Re- Examining the Concept of a Valid will in Nigeria*

Abstract

A will is a legal document executed by a testator, expressing his or her wishes as regards the means by which his or her property is to be distributed upon their demise, they are often required to name one or more persons (the executor), to manage the estate pending its final distribution. A deceased person may choose to leave a gift for people outside his relation or for charity in his will but this might not be possible if such deceased person did not leave a will. In making of a will, certain problems may arise most especially if the will was drafted by a non-lawyer, the testator may fail to sign the will, the person who drafted the will may handwrite only certain portions of the will or may fail to have witnesses as required by law even when witnesses are present they may be persons who by law should not attest to the will such persons include any beneficiary of the will. A will is like an umbrella, it covers all kinds of property, imaginable and unimaginable assets such as copyright, patent, and right to trade mark, movable and immovable property. This aim of this paper is to re- examine the importance of a will and the ingredients that must be present before a valid will can be birthed. This paper further re- examines the elements for a valid will, the procedures for its execution, amendment and revocation in Nigeria. This study adopts a doctrinal method of research in x-raying the concept of a will. This paper advocates the need for individuals to draft a will especially individuals in polygamous families, as will reduces the incidence of conflict which arises when sharing a deceased person's estate among family members.

Key Words: Will, Valid, Deceased, Testator, Beneficiary, Estate

1. Introduction

In many countries, a single or a married person in Nigeria can dispose of his/her property through a will to avoid the state from taking charge of the distribution of such person's estate upon their demise. The idea or thought of making a will to an average Nigerian is often interpreted as superstitious beliefs of wishing death on the individual, it is one largely frowned upon and not embraced by many, but in reality a will is as important as acquiring assets especially when one has a large family that may not easily agree on sharing after one's demise. A will is likened to an insurance policy where you can ensure that the interest of your loved ones and life's worth are protected, even after demise.

A Will allows a Testator to choose trustworthy persons as his Executors, who will take into consideration the interests of the beneficiaries[1]. When a person dies intestate (without a Will), only certain categories of people can become Executors and these persons may not deal with the estate fairly. Most people associate the making of a Will with the anticipation of death but asides the unrealistic notion of one making a will the act of making a Will does not mean that a person will die soon neither does it hasten death. It only ensures that upon a person's demise, the properties of the person will be shared in accordance with his/her wishes amongst the person's beneficiaries.

The importance of a will cannot be over emphasized, It determine how assets will be shared, the appointment of executors for the estate, to avoid your properties being shared according to

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[1] F Saiki "The importance of making a will in Nigeria" 2019, Mondaq connecting knowledge & people, available at https://www.mondaq.com/nigeria/wills-intestacy-estate-planning/877884/importance-of-making-a-will-in-nigeria, accessed on 20 August, 2022.

customary law, to avoid incessant suits in court, to take care of other incidental matters like guardianship and funeral arrangements most importantly to promote peace among the people left behind. Making of a will is in fact one of the most critical things you can do for your loved ones. What are the benefits of drafting or making a will? When one decides to make a will he/ she is, providing financial security for loved ones, making gifts of possessions and money, appointing guardians for one's children, choose and appoint executors you trust etc.

The outcome of the article is to give an overview of the meaning of wills and its validity, its testamentary capacity and various limitations, Execution, amendment and Revocation of Valid will in Nigeria.

2. What is a Will?

A will is a testamentary and revocable document, voluntarily made, executed and witnessed according to law by a testator, wherein he disposes of his property subject to any limitation imposed by law giving such other directives as he may deem fit to his personal representative otherwise known as his executors. The executor administers his estate in accordance with the wishes manifested in his will.[2]In *Asika v. Atuanya*,[3] the Supreme Court noted that a will has two distinct meanings. The first meaning is metaphysical and denotes the sum of what the Testator wishes, or *wills* to happen on his death. The second meaning is physical and denotes the document or documents in which that intention is expressed. It is the declaration in a prescribed manner of the intention of the person making it with regard to matters which he wishes to take effect upon or after his death.[4] A will is sacrosanct because the wishes of the testator in the will are his last wishes and testament which applies to his declared estate.[5]

A will can also be defined as a the declaration in a prescribed manner of the intention of the person making it with regards to matters wish he wishes to take effect upon or after his death[6]. A will must be made voluntarily without any external influence. The will must be signed by the testator or any person he chooses on his behalf who then must sign in his presence and by his directions. The testator must acknowledge his signature in presence of two (2) witnesses who must be present at the same time.

