid.

efforts to make oral Wills.[52] In the case of *In re Matle's Will*,[53] the deceased on his deathbed stated his wishes as far as his real property was concerned to seven witnesses among whom was his solicitor who made a rough outline of the deceased's Will based on the wishes the latter dictated to him. Unfortunately, the deceased was prevented by ill-health from appending his signature on the outline or on the completed Will before his death. The Prerogative Court held that the deceased failed to make a written Will which could be used to dispose his real property and that the draft would not succeed as an oral Will under strict interpretation of the law because the aim of the deceased was to make a written Will.[54]

The Court may not have considered any extraneous evidence to show that the deceased assented by words or conduct to the unsigned document presented by his Solicitor although it added that notes taken by one of the several witnesses showed a defective written Will which could at best pass as an oral Will.[55] Despite the above hint from the Court, the Will was denied probate.[56] Thus, the requirements spelt out for Wills in the Statute of Fraud was also deficient and fell short of the ideal instrument needed for the actualization of testators' donative intents. The seemingly inability of the Statute of Fraud to address the object of its creation made many to call for its review upon which the following recommendations were made:[57]

i. Two witnesses could affirm a Will;
ii. The witnesses who affirm the Will for the disposition of immovable property shall be in the physical presence of the testator;
iii. Only persons qualified under the law can affirm the conveyance of immovable property made through Wills.

B. Section 9 of the Wills Act

Section 9 of the Act may have drawn some of its provisions from the recommendations of the commission set up to review the Statute of Frauds.[58] The section accommodates the disposition of both movable and immovable properties and makes provisions for two categories of Wills namely; formal and informal Wills.[59] The latter is accepted when made by

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[52] *Plater v Groome*, 3 Md, 134, 141 (1952).
[53] 24, A 370, N J Prerogative Court (1892).
[54] ibid.
[55] ibid; see also *Mason v Dunman* 15 Va 156, 459 (1810).
[56] ibid.
[57] Nelson and Starck (n 17). The object of the Statute of Fraud is provided in its title 'An Act for the Prevention of Frauds and Prejuries'.
[58] Wills Act of England, 1837 (Hereinafter referred to as the Wills Act 1837)
[59] WF Frank, *The General Principles of English Law* (6th edn, George G Harrap & Co

certain categories of persons and in times of exigency while the former must have the under listed features to be deemed valid.[60] The features include:

i. It must be in writing.
ii. It must be duly signed by the testator or by another as directed by him and in his presence.
iii. The testator's signature or acknowledgement of same must be made in the presence of two attesting witnesses who must be present at the same time to carry out their confirmation duty.
iv. The attesting witnesses must in turn sign the Will before the testator but not necessarily before one another.[61]

The requirements are set out primarily to ensure that a would-be testator makes his Will as a free agent and that the wishes contained in the will remain unaltered after his demise.[62] The aforementioned objectives were also reiterated by the Court in its subsequent judgements in the cases of *Huffman v Huffman* [63] and in *Savage v Bowen.*[64] In the former, the Court held that the reason for specifying that Wills should be written is to ensure that testamentary wishes are not altered once communicated[65] whilst in the latter, it was held that the formal requirements are meant to protect testators from external influences during the Will making process and thereafter ensure that the confidentiality of the wishes conveyed is maintained.[66]

C. Device Used to Supplement the Provisions under the Wills Act

The need for a revolution in the proof of genuine testamentary wishes may have witnessed supplementary arrangements such as the inclusion of self-proving affidavits to Wills, the use of *terrorem* clauses in Wills, reference to Will substitutes and the use of declaratory orders sought and obtained by testators while alive to corroborate the content of Wills.[67] The latter is more appropriately described as Ante-Mortem Probate.[68] Perhaps, the use

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Ltd 1969) 151.
[60] ibid.
[61] Will Act (n 58).
[62] Nelson and Starck (n 17).
[63] 161 Tex 267, 273, 339, S W 2d 885, 889 (1960).
[64] 49 S E 668, 669 (Va 1905).
[65] *Huffman* (n 63).
[66] *Savage* (n 64).
[67] H Fink, 'Ante-Mortem Probate Revisited: Can an Idea Have a Life after Death?' (1976) 246 *Ohio State Law Journal* 267.
[68] ibid.

