

**THE ADVENT AND LEGALITY OF ELECTRONIC WILLS IN UNITED STATES:
NEED FOR A LEGAL FRAMEWORK IN NIGERIA***

Abstract

The advent and legality of electronic Wills in some States in United States of America such as Nevada, New Hampshire, and Virginia are backed by enabling laws. Electronic Wills are made, created or stored by a competent testator as a disposition in an electronic form to take effect after his death. Electronic Wills complement traditional forms of Will which are still prevalent in the United States. Electronic Wills permit its creation and execution by a person without leaving the comfort of home and without the need for paper work. The process in general is anchored on its simplicity. In Nigeria, only the traditional form of Wills is operational. This is virtue of the statutes of general application. On this basis, the Wills Act of 1837 enacted in England to govern testate succession, were introduced into Nigeria. Electronic Wills is hinged on the use of electronic applications and devices. It is trite that the use of the internet through various media online platforms such as facebook, WhatsApp etcetera and use of electronic devices such as android phones, laptops, memory cards etcetera are no new to the citizens of Nigeria. Some of the above-mentioned are used by citizens to receive, record, transmit, store, process, retrieve information electronically. Therefore, there is the need for a legal framework in Nigeria for electronic wills to complement traditional forms of Wills based on views stated above and the practice should accord with what is obtainable in some States in the United States of America.

Keywords: Electronic Wills, Traditional Wills, Advent, Legality, United States, Nigeria.

1. Introduction

In Nigeria, a Will could either be oral or written (paper Wills). Oral Wills are recognized by word of mouth under customary laws also known as a nuncupative or deathbed Will, a Will that is spoken to witnesses, but not written while law and statutes govern written Wills. Abayomi defines a Will as a testamentary and revocable document, freely drawn up, executed and witnessed by a testator according to law with a sound mind in which he disposes of his property subject to any restriction imposed by law, and in which he provides such other orders as he may deem appropriate to his personal representatives otherwise known as his executors, who administer his property in compliance with his wishes manifested in the Will¹. Thus, a Will is a document through which a person directs how to distribute his assets when he is dead. A Will takes effect only upon the passing away of its maker (the testator) and until then it is but a declaration of intention which can be varied or revoked at any time². In *Igboidu v Igboidu*³ the Court of Appeal held that a testator's wishes must prevail. A Will should be allowed to speak in the way made and must not be modified by any one or Court to suit an imaginary intention of the testator. The concept of Wills in the English form can be traced to England after the Norman Conquest of 1066 where a man had the power to dispose of both his real and personal properties. In 1540, the English Parliament passed the Statute of Wills, which gave landowners some freedom to choose how to give away their land at death and permitted of taking advantage of a written Will to do so⁴. However, the Statute of Wills did not specify that a written Will had to be signed, witnessed or bear any other marks of validity⁵. In addition, the statute continued to allow oral Wills to pass personal property at death⁶.

Over a century later, in 1677, the enactment of the Statute of Frauds tightened the requirements for making a Will⁷. To give away land, a Will had to be (1) in writing, (2) signed by the testator and (3) signed by three witnesses. The Wills Act of 1837 enacted slightly different and in some ways more stringent

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¹ K Abayomi *Wills: Law and Practice* (Lagos; Mbeyi and Associates, 2004) p.6.

² O Egwuatu, 'Limits of a Testator on Freedom of Will Testament' <<http://www.nigerianlawguru.com/articles/customary%20lawand%20procedure/LIMITS%20OFF%20A%20TESTATOR%20ON%20FREEDOM%20OF%20WILL%20TESTAMENT.pdf>> accessed on 27 June 2020.

³ (1999) 1 NWLR (Pt 585) 27.

⁴ GW. Beyer and CG. Hargrove *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?* (2007) 33 *Ohio N.U.L. Rev.* 865, 870.

⁵ See Statute of Wills, 1540.

⁶ See CD Miller *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code Harmless Error Rule and the Movement Toward Amorphism*, (1991) 43 *Fla. L. Rev.* 167, 198.