2.1 Types of Wills and Validity

Having defined a will above, it is important to expatiate on the available types of a will recognized by the Nigerian judicial system. While discussing these types of will, each type would be x-rayed in its merits pointing out distinct measures that render them valid;

a) Statutory Will:

These are wills made in accordance with the provisions of the relevant statutes in force.[7] To be valid, the will must confirm with the requirement prescribed by the relevant statute in the English Wills Act 1837,[8] The Wills Act (Amendment Act) 1852 and The Wills Act (Lord King down's Act)1861.[9]In some cases, the will is not worth the paper on which it is written. The intention, desire and wish of the testator, including his anxieties over his affair, would thus be

[2] K Abayomi, *Wills: Law and Practice* (Lagos, Mbeyi & Associates (Nig) Ltd, 2004).
[3] (2014) AFWLR, part 710, p. 1264.
[4] ibid.
[5] *Asika v. Atuanya* (2008) ALL FWLR part 433, p. 1293 at 1317.
[6] *Halsbury's Law of England*, 3rd ed (United Kingdom, LexisNexis Butterworth, 1964) Vol.3a, p.842.
[7] Wills Act 1837, Wills Act Amendment Act 1852, Wills Law of the Old Region of Nigeria, 1958 Wills Edict 1990 of Lagos State, Wills Edict 1990 of Oyo State.
[8] Will, 4 & 1 Vict. C. 26.
[9] 24 and 25 Vict. C. 114.

frustrated. The consequences are that, his bounties might end up in the hands of people never contemplated by the testator.
The requirement for the execution of a valid will are stipulated under Section 9 of the Act, to include:

1. The will must be in writing.
2. The testator must sign his/her will or direct some other person to do so his his/her presence;
3. The relevant signature must be made or acknowledged by the testator in the presence of two or more witnesses present at the same time;[10] and
4. The witnesses must attest and subscribe the will in the presence of the testator;

Note that the testator from the above requirements the testator is expected to hire a competent hand sufficient to reflect his wishes within the statutory bounds.

b) Nuncupative Wills:
Some decades ago, Meek[11] defined a nuncupative will as: "a declaration made voluntarily and orally by a person of sound mind, in expectation of death in the presence of a disinterested persons". It is oral and takes effect under customary law- a directive of someone made in anticipation of death before a credible witnesses. Such directives are usually enforced with the consent of the testator's family.[12]Thus, a nuncupative will may be invalid if made in secret (in the absence of a witness).[13] Similarly Obi[14] wrote: "the presence of a disinterested witnesses is necessary, for purposes of proof of the declaration".

It is submitted thus, that the essential elements of a nuncupative will are;

(a) The identity of the subject matter, this in effect means that the particular item must be specified;
(b) The identity of the beneficiary; and
(c) The absolute ownership of the property in question.[15]

Although, a nuncupative will is made in anticipation of death, the person making it need not be on his bed literally when making same. The court in *Ayinke v. Ibidunni*[16] adding that such declaration may be made by "*a man on his death bed in the presence of witnesses*," their validity lies therefore in their being made before witnesses- some of whom should be family members.

c) Written Customary Wills:
Nwogugu[17] stated: writing is not an intrinsic feature of customary law, where the customary law will was not drafted by a solicitor. Where the written customary law will was not drafted by a solicitor, it must be proved to be genuine. To prove this validity, a party needs to show that the testator was an adult, knew what he was doing and it's effect, and had made the will in the presence of one or more adult witnesses. There are two schools of thought on the validity

[10] *Apatire v Akanke* (1953) 13 W.A.C.A. 347; Also, Illiterates Protection Act and Law; Laws of the Federation of Nigeria, 1958, Cap 83.
[11] C K Meek *Land Tenure and Land Administration in Nigeria in colonial Research Studies*, No.22 (London, H.M.S.O 1957) p. 182.
[12] ibid.
[13] *Ayinke v. Ibudunmi* (1959) 4 F.S.C. 280, at pp. 281-282.
[14] S N C Obi *Ibo Law of Property (African Law*) (United Kingdom, Butterworth, 1963) at p.248.
[15] E I Nwogugu, *Family in Nigeria* (Ibadan, Heinemann Educational Books Nig. Ltd 1990) Pp.396-397.
[16] (1959)4 F.S.C. 280, at p. 282; also *Nelson v Nelson* (1951) 13 W.A.C.A 248.
[17] E I Nwogugu (n.16) at p.397.