of judicial process to validate evidence used as supplement to Wills may be the unique feature of ante-mortem probate and also a subject of interest in the discussion on the change phenomenon in Wills introduced to meet the object of testamentary disposition namely; the actualization of testamentary wishes.[69] Ante-mortem probate which root is traceable to the United States of America allows a testator to approach the Court while alive for a declaratory order which will specifically state that at the time his Will was made, he was of the right mental state and that he was not under any influence which could suggest the absence of voluntariness in the wishes he communicated on paper.[70] The evidence which the Court is expected to rely upon to either grant the order or dismiss same is that given by the testator himself who must be physically present to give his testimony. The testator's testimony would be evaluated mainly by his demeanour in court since the Will making process would have been concluded before the proceedings at the court.[71] The order given by the Court is meant to serve the purpose of evidence should the Will be challenged after the demise of the testator.[72]

Perhaps, the need to address some of the problems associated with Wills that are queried and denied probate due to lack of authoritative evidence that can be relied upon by the Court without it warning itself of the risk in taking whole- heartedly the proof offered, may have necessitated the inclusion of orders emanating from the Court in substantiating the integrity of a Will. Proponents of ante-mortem probate must have thought it imperative to introduce a supplement with judicial undertone to aid Wills made by testators whose purpose in opting for testate succession law is for assent to be given to their last wishes. The cost at which the latter is attained as well as the effort exerted in accomplishing the said goal may be immaterial provided the goal is met.[73]

Ante-mortem probate may be described as a paradox because it connotes the happening of an event prior to its occurrence. The absurdity in its usage lies in the fact that the probate of a Will naturally occurs after the death of the maker of the Will so, a situation where a Will which is

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[69] RK Weisbord, 'Wills for Everyone: Helping Individuals Opt Out of Intestacy' (2012) 53 *Boston College Law Review* 884.

[70] FJ Heyman, 'A Patchwork Quilt: The Case for Collage Contest Model Ante-Mortem Probate in Light of Alaska's Recent Ante-Mortem Legislation' (2012) 19 *The Elder Law Journal* 386.

[71] ibid.

[72] ibid.

[73] ibid.

supposed to derive its legality from the death of the maker is authenticated as a legal document before his passing on may be inexplicable. Yet, the evidence is sought to serve as a relevant and admissible evidence to establish that a Will is not just true but real.[74]

The practice of using testators to testify about their Wills may have developed from the civil law practice in Europe before the advent of modern Wills. Hitherto, testamentary wishes were communicated orally and in native languages different from the official language recognised in that jurisdiction which is also the language of the Court.[75] The wishes so represented have to be re-represented in the official language for the purpose of granting probate to testators' last wishes. One of the conditions for the re-representation is that it must be done by a person charged with such task so that his signature will be sufficient to guarantee to a large extent, the authenticity of the document.[76] The latter may have led quasi-judicial persons whose signatures were needed in transcribed testamentary wishes to request that testators who desired their testamentary wishes to be re-represented to produce a declaratory judgement from the Court detailing their mental state at the time their Wills were made and the voluntariness of the wishes contain therein.[77] The declaratory order must be sought for by the testator whose Will is under consideration and same submitted by him alongside his Will to be transcribed.[78] The above procedure gained grounds in Europe and was automatically transformed into a valuable procedure for the validation of modern Wills after the demise of testators.[79]

The State of Michigan was the first to give legal force to ante-mortem probate practice by providing legislation for it.[80] The validity of the law was put to test in the case of *Lloyd v Wayne Circuit Judge*.[81] In that case, the testator excluded his wife and one of his sons as beneficiaries to his Will. He applied for a declaratory order through ante-mortem probate proceedings to corroborate his right mental capacity and absence of coercion during the making of his Will.[82] The originating Court refused his