⁷ See Beyer and Hargrove *supra* n.4. G.

formalities for making a valid Will. These formalities applied equally to Wills passing land and to those passing personal property. Under the 1837 Wills Act, as under the 1677 Statute of Frauds, every Will had to be in writing and signed by the testator and witnesses.⁸ However, unlike the 1677 Statute of Frauds, the 1837 Wills Act required that the testator and the witnesses do: (i) sign at the end of the Will and (ii) be in each other's presence at the time they signed the Will. And, while the 1677 Statute of Frauds required *three* witnesses, the 1837 Wills Act required only *two*⁹. In America, the core formalities of writing, signature and attestation in a traditional Will are drawn from these English laws, but States have based their specific statutes on various elements of the different English laws, some on the 1677 Statute of Frauds and others on the 1837 Wills Act¹⁰. In addition, some States have imposed requirements of their own. For example, some States require the testator to 'publish' his Will, meaning to declare to the witnesses that the writing is his last Will and testament. Presently, apart from the existence of traditional Wills, that is paper Wills in the United States, some States have enacted laws giving legality to the operation of electronic Wills. Electronic Wills and traditional Wills are now operational in the United States. In Nigeria, only the traditional form of Wills is operational. This is virtue of the statutes of general application, which were enacted in England, applicable in Nigeria so long as they were in force in England on the 1st day of January 1900. On this basis, the Wills Act of 1837¹¹ enacted in England to govern testate succession, were introduced into Nigeria.

This paper in lieu of the above deals with six interrelated parts beginning with the introductory part. Part 2 highlights the forms of electronic Wills in the United States such as *offline electronic Wills and online electronic Wills*. Succinctly, part 3 takes cognizance of the fact of the legality of electronic Wills in some States in United States of America. It mentions such States such as Nevada, New Hampshire, Virginia where laws have been enacted on the legality of electronic Wills. Under part 4, the position in Nigeria pertaining to Wills is stated. Traditional wills, that is paper Wills, written or oral Wills are the only forms of Wills presently recognized under Nigeria's extant laws.¹² Electronic Wills are not currently recognized or operational in Nigeria. Part 5 deals with the need for legal framework for electronic Wills in Nigeria. It states that it timely and appropriate to adopt and recognize electronic Wills in Nigeria as the use of the internet through various media online platforms is not new to the inhabitants of Nigeria.. Finally, part 6 concludes that electronic Wills should be enacted to complement traditional forms of Wills in Nigeria and the practice should accord with what is obtainable in some States in the United States of America. This will go a long way in regulating and complementing Wills practice in Nigeria.

2. Forms of Electronic Wills in the United States

The law governing the execution of traditional Wills is a notable exception to the technological and legal progress that has improved people's lives in recent decades¹³. In order to make a valid Will, most American States require a person making a Will (the 'testator') to satisfy three core Will formalities: (1) *writing* - the Will must be in the form of a writing¹⁴; (2) *signature* - the Will must be signed by the testator; and (3) *attestation* - the Will must be signed by at least two witnesses, who attest to the testator's signature¹⁵. Aside traditional Wills, there is now the existence and operation of electronic Wills in some States in America. Forms of electronic Wills are discussed thus:

⁸ See Wills Act, 1837.

⁹ See Miller *supra* n.6.

¹⁰ See Restatement (Third) of Property, Wills and Other Donative Transfers United States.

¹¹ The statutes applicable in Nigeria on Wills include: 1.The Wills Act of 1837 which applies to States in Northern and some parts of the Eastern States of Nigeria. 2.The Wills Amendment Act 1852 which also applies to States in Northern and some parts of the Western States of Nigeria. 3.The Wills Laws of Western Region 1958 which applies to the States comprised in the former Western Region including Edo and Delta States. 4.The Wills Law Cap w2 Laws of Lagos State 2004. 5.Armed Forces Act No. 105 of 1993 which was enacted by the Federal Government to govern persons subject to Service Laws i.e.that is, Officers of the Army, Naval and Air Force. 6.The High Court of Lagos State (Civil Procedure) Rules 2004.

¹² *Ibid*. The statutes applicable in Nigeria on Wills.

¹³Significantly, statutes such as the Electronic Signatures in Global and National Commerce Act ('E-SIGN'), which Congress enacted in 2000 and the Uniform Electronic Transactions Act ('UETA'), which the Uniform Law Commission promulgated in 1999 are specifically inapplicable to Wills. See 15 United States Code Annotated (U.S.C.A). article 7003(a)(1); Uniform. Electronic. Transactions Act article 3(b)(1).

¹⁴ 'Writing' means a reasonably permanent record. See Uniform. Probate Code article 2-502.The requirement of a writing does not require that the Will be written on sheets of paper, but it does require a medium that allows the markings to be detected.