of a written will. Odje appears to suggest that any such document must fall or rise with the provisions of the general statue relating to Wills.[18] A written will is usually a typed Will that has to be dated and signed in front of two witnesses. The two witnesses must also sign the Will. All three (you and your two witnesses) must be together when signing. The two witnesses cannot be beneficiaries under the Will. A written Will is governed by law and statutes.

3. Testamentary Capacity

In the common law tradition, testamentary capacity is the legal term used to describe a person's legal and mental ability to make or alter a valid will. This concept has also been called sound mind and memory or disposing mind and memory.

3.1 Testamentary Capacity of a person to make a will

The testator must have testamentary capacity i.e. he must be 18 or 21 above depending on the applicable law, the age requirement maybe set out as follows-

a) Under the Wills Act, the legal age by which a person can make a Will is twenty one years.[19]
b) Lagos State- Section 3 of Wills Law Lagos State provides that the legal age in Lagos State is eighteen years.[20]
c) Kaduna State – Section 6 of Wills Law of Kaduna State provides that the legal age in Kaduna State is eighteen years.[21]
d) Abia State – the legal age is also eighteen years.[22]
e) Oyo State- Section 5 Wills Edict of Oyo State the legal age in Oyo State is eighteen years.[23]

There are exceptions to the requirement of age and this applies to seamen or military or solder in actual military service may make a Will even though he is a minor and such Will need not comply with the rigorous formalities prescribed by law.[24]

In the States in which the Wills Act of 1837 is still the applicable law, there is unrestricted testamentary freedom. Testators in those States are free to dispose of their properties to whomever they wish, even if they choose to disregard their family members and dependants and give all their properties to complete strangers[25]. The applicable section is Section 3 (1) which reads as follows:

> It shall be lawful for every person to demise, 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 …

Although, Section 3 of the Wills Act 1837 stipulates that there is no restriction to testamentary freedom, this absolute testamentary freedom as in the Wills Act of 1837 was criticized on moral, customary and religious grounds. It was argued that it could lead to testators

[18] B W Harvey," *The Law and Practice of Nigerian Wills, Probate and Succession*"(London, Sweet &Maxwell, 1968) at p. 45.
[19]Section 7 of Wills Act 1837.
[20]Wills Law Lagos State Cap. W2 Laws of Lagos State, 2004.
[21]Wills Law Cap. 163 of Kaduna State of 1991.
[22]Wills Law Abia State Cap. 37 Laws of Abia State 1999.
[23]Wills Edict of Oyo State 1990.
[24]Section 8 Wills Edict Oyo; Section 6 Wills Edict Lagos; Section 9 Wills Law Western Region.
[25] A I Fenemigbo, "Statutory Limitation to Testamentary Freedom" 2013 avaliable at https://www.ajolilnfo/index.php/naujiliji/view136294/125784. Accessed on 20 August, 2022.

disinheriting his dependents in favour of strangers, which would cause hardship to those dependents.[26] Also, according to Sagay, Muslims are particularly critical of the fact that this freedom would enable a Muslim dispose of his property by will, in a manner contrary to Islamic law.[27] It was also argued that some properties are sacred under customary law and cannot be disposed of by the testator however he wishes. All these led to the legislative attitude as manifested in the wills laws as enacted by some states in which laws now introduce certain limitations being placed on the testamentary freedom of testator within the States.

These limitations include:

I. **Customary Law Limitation:**

This restriction serves to restrict the property that can be disposed of by will. *S. 3 (1) of the Wills Law of the former Western Region* reads as follows:

> Subject to any Customary Law relating thereto, it shall be lawful for every person to demise, bequeath or dispose of, by his will executed in a manner hereinafter required, all real and personal estate which he shall be entitled to, either in law or in equity, at the time of his death and which if not so demised, bequeathed and disposed of would *devolve upon* the heir at law of him, or if he became entitled by descent, of his ancestor, or upon his executor or administrator.