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74 ibid.
75 ibid.
76 ibid.
77 ibid.
78 ibid.
79 Fink (n 67).
80 1883 Mich Pub Act.
81 56 Mich, 236, 23 NW 28 (1885).
82 ibid.

application because of a technical flaw in the Act which provisions are followed for ante-mortem probate.[83] The Court held that since the Act did not provide for service of notice to all parties interested in the Will, its application is inconsistent with the provisions of the constitution which requires all parties whether directly or indirectly affected in a suit to be put on notice.[84] The decision of the originating Court was upheld by the Supreme Court. Again, the illegality of the ante-mortem probate Act was expatiated on. The apex Court held inter alia thus:

i The exclusion of the testator's wife as a necessary party to a suit initiated by a testator on his Will is bad enough to render the proceeding null.[85]

ii It is absurd for a testator to be involved in a judicial process that will give assent to his Will while he is still alive.[86]

The Court held further that ante-mortem probate is unknown to case law and that the legislation giving effect to it appears not to accommodate other ancillary elements of Wills.[87] For example, the legislation is silent over the elements of revocation as well as that of the confidentiality of Wills.[88] Thus, where the need arises for a Will already subjected to ante-mortem probate to be amended; there is no relevant provision in the Act to regulate that activity. The aforementioned loophole may present some negative consequences such as the use of the declaratory order obtained for the first Will made by a testator and revoked afterwards could be used for the last Will of the testator which lacks the features attributed to it. Therefore, the Ante-Mortem Probate Act may be used as the wheel in the engine of fraud which it is supposed to cure. The Court in the case under review concluded with a clear explanation on its duties as per the probate of a Will. It held that the determination of testamentary capacity of the living may not be a judicial task because the law does not recognise a conflict of issue between a testator who is alive and the possible beneficiaries of his estate.[89] Any justiciable issue arising from a Will will only be after the death of the maker because that is when the last wishes he made is recognised [90]

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[83] ibid.
[84] ibid.
[85] ibid (Chief Justice Cooley).
[86] ibid (Justice Campbell).
[87] ibid.
[88] R Kerridge and DH Parry, *The Law of Succession* (2nd edn, Sweet & Maxwell 2009).
[89] *Lloyd v Wayne* (n 81) (Circuit Judge).
[90] ibid.

The Court's decision in the *Lloyd's case*,[91] which appears to have invalidated Ante-Mortem Probate Act, laid the foundation for the amendment of same in 1930.[92] Ante-Mortem Probate still remains an aberration in the eyes of the Court. Perhaps, its numerous disadvantages also worked against its use as a valid corroborative evidence for testamentary dispositions. First, is the judicial process involved and in addition to that is the monetary involvement which will add much burden on testators. Many would-be testators who would have wished to expose their Wills to the validating procedure may be denied the opportunity and that makes the practice restrictive and selective.[93] Secondly, the testator's presence at the proceedings in the court may scare his beneficiaries from opening up about their perceptions on the prayer sought from the Court. Therefore, while the testator may presume their silence to mean approval, the same issues may be the basis for the challenge of his Will after his demise; thereby exposing the futility in the exercise.[94]

Again, the proceedings may be marred on the grounds of technicalities namely the non-issuance of notice to interested parties which is enough to oust the jurisdiction of the Court.[95] Also, and unforeseen emotional wound may result from such practice particularly where a testator has among his heirs some wastrels. Some of these persons may elect to lavish part of the testator's estate given to them even before the latter's demise forcing him to watch, painfully, the things he struggled to acquire being squandered.[96] Ante-mortem probate may not be a totally wrong concept. Its benefits can be incorporated into the Will making process through the use of a medium offered by change in the society across jurisdictions and imbibed by persons of different classes.