¹⁵ Various States have developed additional formalities beyond these core requirements. For example, some statutes have an additional 'subscription' or 'sign-at-the-end' requirement, adopted from a particular English law, whereby the

Offline Electronic Wills

Offline electronic Wills are those¹⁶ that are simply typed (or 'handwritten' via a stylus) by the testator himself on an electronic device, signed by the testator typing his name or placing another signatory mark in the document and stored on the local hard drive of the electronic device. They are usually not written, traditionally attested, or uploaded onto a website. This category is intended to cover, for example, situations¹⁷ where the testator simply opens a word-processing programme on his computer, types out a Will, then saves the document onto his computer's local hard drive. It also covers situations where traditional desktop computer is used by the testator. He may use¹⁸ an electronic device such as a laptop, tablet computer, or any other device capable of storing typed in text or text that has been 'handwritten' through a stylus or similar writing utensil into a document. Hardly any case law in the United States relates to offline electronic wills, but one case is worth examining. *Re: Javier Castro's estate*¹⁹, the foundation of the above hypothetical example, the Ohio Court of Common Pleas, Lorain County, found a valid Will where a hospitalbound testator dictated his Will to a friend who transcribed it on a tablet. The court interpreted the requirement for writing as being met by the electronic document and the requirement for signature as being satisfied by markings using a stylus. The court was also able to rely on a considerable amount of evidence of testamentary intent: 'six witnesses gave evidence that the testator had stated that the document he signed on the tablet was his wishes and that it was his last will and testament'.

Online Electronic Wills

Whereas offline electronic wills involve the actions²⁰ of only one person, the testator himself. Online electronic Wills bring other private actors into the mix. Online electronic Wills are those created or stored using a third party service where the third party service has no undertaken to store the Will of the testator and is not subject to any special rules or regulations regarding electronic Will storage. In this way, the use of the third party service by the testator is incidental, the testator probably used the third party service²¹ because he already had an existing account with the service, not because the third party service suggested that his platform be used to create or store electronic Wills. If the original Will of the testator or a copy of it can be found²² elsewhere than the hard drive of the electronic device of the testator and the testator has not used the services of a private actor who has specially undertaken to store the Will, the testator has probably created an electronic Will online. This category is intended to cover, for example, situations where a testator logs into her Facebook account and creates a post titled 'My Last Will and Testament.' This would also cover other entities such as cell phone service providers. If the testator sends a text message to a friend with a purported Will, the testator is using a service provided²³ by (for example) Verizon Wireless, a third party.

3. Legality of Electronic Wills in Some States in United States of America

The introduction via enactment of electronic Wills into force in some States in the United States has been recognized. The States and case law on electronic Wills form the purview of the segment of this paper.

Nevada

Nevada has so far statutorily enabled electronic Wills. Passed in 2001, Nevada's statute was amended in 2017 to include specific provisions for qualified custodian Wills²⁴ as well as to define an electronic Will as a Will that 'is created and maintained in an electronic record' and that 'contains the date and

testator's signature must appear 'at the foot or end' of the Will. See Restatement (Third) of Property, Wills and Other Donative Transfers article 3.1.

¹⁶ Cyberlaw / Internet What is an 'Electronic Will'? Chapter Four Developments in the Law Harv. L. Rev. 1790 <<https://harvardlawreview.org/2018/04/what-is-an-electronic-will/>> accessed 10 July 2020.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ No. 2013ES00140 (Ohio Ct. Com. Pl. June 19, 2013).

²⁰ Cyberlaw / Internet *supra* n.16.

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ See E Dailey, *Nevada Enacts Notary Provisions*, Bankers Advisory <<http://blogs.claconnect.com/residentialmortgage/nevada-enacts-notary-provisions> [<https://perma.cc/83R9-NG3S>]>.accessed May 6 2020.

the electronic signature of the testator²⁵.' The statute also requires²⁶ at least one authentication method: either a test specific authentication feature (such as a 'fingerprint, retinal scan, voice recognition, facial recognition, video recording, (or) a digitized signature'), a notary public electronic signature, or two electronic signatures by witnesses.

New Hampshire

The New Hampshire Electronic Wills Act (SB 40) as written was far less stringent on authentication. The bill only required that the Will be e- signed by the testator and then e-signed by a notary or two witnesses. These signings were to be also²⁷ capable of being done by means of live video and audio conference.