This statutory limitation recognized that complete testamentary freedom could upset some established rules in our Customary Laws. Belgore JSC explains this in *Lawal–Osula v. Lawal–Osula*[28] as follows:

> Binis like some other tribes in Nigeria have got some age long traditions and norms, some peculiar to them, others in common with the other races in the other parts of the world that cannot be written off by mere legislation. To legislate to ban some of these native law and customs would lead to serious disorder that makes governance and obedience difficult. It is in light of these that instead of entirely discarding a practice that has been tried and tested over centuries, legislation are carefully drafted to accommodate the laws and customs in question and to regulate their practice.

There was confusion as to the effect of S. 3 (1) of the Wills Law of Western Nigeria, i.e. whether it operated to take away the testamentary capacity of all persons subject to any Customary Law or if it merely qualified the property that could be disposed of in a will[29].

For example, in the case of *Idehen v. Idehen*[30], this was a case involving the Bini Customary Law, the testator having died leaving behind a will wherein he devised the two houses in which he lived in his life time to his eldest son. The son however predeceased him and thus the two houses would pass to the residual estate since there were specifically willed to the son. However, these two houses wherein he lived in his lifetime constituted the Igiogbe or family seat[31] under the Bini Customary Law which is to pass automatically to the oldest surviving son of the deceased upon completion of the testator's second burial rites, to the exclusion of all his other children. The oldest surviving son of the testator, along with some other children therefore instituted an action seeking a declaration that the will was invalid because of its conflict with the Bini Customary Law. The trial court found that indeed the plaintiff as the

[26]I Sagay *Nigerian Law of Succession* (Lagos, Malthouse Press Ltd, 2007) p.127.
[27]ibid.
[28] [1995] 32 LRCN 291.
[29]I Sagay (n.27) p. 141.
[30](1991) 6 NWLR (Pt. 198) 382.
[31]I Sagay (n.27), p.143.

oldest surviving son by Bini Customary Law, was entitled to inherit the two houses constituting the Igiogbe. The court therefore held that the part of the will devising the houses to the deceased eldest son as invalid but upheld the remaining part of the will as valid. At the Court of Appeal, the plaintiff's right to the two houses was upheld but the entire will was declared void reason being that the dispositions under were all void. Upon further appeal, the Supreme Court however held that Section 3 (1) of the Wills Law of Old Bendel State[32] related only to the subject matter of a demise, that is, it restricted only the property that could be passed under a will, and that it was not intended to take away the testamentary capacity of a testator i.e. his ability to make a will. The judgment of the Court of Appeal was therefore reversed, and that of the trial court restored.

II. **Islamic Law Limitation**:

This limitation is included in the Wills Law of Kaduna State, Oyo State, Kwara State, Jigawa State and Plateau State. It stipulates that a person subject to Islamic law immediately before his death cannot dispose of more than one-third of his property by will. The Supreme Court decision in *Adesubokun v. Yunusa*[33]. In this case, the testator, a Muslim from Lagos State subject to the Islamic Law of the Maliki School made a will according to the Wills Act. The validity of the will was challenged on the ground that the testator did not make certain dispositions to his heirs according to Islamic Law. The trial judge held that the will was invalid as the testator did not comply with Islamic Law. However, the Supreme Court held that the testator intended to distribute his property under the Wills Act and thus Islamic Law could not be applied to him. According to Dadem, it was perhaps in response to the complete testamentary freedom approved by the Supreme Court in *Adesubokun v. Yunusa*[34] that the Islamic Law limitation in the Wills law discussed below arose. By the principles of Islamic Law, a testator cannot dispose of more than one-third of his properties by a will without the consent of his legal heirs (his heirs under Islamic Law).This restriction is now subsumed under the Wills Law of Kaduna State, the Wills Law of Oyo State, the Plateau State Wills Edict,[35] the Bauchi State Wills Law,[36] the Kwara State Wills Law[37] and the *Jigawa State Wills La*w[38].This was also held in the case of *Ajibaiye v. Ajibaiye*[39] where contrary to the wishes of the testator, excluding the application of Islamic law in disposing of his property. In the aforementioned case, the testator (deceased), a Muslim from Ilorin, made a will under the Wills Act, where he disposed of his properties in a manner not agreeable with the principles of Islamic Law. He added a statement in his will thus:

> I also direct and want my estate to be shared in accordance with the English Law and as contained in this will having chosen English Law to guide my transactions and affairs in my life time notwithstanding the fact that I am a Muslim.