III. IMPEDIMENTS TO THE PROVISIONS UNDER THE ACT

The formal features of Wills specified under the Act would have been sufficient to guarantee if other conditions needed for the validation of a Will are subsumed under it. The features have in most cases play insignificant role in the determination of genuine intentions made by testators because pertinent legal issues which may make or mar a Will may

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91 ibid.
92 Heyman (n 70).
93 ibid.
94 ibid.
95 ibid.
96 ibid.

not be resolved even where a Will bore the said feature.[97] Thus, the inclusion of formal features in a Will may not clear doubts raised about the Will neither would it render the contents expressed therein effective. [98]

The inadequacy of formal features is seen in Will cases litigated over a considerable number of years for reasons other than compliance to former requirements specified by statue. Perhaps, one of the underlining motives behind the choice to die testate instead of surrendering one's life possession to intestate rule after death is that gifts made under a Will are supposed to pass unhindered immediately the maker of the Will passes to the world beyond or as directed by him in the Will he made. But the undue emphasis placed on former requirements seems to create an erroneous belief that compliance to physical statutory requirements was all it takes to achieve the above. In *Jadesimi v Okotie Eboh,*[99] former features were visible in the Will the testator made. The argument against the Will by some of the descendants he left behind is that the Will made in 1942 by the testator was revoked by the operation of law evidenced by his subsequent marriage under the marriage Act in1961 to the first respondent. They further argued that since the Will was deemed revoked, the document described as Will was void and the content ineffective.[100]

The Court held that the subsequent marriage contracted by the testator did not revoke the Will he made before the marriage because the latter marriage was to the same person that is, the first respondent. Although, the decision of the court was in favour of the Will, the beneficiaries of the Will were denied access to the Will for thirty (30) years after the death of the maker and the son of three million, four hundred thousand naira (3,400,000) was expended in the litigation of the case as at 1996 when the case was determined. No would be testator would opt for testamentary disposition knowing that his gifts may pass the value have depreciated or that his last wishes would impoverish his family when there is a challenge on his Will. The reason for the quarry on that Will has nothing to do with formal features but same would have been avoided if advancement in technology were included during the Will making process.

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[97] *Delapp v Pratt* 152 S W 3d 530, 532 42.

[98] RJ Scalise Jr, 'Undue Influence & the Law of Will: A Comparative Analysis' (2000) 19 (41) *Duke Journal of Comparative and Int Law* 43.

[99] (1992) SC 188.

[100] ibid.

IV. TOWARDS A NEW LEGAL REGIME

There may have been gradated forms of conventional Wills over the periods since inception, the continual use of the form prescribed by the 1837 Act in today's technologically driven world may be inadequate considering the implied demand for tangible proof in contested Will cases which tend to suggest transparency in the act done and kept in secret particularly out of the purview of those who could be positively or negatively affected by its content.[101] The application of technological inventions to the Will making process will enable beneficiaries to view again, the person of the testator (and get the personal conviction that the Will ascribed to the testator who is their own did not emanated from an imposter), listen to how the testator while alive distributed his legacies among his beneficiaries (which will remove any iota of doubt about the true intentions of the testator) and observe the demeanour of the testator at the time the Will was made (providing proof that will clear any disbelief nursed by dissatisfied beneficiaries about the stability of the testator at the time he made his Will).[102]

The use of technological devices to make and preserve Wills help to promote the objects of the statutory requirements for Wills.[103] For example, one of the aims for specifying that Wills be written is to ensure that testamentary wishes communicated before the death of the maker remains in a permanent readable state that will exclude externalities not solicited for by the maker until the time of its unsealing which may take decades of years.[104] The above may have case of *In re Will of Brad Way*[105] and the denial of same to the Will in *Reed v Woodward*[106] where the testator wrote his testamentary wishes with chalk.[107] Both properties of permanency and legibility are retained in documents produced with the aid of electronic devices.[108]

Again, where electronic devices are used in communicating testamentary wishes, alterations made in the document can be detected

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[101] M Bender and others, 'The Effect of Videotaped Testimony in Jury Trials: Studies on Juror Decision Making Information, Retention and Emotional Arousal' (1894) *BYUL Rev.*

[102] Beyer (n 16).

[103] Wills Act (n 58).

[104] *Huffman* (n 63).

[105] No A-4535-16T3, 2018 WL 3097060, 5-6 (NJ Super Ct App Div 25 June 2018).

[106] 11 Phila Rep 547, 543 (Ct Com Pl 1875).

[107] ibid.