Virginia

HB 1643, aim was to validate²⁸ and regulate e-Wills by amending Title 64 of the Virginia Code to make electronic electronic Wills valid once it has been signed by the testator and also by a notary or two witnesses. The e-Will in Virginia would then have been required²⁹ to be placed under the control of a qualified custodian who must have been in possession of visual records that demonstrated the identity of all the signatories of the Will at the same time as the document was actually signed.

Furthermore, the common law in some States has recognized³⁰ the validity of electronic Wills via decisions of the courts. In *Taylor v. Holt*³¹, the Tennessee Court of Appeals upheld a testator's Will recorded on his written Will and registered an electronic version of his signature. Two people who were physically present at the signing of the testator observed the Will and who signed a specially crafted attestation document acknowledging the electronic signature of the testator. The Tennessee court found that the electronic signatures complied with Tennessee law allowing a testament to be signed by 'any other symbol or methodology executed or adopted by a party with the intention of authenticating a writing or record.' In *Javier Castro's estate*³², an Ohio trial court ruled that the testator had signed an electronic testament using a stylus on a Samsung Galaxy Note. The electronic Will itself was found to be valid under the 'harmless mistake' statute of Ohio, which requires the examination of a Will otherwise not performed with the proper legal formalities to be considered valid if sufficient evidence is presented to show that the testator intended the document to be his Will.

Perhaps the most prominent³³ application of a State's harmless error law to an electronic will is *Estate of Horton*³⁴. Duane Francis Horton II wrote an entry in his journal directing the reader to look up what he called his 'farewell' on his phone. Horton's own handwriting contained the entry in the journal. The farewell was in his phone on his Evernote app in an entry titled 'Last Note' and included a paragraph about Horton's disposition, among other information. The court noted that under Michigan's harmless error law, 'any document or writing can constitute a valid Will provided that 'through clear and convincing evidence, the adherent of the text or the writer determines that the decedent meant the paper or the writing to represent his Will. The court held that the extrinsic evidence submitted by adherents of the adherents of the Evernote Will was sufficient to meet the clear and convincing standard of evidence and 'strongly supports the presumption that the decedent intended the electronic note to constitute his Will.'

4. The Position in Nigeria

Traditional wills, that is paper Wills, written or oral Wills are the only forms of Wills presently recognized under Nigeria's extant laws.³⁵ Electronic Wills are not currently recognized or operational

²⁵ Assemb. B. 413, 2017 Leg., 79th Sess. Article 19 (Nevada. 2017).

²⁶ Cyberlaw / Internet *supra* n.16.

²⁷ D DeNicuolo The Future of Electronic Wills <https://www.americanbar.org/groups/law_aging/publications/bifocal/vol_38/issue-5--june-2017/the-future-of-electronic-wills/> accessed 6 July 2020.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ D.D Little The Future is (Almost) Here: Electronic Wills in California <<https://www.law.com/therecorder/2020/02/11/the-future-is-almost-here-electronic-wills-in-california/>> accessed 7 May 2020.

³¹ 134 S.W.3d 830 (Tenn. 2003).

³² (2013ES00140 (Lorain Cnty. Ct. Com. Pl., 2013).

³³ D.D Little *supra* n.30.

³⁴ (325 Mich.App. 325 (Mich. Ct. App. 2018).

³⁵ See n.11 *supra*. The statutes applicable in Nigeria on Wills.

in Nigeria. Apart from privileged Wills, for a Will to be valid, it must comply with the formalities laid down in all the applicable Wills law or law. The following formalities are compulsory:

- i. The Will shall be in writing. While the law requires a Will to be written and not oral. It does not prescribe any particular form of writing or any particular substance. The established practice is to write Wills on long lasting paper that would stand the test of time;
- ii. the Will must be signed³⁶ by the Testator or some other person in his presence and in his direction at the foot end of it;
- iii. the Testator's signature must be made or acknowledged by the Testator in the presence of two witnesses, iv. the two witnesses who must be present at the same time must then attest and subscribe the Will in the presence of the Testator and v. no obliteration, interlineation or other alteration made³⁷ in a testament after its execution shall be valid or have any effect except that such alteration is executed in the same manner.