The will was challenged in court, the reason being that as a Muslim from Ilorin, Kwara State whose Wills Law contained the Islamic Law limitation; the testator could not dispose of his properties as he wished. His last wife who received the bulk of his estate under the will claimed that her husband did not live his life according to the principles of Islamic Law and so could not have been subject to it. The Court of Appeal, agreeing with the trial court, held the will to

[32]Cap 172 of 1976, applicable in Edo State.
[33][1971] 1 All NLR 225.
[34]ibid.
[35]No. 2 of 1988.
[36]Cap 168 Laws of Bauchi State 1989.
[37]Cap 168 Laws of Kwara State 1991.
[38]Cap 155 Laws of Jigawa State 1998.
[39](2007) All FWLR (Pt. 359) 1321.

be void for being contrary to the Wills Law of Kwara State, as the testator having declared himself to be a Muslim was subject to Islamic Law notwithstanding his belief that he could choose to be governed by English Law in this regard, while being a Muslim.

III. **Provision for Family and Dependents:**

This is recognized by statutes. Section 2,[40] provides that notwithstanding the provisions of a testator's/testatrix's will, the wife or husband as the case may be or the children may apply to the court on the ground that the dispositions in the will did not make reasonable financial provisions for his dependents. The application is made at the High Court of a State.

This reasonable financial provision in the case of an application by a spouse save when the marriage was subject to a decree of judicial separation, means such financial provision as would be reasonable in all the circumstances of the case for the spouse to receive, whether such is required for his or her maintenance or not.[41] Section 2(3) goes on to stipulate that all applications must be brought within a period of six months from the grant of probate.

3.2 Testamentary Capacity and Mental Disposing Capacity

For a testator to possess the testamentary capacity to make a will, three things must exist which are namely;

a) The testator must understand that he is giving his property to one or more objects of his regard;
b) He must understand and recollect the extent of his property.
c) He must also understand the nature and extent of the claim upon him both of those whom he is including in his will and those he is excluding from his will.

In *Okelola v Boyle,*[42]*Onu J.S.C,* observed that no person is capable of making a will who is not of sound mind, memory and understanding. That the testator's mind must be sound to be capable of forming the testamentary intentions in the will, his memory must be sound to recall the several persons who ought to be considered as his possible beneficiaries.

What situation deprives a testator of a sound disposing mind? It does seem that if the human instincts and affections or the moral sense become perverted by mental disease, if insane suspicious or aversion takes place of natural affection, if reasons and judgement are lost and the mind becomes prone to insane delusion calculated to interfere with and disturb its functions and lead to testamentary dispositions due only to their baneful influence in any of these cases or a combination of any of the, the testator loses capacity and does not possess the power to dispose of his property by Will. Indeed, any Will made under any of these conditions ought not to stand.[43]

To proof a testator was of sound mind as at when he made the will the burden of proof is often on the beneficiary where a person alleges foul play, the evidence would be oral or documentary and include the following:

[40] Wills Law of Lagos State Cap. W2 Laws of Lagos State, 2004.
[41] Wills Law of Lagos State, Section 2 (2).
[42] (1998)2 NWLR part 539, p, 533.
[43] Cockburn C.J in *Banks v Good fellow* (1870) LR5, QB 544, stated thus "it is essential that the testator shall understand the nature of the act and its effect, shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect. No disorder of mind shall affect his affections, pervert his sense of right, or prevent the exercise of his natural faculties. That no insane delusions shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

a) Evidence that the will was indeed written by the testator
b) Corroborating evidence of an attesting witness
c) Medical Evidence[44]
d) The routine and habits of the testator.[45]

4. Execution and Amendment of a Will

4.1 Execution of a Will

If a will is correctly executed, it has formal validity (that is, it is recognised as a valid testamentary document). There are formalities involved in making a will. One such formality is with respect to the execution of a will. Section 4 of the Wills Act sets out the execution requirements. It provides in part that:

A will is not valid unless

(a) It is attested to at its end by the testator

(b)The testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time, and

(c) Two or more of the attesting witnesses subscribe to the will in the presence of the testator.