[108] UNCITRAL Model Law on Electronic Commerce (the UNCITRAL guide) <https://www.unicitral.org/pd> accessed 20 August 2021.

and distinguished from those carried out by the testator.[109] In the same vein, the preservation of the Wills so made is to a large extent secured from external interference because the Will is retained in soft copy which may not be easily tampered with as would the hard copy of the same Will.[110] There is minimal risk of manipulation in soft copy documents because they exist in intangible form which places them out of reach for many.[111]

Advancement in technology has also increased and improved means through which documents can be authenticated. The means provided through electronic authentication easily link the maker to the document and are admissible in Court for resolving disputes on Wills. The methods include the conventional method of simply appending signatures to documents to serve as proof of consent and approval from the maker and the use of finger prints, retinal shots which electronic devices put into use can capture during usage.[112] In *Estate of Javier Castro*,[113] the testator signed the electronic Will he wrote on a tablet with a stylus pen. The Court held that the signature which is not the testator's wet signature is an authentic proof of the testator's approval of his Will.[114] Perhaps, the Court's decision is strengthened by the fact that the testator's Will was retained in soft copy where it remained unaltered as evidenced in the hard copy which did not differ from it.[115]

The Court has even gone further to establish that where no form of signature exist in an electronic Will, it may still be granted probate provided it can be linked to the testator who must have demonstrated that he meant the Will to be his last wishes and must have secured same where no one could assess it unless with his permission. The aforementioned was illustrated by the Court in *Alan Yazbek v Ghosn Yazbek*,[116] where legal status was given to the unsigned electronic Will of the testator, saved in his laptop and secured by his password.[117] Therefore, the use of electronic devices to make Wills may guarantee the grant of probate to testamentary wishes which is the essence of Testate Succession Law namely, to ensure that testators' wishes are given assent to in their free and original form.

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[109] *Alan Yazbek v Ghosn Yazbek* (2012) NSWS.
[110] S Papadopoulos, 'Electronic Wills with an Aura of Authenticity*: Van Der Merwe v The Master of the High Court & Anor*' (2012) 24 *SA Mere LJ*.
[111] ibid.
[112] D Horton, 'Wills without Signatures' (2019) 99 *Boston University Law Review* 9.
[113] (2013) ES00140 (Ohio Ct Com Pl June 19 2013).
[114] ibid.
[115] ibid.
[116] *Alan Yazbek* (n 109).
[117] ibid.

Besides, assuring the actualization of testamentary goals, a change in the form of Wills to incorporate the digital move of the present and future generation will draw more youth into appreciating the usefulness of testamentary disposition so that the Will making process will not be exclusively reserved for the old. It is necessary to change the old misconception about Wills which tend to tie Will making to death. Perhaps, the easiest way to correct the wrong notion is to change the form a Will can take to a form which will appeal to persons of different generations and class. Digitalization of life activities have been made possible by technology and it is welcomed by both the young and the old. There is the need to subject testamentary disposition to the changing change of societal growth.

V. CONCLUSION

Formal features of Wills are meant to safeguard last wishes made by testators from fraudulent practices. Thus, once they are visible in a Will, the presumption is that the Will is a reflection of the maker's testamentary intentions. The use of the features approved by statute for the authentication of documents which tend to pass on legacies to beneficiaries seems to have been applied in stages with each stage witnessing a remarkable change. Each change process appears to be founded on noticeable limitations impeding the genuine passing of assets as intended by testators. While the use of formal features in testamentary disposition appear to have satisfied some of the problems associated with other instruments of disposition, new challenges seem to point to the fact that change must be a continuous activity if better Wills were to be made. Thus, technological inventions which appear to be the solutions to the proof of queried Wills in analogue form may not be adequate in the distant future where new challenges may require another transformation in Wills in line with changes of that period.

Wills may take different forms which at a given time will enable the seamless actualization of testamentary wishes. The form needed today, demands the application of technology in the making and preservation of Wills. Therefore, this work recommends an amendment in the statutes on Wills to reflect the new changes in today's technological world so that improved testamentary disposition can be guaranteed and appreciated.

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