5. Need for a Legal Framework for Electronic Wills in Nigeria

The States of Nevada, New Hampshire and Virginia are the only jurisdiction in the United States with specific statute recognizing electronic Wills. What its Legislators had done is worth emulating by Nigeria considering the obvious fact that Nigeria had already enacted the Evidence Act³⁸ which lays down rules for the admissibility of electronic evidence. It is therefore timely and appropriate to adopt and recognize electronic Wills in Nigeria through the enactment of an enabling law. It is trite that use of the internet through various media online platforms such as facebook, WhatsApp, instagram, twitter, yahoo and gmail *etcetera* and use of electronic devices such as android phones, apple phones, laptops, memory cards *etcetera* are no new to the citizens of Nigeria. Some of the above-mentioned devices can be used to receive, record, transmit, store, process, retrieve information electronically. The above is succinctly captured by Rubi thus³⁹:

The adoption of an electronic form of Wills in our laws does not require much changes considering that provisions in the rules of court as on electronic evidence can be made applicable. Testamentary capacity of the testator shall remain the same. As far as the authenticity of the will is concerned, technological means are now available in order to determine that the same is authentic. This move will also encourage the testator to make a will to favour testamentary succession, therefore, the testator will be given liberty on how to make, create and store his will. This form also favours that the testator's personal act is indeed a will.

Similarly, Grant discussed two possible ways to adopt such laws for those states or countries that want to recognize electronic and non-conforming Wills⁴⁰ in his article on electronic Wills. He states thus: it could be done to that end by adopting a separate statute. If the country opts to make a separate statute for electronic Will recognition, the key and integral terms will be embodied in the same statute instead of simply referring them to other⁴¹ laws. For instance, electronic Will may be defined as a disposition of its property, made, created or stored by a competent testator, to take effect after his death. Its purpose should be clearly stated including a legislative directive for the judiciary on how to interpret such forms. The law should also clearly describe how the Wills are to be electronically created, stored and generated. For example, videotape, audiotape, computer-generated Will with electronic signature should be addressed by the mechanism by which the testator can make an electronic Will. A new statute of Will may also be adopted by making making⁴² linguistic changes to the current Wills Act. That way, it should be done simply by changing the terms of the current legislation.

For example, every Will has to be written, created or stored and executed in a language or dialect the testator knows. E-will is on the way. In some States, the ability to create, sign and store a Will online has

³⁶ T Akinlawon (SAN) President, Catholic Lawyers Association delivered a Public Lecture on Wills titled *Speaking From the Grave* at St. Agnes Parish Church Maryland, Lagos <<http://akinlawonajomo.org/writing-a-will-v-intestacy-in-nigeria-mrs-akinlawon-san-shares-on-why-it-is-necessary-to-speak-from-the-grave/>> accessed 12 June 2020.

³⁷ *Ibid.*

³⁸ Nigeria's Evidence Act 2011.

³⁹ P Rubi The Proposal to Amend the Existing Law on Succession in the Philippines to Admit Alternative Forms in Wills <<https://ausltechlaw.wordpress.com/2012/09/27/rubi-pamela-the-proposal-to-amend-the-existing-law-on-succession-in-the-philippines-to-admit-alternative-forms-in-wills/>> accessed May 31 2020.

⁴⁰ JK Grant, in his article on 'Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of The Electronic Wills' <<https://repository.law.umich.edu/mjlr/vol42/iss1/4/>> accessed 9 July 2020.

⁴¹ *Ibid.*

⁴² See Rubi n.39.

become a reality⁴³. An electronic Will allows a person to create and execute a Will without leaving home comfort and without having to have paperwork. The process generally works like this: the user⁴⁴ creates a Will online and transmits it to an online notary who then has a video chat with the user. The notary asks some questions for the user, notarizes the documents and sends them back. The Will can then be stored⁴⁵ online without changing hands of a hard copy. It is easy.

6. Conclusion

There is the need for a legal framework for electronic wills to complement traditional forms of Wills in Nigeria as adumbrated⁴⁶ and the practice should accord with what is obtainable in some States in the United States of America. This will go a long way in regulating and complementing Wills practice in Nigeria.

⁴³ C Fletcher The Pros and Cons of Electronic Wills <<https://www.forbes.com/sites/christinefletcher/2019/10/25/the-pros-and-cons-of-electronic-wills/#3792dd3d5457>> accessed 18 June 2020.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ This has been fully adumbrated on fully in the preceding headings notably heading 5.