If a will was not executed in accordance with the above requirements, the will would be found to be invalid. The legal burden of proof with respect to due execution of a will rests with the person upholding the will. In most cases, that person is the executor. The executor, especially the executor of a will made decades ago, may find himself in a situation such that he cannot positively prove that the will was signed pursuant to the statutory requirements because the witnesses attesting to the will may have died or disappeared[46]. What can he do in the circumstances?

The Supreme Court of British Columbia recently revisited the issue in *Hsia v. Yen-Zimmerman*,[47] In that case, one of the testator's daughters was murdered in 1972. The testator made a will in 1973 providing for his surviving children. The 1973 will did not provide anything for the children of his deceased daughter. The will appeared to have been witnessed by two people: Frank McGinley and Ethel Strachan. The former was the testator's lawyer and had predeceased the testator. The identity and whereabouts of the latter were unknown when the will was probated.

The testator died in 2010. His grandchildren who were left out of the will challenged the validity of the will. They argued, in part, that without evidence from either of the witnesses to the will that the will was signed in accordance with Section 4 of the Wills Act, the executor had not proved that the will was validly executed.

The Supreme Court of British Columbia held that the will was valid, and confirmed the long standing common law principle that if a will on its face appeared to be duly signed, it would be presumed to have been duly signed unless there is clear, positive and reliable evidence that there was some defect in the signing of the will. The Court held that the 1973 will on its face appeared to be duly executed, and the grandchildren failed to produce any evidence which cast due execution into doubt.

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[44] *Adebajo v Adebajo (1971) ALL NLR p. 155.*

[45] ibid.

[46] C Wilson "How Does an Execution Prove the Proper Execution of Will?" *December 4, 2012 available at https://www.cwilson.com/how-does-an-executor-prove-the-proper-execution-of-a-will* accessed on 22 August, 2022.

[47] 2012 BCSC 1620.

The presumption of proper signing of a will is a "*rebuttable*" presumption. This means if the Court finds that the challenger of a will has produced evidence that casts due execution into doubt, then the legal burden of proof shifts to the person who is upholding the will.

The presumption of due execution will apply depending on the circumstances of each case. Where the Will appears *ex facie* to have been duly executed, the presumption applies. The presumption maybe displaced by clear and reliable evidence which shows that the Will was not duly executed where there is dispute on the validity of a Will. The Will to be signed must be in writing. The law does not specifically prescribe any form of writing, accordingly, the Will can be handwritten or typed. It must be signed by the testator or by another person in his presence and by his direction. Where it was signed by another person, such other person may sign the testers name or his own. Signature for this may be a cross, an initial, rubber stamp or a name or signature.

4.2 Amendment of a Will

A will is amended with the use of codicils. A codicil is a legal document that dictates any modifications or amendments to your last Will and Testament. According to Wikipedia,[48] A codicil is a testamentary or supplementary document similar but not necessarily identical to a will. In some jurisdictions, it may serve to amend rather than replace a previously executed will. In others, it may serve as an alternative to a will. In still others, there is no recognized distinction between a codicil and a will. Order 49, Rule 27(2) of the Federal Capital Territory Abuja High Court Civil Procedure Rules 2004, states that "The provisions respecting Wills shall apply equally to codicils."

Specifically, a codicil performs the following functions

a) It may affirm the contents of a will.
b) It may alter or amend the provisions of a will.
c) It may correct a clerical error in a will and validate alterations in a will.
d) It may revoke a will.

There are a number of circumstances that can precipitate the need for a codicil to a will. Perhaps you've reached a new milestone (like marriage or the birth of a child or grandchildren) and you want your existing Will to reflect those changes. Maybe you've acquired additional properties or assets you know you want to leave behind for your beneficiaries. Whatever your motivation is, here are several things you can do with a codicil:

a) Change your executor: If the executor you named in your original Will passes away or you feel they are no longer fit to manage your affairs, you can name someone else using a codicil. You can also add a co-executor if you feel so inclined
b) Update beneficiaries: Add new (or change existing) beneficiaries to your Will with a codicil. You can also name new contingent beneficiaries
c) Make note of new familial or financial circumstances: In instances where the guardian(s) you named for your children pass away or become unfit, you can use a codicil to update your guardianship wishes. You can also create a codicil to protect your beneficiaries if there are significant tax consequences not covered by your Will

[48]https://en.wikipedia.org accessed 22 August, 2022.

d) Revise end of the life wished: if you or anyone covered in your Will wants to modify their funeral or burial arrangements for any reason, a codicil can ratify those wishes

5. Revocation of Will

There are four ways in which a Will maybe revoked as follows; by marriage, by making another Will, by writing to revoke and by destruction.[49]
These would be considered in some detail:

5.1 Revocation of Will by Marriage

As noted above, the testator's marriage will automatically revoke any existing wills and codicils.[50] This revocation occurs by operation of law, whether or not the testator wishes or intends such a revocation.

Unfortunately, not all married persons are privy to the knowledge of this deemed revocation and the law may occasionally be viewed as creating some hardship to the disappointed beneficiaries. The rationale for this rule however, is to ensure that any children and new spouse will benefit, that is by creating an intestacy in the absence of a new will. In Lagos State, the typical law states:

> "Every Will made by a man or woman shall be revoked by his or her marriage (other than a marriage in accordance with customary law) except: A will expressed to be made in contemplation of the celebration of that marriage. Provided that the names of the parties to the marriage contemplated are clearly stated"[51]

An exception to this general rule is made if, and only if,

a) Wills made in exercise of a power of appointment in which the person appointed will not default of the appointment but it passes to his or her executor or administrator.
b) Wills expressed to be made in contemplation of celebration of a marriage where the names of the parties to the marriage contemplated are clearly stated.

By way of example, in *Re Pluto*,[52] the Supreme Court of British Columbia held that the testator's will, leaving "all to my wife" and specifically naming her, was nevertheless revoked by his marriage to that woman the following day. This is not a situation in which one wishes his or her client to be found. It can be avoided by including a clear indication that the testator intends to marry the fiancé (e) named and is making this will in contemplation of that marriage. In *Sallis v. Jones*,[53] a clause in the Will stated that "this Will is made in contemplation of marriage." It was held insufficient to satisfy the requirement of the exception. Similarly, it must be the Will that is so expressed and not just a gift in it.

5.2 Revocation of Will by Voluntary Act

Pursuant to Section 14 of the Wills Act, a will may be revoked, in whole or in part, by the formal execution of a written declaration of revocation, whether this declaration stands alone

[49] Section 18 and 20 Wills Act, section 11 and 13 Wills Law Lagos State; section 14 and 16 Wills Law Kaduna State; Section 13 and 15 Wills Law Abia State; section 13 and 15 Wills Law Oyo State.
[50] Section 18 Wills; section 11 Will Law Lagos State.
[51] Section 11 Wills Edict 1990 0f Lagos State and Section 13 Wills Edict of Oyo State which has identical provisions.
[52] (1969)69 W.W.R. 765.
[53] (1936) p.43.

or is found as part of a subsequent will or codicil. To be effective, however, the testator must intend to rescind the prior will, in whole or in part.

It requires both a written declaration expressing the testator's intent to revoke the prior will and requires that such a declaration be properly executed in compliance with the Wills Act formalities. Most often the revocation will be included in a new will or codicil however that is not required so long as the declaration of revocation is properly executed in compliance with the Wills Act formalities. In *Re Spracklan's Estate*,[54]the testatrix wrote a letter to the manager of her bank where the will was kept with the words "Will you please destroy the will already made out". She signed the letter and it was duly attested. The act was held to be revocation.

Although, the Wills Act specifically permits the partial revocation of a will, such a practice may be risky because codicils or partial revocations can sometimes unfortunately create unintended confusion. From a practice standpoint therefore, where a testator wishes to make changes to a previous will, we suggest the safest practice is usually to start again by drawing a new will revoking the previous will entirely and thus avoiding any confusion. The words of revocation are not clear, the earlier will remain.

5.3 Revocation of Will by Destruction

As noted above, a will, or part of a will may be revoked by the destruction of the will by the testator or by the testator's direction and by sufficient destruction, with the testator's intention of revocation. The intention to destroy and the act of destruction must co-exist for a valid destruction.

The Wills Act requires both that the testator intends a revocation by destruction and witness or participate in that destruction, whether it be the testator or his or her agent who physically effects the destruction. Partial destruction will not revoke the entire will unless those parts of the will left intact cannot stand on their own. In *Cheese v. Lovejoy*,[55]the testator drew a line across the will and wrote the words 'revoked' he squeezed same and threw it in a waste bin. His maid picked it up and placed it on the table, where it remained until his death. The court held that there was no revocation of the Will.

The destruction must not merely be symbolic, but result in actual 'physical injury' to the will, such as cutting the will into bits which could not be pieced together or total incineration. The intention to revoke, no matter how clear it may be, is not enough without a completed act of destruction of the will. Similarly, destruction without intention to revoke does not revoke the will.

In *Re Krushel Estate*,[56] torn bits were found in a bag of garbage after the deceased shot himself. The court held that the throwing away of a mutilated will did not amount to revocation because it was not proven that the mutilation was done at the request of the deceased. This decision was followed by the Nova Scotia Court of Appeal in *Re Theriault estate*,[57] where a will stored at the lawyer's office was destroyed by an accidental fire. Subsequently the testator gave some indication of treating the fire as a revocation after the fact. The court, however, refused to find

[54](1938) 2 ALL ER 345.
[55] (1877)2 P & D 251
[56](1990) 40 E.T.R. 129.
[57](1997) N.S.J.No.36.

a revocation by destruction because there was no evidence of intention to revoke the will at the relevant time, before the destruction.

5.4 Partial Revocation

It is possible to only have a partial revocation of the contents of a will that is to revoke only particular gifts or appointments made under a will. In *Re Witham*,[58]the court admitted to probate a will that had been mutilated by scissors with certain clauses cut out. The court made this finding because one of the clauses had been pinned back to the will in another place.

Similarly in the British case of *Re Nunn*,[59] some lines had been cut out of the will of a deceased seamstress. The remaining parts of the will had been neatly stitched back together. The evidence established that the testatrix had carefully retained the will in her exclusive possession until death. Thus although the court ruled the deceased seamstress had destroyed the missing lines with the intention of revoking them, the court found no intention to destroy the entire will. The court thus found a partial revocation.

5.5 Conditional Revocation

What happens when a will or codicil is revoked by a later will and that later will is ultimately found to be ineffective? In such a case, for example where the new will is struck down for improper execution, lack of mental capacity, undue influence or the like, the court may breathe life back into the previous will. Williams & Mortimer catalogued three sub-heads of conditional revocation:

1. Purported and revocation due to a mistake of fact.[60]
2. Purported Revocation due to mistake of Law.[61]
3. Purported revocation effected as a preliminary to making a fresh Will.[62]

It may do so by applying the doctrine of conditional revocation and finding that the testator's intention to revoke the first will was conditional on the new will being an effective substitution for it. The court will apply this doctrine to avoid an intestacy and admit the previous will into probate.

6. Conclusion

Anyone who has children, property and assets should have a will. And, once drafted and signed, it should be reviewed every three to five years to ensure that it continues to reflect your life and wishes. With that, it can be updated according to any life changes, like marriage, having children, a death in the family, divorce, and property acquisition.

A testator's first inclination may be to keep the will in a safe deposit box, along with other important papers. This option could cause delay in locating the will because access to a decedent's safe deposit box to search for the will requires an ex parte court order. As an alternative, the will can be deposited in a will safe or vault of the attorney who drafted it. A will may also be deposited with a bank or at the probate registry in a court for safety, upon payment of certain lodgement fees.

If an individual doesn't have a will, they have no say regards how their estate is distributed, dying without a will (known as 'dying intestate') would subject the estate to be distributed to your relatives according to a legal formula (called the 'intestacy rules'). This could be very different from what you wanted or intended to happen. Dying 'intestate' can also cause complications, delays and extra costs for those left behind. Dying intestate without any relatives closer than a first cousin automatically transfers your estate to the government.

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[58] (1938) 3 D.L.R. 142.
[59] (1936) 1 All E.R. 555.
[60]*Campbell v. French* (1797)3 Ves 321.
[61]*Adam v. Southerden* (1925).P. 177.
[62]*Powell v Powell* (1866) L.R. 1P & D209.